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**COMPARING THE PROCEDURAL SAFEGUARDS IN THE
FINNISH AND U.S. LAW IN CASE OF CHILD ABDUCTION IN
RELATION TO THE INTERNATIONAL REQUIREMENTS**

Bachelor's thesis

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ABSTRACT

The aim of the thesis is to research how well the international legislation is implemented in two different states, Finland and the United States, which both have signed and ratified the international instrument concerning international child abduction, the Hague Convention on the Civil Aspects of International Child Abduction. International issues have often many aspects and different interpretation of the same Convention can cause misunderstanding and problems. Basically, states should follow same guidelines similarly when interpreting the Convention, so results of the cases could be unbiased for everybody. Different interpretation can lead to ineffectiveness of the Convention, and therefore the identical understanding of the main function and purpose of the Convention plays an essential role. This thesis compares, is the interpretation similar in Finland and the United States. The author has researched the topic by analysing cases from both countries and making conclusions based on the literature. Because Finland and the United States differs quite greatly from each other, the historical and cultural aspect causes the differences of interpretation. Statistics are used for helping to perceive the prevalence of parental child abductions and the thesis demonstrates the factors why international child abductions can be very difficult issues for especially to the family, but also for the states. As a result, there are differences of interpretation and aspects what may cause that are presented in the chapters.

Keywords: parental child abduction, international child abduction, international legislation of child abduction, different interpretations of the Hague Convention on the Civil Aspects of International Child Abduction

INTRODUCTION

The reason to choose this research problem as a Thesis topic is that child abduction is multithreaded problem among States all over the world and the cross-border element makes the topic both interesting but also complex issue. Not all states have ratified the international convention concerning child abduction and that give rise to serious problems between the States' legislations. Child abduction is a serious crime and it can cause multi-scale problems for a child, because even the child is stolen by his or her own parent, the abduction can cause far-reaching psychological problems. A limited ability of individual to operate in front of complex international law is a big challenge and the main function of the international convention concerning child abduction is to make the process easier and faster. Child abduction occur when a minor is removed from his or her parents or guardians by a family relative or by stranger. This Thesis concentrates mainly to a parental child abduction, because statistics has shown that surprisingly, it is the most common form of a child abduction.

This Thesis enter the definition of child abduction and how issues related to child abduction are regulated. The focus is to compare the procedural safeguards in the Finnish and United States legislation and their relation to the international requirements. The aim to be achieved with the Thesis is to find and analyse the differences in implementation of Hague Convention on the Civil Aspects of International Child Abduction, which is signed and ratified by the both States.

Main research questions are following: what means child abduction, how is child abduction issues regulated, what are the procedural safeguards in Finland and in US in the case of child abduction, how these procedural safeguards are in relation to the international requirements, how these procedures differ from each other and what are the international requirements. These questions help to analyse the topic comprehensively and give an interesting information about the chosen states and especially their interpretation of the international requirements.

Research methodology in this Thesis is to compare two different legal systems by using States' statistics to seek the differences and similarities. Both qualitative and quantitative methods are used in the research. By quantitative method the author clarifies how the basic procedure is operated in the chosen States and by qualitative method it is possible to express the reasons behind the mode of operation.

The structure of this Thesis is following: in the first topic is defined what is child abduction and the difference between international parental abduction and abduction made by stranger. This Thesis concentrates on the international parental child abduction, so the emphasis is in that, even the child abduction made by stranger is also introduced.

The second topic concerns the legal instruments relating to child abduction, and the only international instrument is The Hague Child Abduction Convention, which is introduced in detail. There is also provided the Guide to Good Practice of the Convention by The Hague Conference on Private International Law, and the second topic also introduces the third part of the Guide which includes information about preventive measures concerning international child abductions.

Third topic present the procedural safeguards in Finland and briefly review the criminal consequences of child abduction on Finland. There is also presented statistics about international child abductions from Finland and to Finland, which indicates well the scope of the problem. Child abductions are not common in Finland, but the number of the cases has increased in past ten years.

Fourth topic analyses the procedural safeguards in United States and shows that in the United States there is more Acts regulating child abductions, which makes the legislation more difficult and complex comparing to the Finnish system. In addition to The Hague Convention, there is several state laws and criminal laws and laws which regulates the process of locating missing children.

Fifth topic compares how the procedural safeguards are in relation to the international requirements in Finland and the United States. It presents cases in the United States and in Finland which shows the implementation of the Convention in the state and demonstrates the difficulty when defining the terms such as habitual residence. In the subtopic, which survey the implementation of the Convention in Finland, there is also a brief review to the history and the general atmosphere concerning child abductions before The Hague Convention came into force.

The last topic compares the implementation of the Convention and the legislation concerning the child abduction between Finland and United States. After these six topics, there is conclusion, which includes the final processing of information and gives the outcome of the research questions.

1. WHAT IS A CHILD ABDUCTION?

In general, child abduction is defined as an unauthorized removal of a minor from his or her parents or guardian. Child abduction can be separated into two categories: parental child abduction and child abduction by a stranger. International child abduction means that the child is removed abroad from the country of his or her habitual residence and in the cases like that, the only international legal tool is The Hague Convention. The Convention is applicable only to the cases when both countries, the country of habitual residence and the country where the child is supposed to stay at the moment, are signed and ratified the Convention. Unless one or both countries are not signed and ratified the Convention, the process of return of the child to his or her custodian would be very problematic causing from the fact that legal systems, cultures and traditions of countries differs considerably from each other.

1.1 Parental child abduction

In many cases, parental child abduction is the outcome of a cross-cultural families at the time of a legal separation or divorce. That situation leads often to conflicts, and a parent can feel that leaving a country with a child can be a solution to the problems. If other parent or guardian disagree with the action, the existing situation is called international parental child abduction and it is a crime.¹

The amount of parental child abductions has increased during the times and the main reasons are high rate of divorces and internationalization. People contract a cross-border marriages in increasing extent and when the marriage ends up to a divorce, the amount of problems can be a higher than in marriages contracted between people with same nationality and origin.² For example, differences in culture, traditions and religion can lead to a disagreement between parents and other parent can have a distorted vision that the only solution is to take the child and move back to the country of his or her origin.

European Union Policy Department C has collected the statistics of cross-border parental child abductions in the European Union. The data of the study has been collected in 1999, 2003 and 2008, though the full statistics of 1999 were not available. The table shows return applications received and made by Central Authorities of EU Member States and during the five-year-period

¹ Crouch, J. The Hague Convention on Child Abduction, Family Advocate vol. 28, no. 2, 2005, p 42-44.

² Chaikin, D. International Extradition and Parental Child Abduction, Bond Law Review vol. 5, no. 1, 1993, p [i]-151

from 2003 to 2008, the total number of requests have almost doubled. In 2003, the amount of return applications has been 1295 and in 2008 it has been 2058. Only in Hungary, Scotland, Cyprus and Malta the amount of received requests is decreased. The highest numbers of received and made requests have been every year in United Kingdom (England and Wales).³

In United States, the corresponding figures from 2010 and 2013 shows that the number of new abduction cases has decreased according to statistics made by the Office of Children's Issues, a part of the Department of State's Bureau of Consular Affairs. In 2010, the number of new outgoing and incoming international child abduction cases was 1312⁴⁵ and the same number in 2013 was 1066⁶⁷. The numbers consist of the cases reported to the Office of Children's Issues, not the number of Hague applications.⁸ These statistics can be interpreted that the effectiveness of legislation concerning the child abduction has worked successfully, even though making any conclusions based on this one year is not reliable and the trend

There have been found some common characteristics what have been observed belonging to a parent who have abducted his or her own child. Abducting parents can have mental problems, such as psychopathic, paranoid or sociopathic features; delusions that the other parent will injure the child without any actual proof to that claim; they can see that the child is not an individual person but merely a part of themselves and they need the abduction because it is safeguard for the child. Also, a will to control other people and using children to take vengeance have seen as characteristics of an abducting parent.⁹

The reason why also a parental child abduction is severe crime is that it is one form of child abuse and it can cause mental problems for a child. People may think that a child is not suffering because he or she is with a parent, but the truth is that abduction causes many short-term and long-term problems for the child's mental and physical health. Abducted child and a parent are often moving from place to another to avoid getting caught. For the same reason, a child may not have the possibility to education or health services and it is obvious that those factors have a serious impact

³ Policy Department, Citizens' Rights and Constitutional Affairs, p 48

⁴ 2010 USCA Incoming Case Statistics

⁵ 2010 USCA Outgoing Case Statistics

⁶ The United States, New Reported Incoming Cases – CY 2013

⁷ The United States, New Reported Outgoing Cases – CY 2013

⁸ U.S. Department of State, International Parental Child Abduction, Legal Information, Data

⁹ Dabbagh, M. Parental Kidnapping in America : An Historical and Cultural Analysis, McFarland & Company, Incorporated Publishers, 2011, p 7-26

on a child's welfare and put a child in danger. In many sources, parental kidnapping is a form of child abuse because of its harmful effects. In addition to the earlier mentioned consequences, the abduction can also lead to the situation where the child is not competent to create social ties, he or she feels abandoned and he or she feels distrust towards the authorities and police. In its extreme form, abduction can also include physical abuse, sexual abuse, or murder. These are still less common features when talking about parental abduction. By influencing this way to the child, the abductive parent causes long-term and even lifetime problems for the child and it is recorded that from 10% to 40% of the abducted children have serious consequences causing from the abduction.¹⁰

Huntington (1982) has listed some effects of parental child abduction which have been found from child victims. Depression; loss of community; loss of stability, security, and trust; excessive fearfulness, even of ordinary occurrences; loneliness; anger; helplessness; disruption in identity formation; and fear of abandonment.¹¹ It is obvious that depriving a child from his or her roots will cause multiform problems and the untruthful conception that the child will not suffer because the abductor is his or her parent is found to be false. Children are especially vulnerable to the abduction because they do not have the same tools to manage and understand the experience as adults may have.

The main legal instrument to solve international child abduction cases is The Hague Convention on the Civil Aspects of International Child Abduction, which is signed and ratified in 96 countries (December 2016). It is more analysed in the second topic.

The states to which this Thesis is concentrated, the United States and Finland, recognize parental child abduction as a crime as well as non-parental abductions. The Hague Convention does not express its opinion concerning the penalty aspect of the abduction, but it is regulated in the national legislation of the states.¹²

¹⁰ Kreston, S. Prosecuting International Parental Kidnapping, *Notre Dame Journal of Law, Ethics & Public Policy* vol. 15, no. 2, 2001, p 533-536

¹¹ Faulkner, N. Parental Child Abduction is Child Abuse, 1999

¹² Elrod, L. Uniform Child Abduction Prevention Act, *Family Law Quarterly* vol. 41, no. 1, 2007, p 23-58

1.2 Child abduction by a stranger

Nonfamily abduction is defined as an unlawful capture of a child by a perpetrator who is not known by the family of the child, or the identity of such person is unknown. The capture usually includes the use of physical force and a threat of bodily harm; a death, sexual assault, luring a child for purposes of ransom and intent to keep the child permanently can be the realistic outcome of the abduction.

U.S. Department of Justice, more specifically Office of Juvenile Justice and Delinquency Prevention has made a research about nonfamily abductions in United States. The studies are mainly from 1999, and during that period the amount of all nonfamily victims were estimated 58,200. The average victim of an abduction was a female at the age between 15 and 17, black, non-Hispanic ethnicity and the abduction was made in the south region. The average perpetrator was alone acted male stranger in the age between 20 and 29. At almost half of the abductions perpetrator sexually assaulted child and other common features to the abduction were that the perpetrator used a weapon and physically assaulted child. Still, in almost all cases (99 %) the child was returned alive.¹³

In Europe, AMBER Alert Europe, The European Child Rescue Alert & Police Network on Missing Children, provides statistics about child abductions where it is believed that the missing child is in danger, the missing is caused by an abduction and there is a high risk of a victim's life or health. The alert system does not make distinction between parental child abduction and an abduction by a stranger and in addition, the organisation does not collect and share information about every missing child but only those who meets the criteria of AMBER Alert or are endangered.

Statistics of AMBER Alert Europe shows that in 2015, there were 29 AMBER Alerts and 1848 missing children. There have been a little increase of both numbers comparing to the previous year. Average missing child was a 14 years old girl from Hungary. High rates of missing children were also in Croatia and Poland.¹⁴

In general, only a little percent of child abductions is so called "stereotypical kidnapping". NISMART has defined the stereotypical kidnapping as an abduction where the perpetrator is a

¹³ Office of Juvenile Justice and Delinquency Prevention, Research about Nonfamily Abductions in United States

¹⁴ Analysis of AMBER Alerts and missing children in Europe

stranger or a slight acquaintance and moves a child at the age between 0 and 17 at least 20 feet and keep a child under his or her control at least one hour. Also at least one of the following circumstances arises: the child is detained overnight, transported at least 50 miles, held for ransom, abducted with intent to keep the child permanently, or killed. Contrary to popular belief, above described abduction occurs very rarely: for example, in United States there were only 115 stereotypical kidnapping in 1999 and the total number of nonfamily child abductions in the same year was 58,200. About 40 percent of victims of stereotypical kidnapping was killed and almost half of them were sexually assaulted by the abductor.¹⁵

There is an interesting analyse about murders of abducted children in a study conducted by the Attorney General of Washington State in 1997. According to the study, child abduction killers have unique characteristics comparing to other murderers. The average killer is white, young (18-30 years old) adult man who is described as “strange” and who use alcohol more than an average people. Mental problems, drug problems and alcohol problems are quite common features of murders and comparing to all murderers, child abductors have ten times more sexual problems, in over 30 % of cases. Child killers have earlier commit to a sexual assault or a rape in over 34 % of cases. Majority of child abduction murders include sexual motive, where only about 5 % of all murders have that feature. That observation supports the idea of uniqueness of child abduction murders and a considerable big role that sex plays in the process of nonfamily child abductions.¹⁶

Those findings make the great difference between international parental abduction and nonfamily child abduction. In both cases a child is unlawfully removed from his or her parent(s) or guardian(s), but the motive behind the abduction differs radically.

¹⁵ Flores, J. National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children NISMART, U.S. Department of Justice, 2002

¹⁶ McKenna, R. Case Management for Missing Children Homicide Investigation, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2006, p 15, 30-32

2. LEGAL INSTRUMENTS REGULATING PARENTAL CHILD ABDUCTION

The only international legal instrument concerning international child abductions is The Hague Child Abduction Convention, which provides a system between State Authorities to return the abducted child to country of his or her habitual residence. The main function of the Convention is to protect children and avoid harmful effects caused by the abduction. A presumption in every international child abduction case is that the unlawful removal of a child from his or her home country is never in the interests of the child and the return is the only and the most effective way to ensure rights of the child. The Convention is applicable only in Contracting States.

The aim of this legal instrument is to unify the legislation among states and in that way increase efficiency concerning the return of abducted child. Because the Convention is signed and ratified in many states, nowadays it has proved to be very useful.¹⁷

2.1. The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

The Hague Child Abduction Convention is concluded on the 25th October in 1980 and the number of Contracting States to the Convention is 96 in January 2017. First States where the Convention entered force were Canada, France and Portugal and within the first ten years from signing the Convention it entered force also in Switzerland, Hungary, United Kingdom of Great Britain and Northern Ireland, Australia, Luxembourg, Spain, United States of America, Austria, Norway, Sweden, Netherlands and Germany. In Finland, the Convention entered force in 1994. The latest States are Japan, Zambia and Philippines.¹⁸

2.1.1. Structure

The structure of the Convention is following: the first Chapter defines the scope of the Convention, the second defines Central Authorities, the third regards return of children, the fourth is the rights of access, the fifth includes general provisions, and the last chapter includes final clauses. There are 45 Articles in total. The Convention does not provide detailed information about how to determine custody rights, but it mainly concentrates to present the procedures which are in the essential role to ensure that all custody-related issues are litigated in the jurisdiction.

¹⁷ Outline of Hague Child Abduction Convention, 2014

¹⁸ HCCH Status Table, Contracting Parties to the Convention, 2017

The most relevant Articles in The Hague Convention are Articles 3 and 12, and the first one includes general definition of wrongful removal or retention and the other provides solutions for such a wrongful removal or retention.¹⁹

2.1.1.1 Chapter I – Scope of the Convention

In the first Article of the Convention is described the objects of the Convention in detail. Two main objects are “(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States”²⁰ The importance of the Convention is the absolute secure of rights of children, because personal relationships and regular contact with both parents and relatives is the basis for the health and balanced childhood and therefore it is necessary to protect that right unless a particular relationship is shown to be injurious for a child. Any legal restrictions should not be done unless it protects the interests of the child.²¹

Articles 3 and 4 includes the elements which must be fulfilled so the Convention is applicable. Wrongful removal or retention of a child is defined as situation where guardian’s or other parents’ rights of custody is breached according to the national law in where the habitual resident of a child was before the removal or retention. To put it simply, if one parent has a legal right to child custody and other parent without right to a child custody remove the child from the habitual resident, the right of a parent having custody is breached and the situation is wrongful removal or retention and thus the case fill the characteristics of Article 3. The other features which must be fulfilled are addressed in Article 4: a child must have a habitual resident in the Contracting State before the breach of custody and to be defined as a child in the meaning of this Convention, a child must be under 16 years old or otherwise the Convention is not applicable.

2.1.1.2 Chapter II – Central Authorities

Every Contracting State shall nominate one or more Central Authorities to meet the duties which the Convention has stated. Basically, one Central Authority is enough in States where are only one

¹⁹ Silberman, L. Hague International Child Abduction Convention: A Progress Report, 1994, p 210-216

²⁰ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Article 1

²¹ HHCH, Transfrontier Contact Concerning Children, General Principles and Guide to Good Practice, Hague Conference on Private International Law, 2008, p 9-11

law system, but for example in Federal States or States where are several different law systems more than one Central Authority may be relevant.

The function of Central Authorities is specified in Article 7. Promoting co-operation between authorities to secure the rapid return of children is the basis for the actions made by Central Authorities. There are also listed nine obligations that authorities have in their range of responsibility either directly or through any intermediary. They shall find where the wrongfully removed or retained child is placed; prevent the possible negative consequences to the child; promote the voluntary return of the child; exchange the information about the social background of the child; to provide information about the law of their State and the connection with the application of the Convention; to facilitate the process to obtaining the return of the child and in some cases, organize the effective exercise of rights of access; facilitate the provision of legal aid and advice; promote the safe and fast return of the child by administrative arrangements, and maintain free flow of information between States and prevent any obstacles to the application of the Convention.²²

The framework for successful co-operation between States includes two basic elements. Firstly, there must be common rules for every State party, so the courts have same tools to exercise jurisdiction and secondly, there must be mutual recognition between States, so the decisions made in one State are lawful in other States. These common jurisdictional standards are helping tools to avoid conflicts, ensure that the authorities have the actual right to make decisions, and create certainty for the parties.²³

In Finland, the Central Authority is the Unit for International Judicial Administration in the Ministry of Justice and in United States the corresponding body is the Office of Children's Issue in U.S. Department of State.²⁴

2.1.1.3 Chapter III – Return of Children

The process of returning a child who has removed or retained by breaching the custody rights starts by application to the Central Authority of the child's habitual residence or Central Authority of any other Contracting State. The content of the application is regulated in the Article 8 and the

²² Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Article 7

²³ HCCH, Transfrontier Contact Concerning Children (2008), *supra nota* 20, p 11-13

²⁴ HCCH, Authorities

application shall include all available information about the applicant, the child, and the person who probably has removed or retained the child. If there is any information about whereabouts of the child, it is also necessary to fulfil to the application. The application shall include also the grounds on why the applicant claim return of the child.

If the application is found to be relevant, a Contracting State which have received the application shall immediately inform the Central Authority of other State, if there is reason to suspect that the child is in other Contracting State.

The basis for the return is always to obtain the voluntary return of the child and it is the responsibility of Central Authority that all possible actions to attain the voluntariness is made. If a period less than one year has elapsed from the time of the wrongful removal or retention, the authority shall return the child forthwith. The return of the child is possible also after the expiration of the period of one year, if the child has not been settled in the new environment. Because the aim of the Convention is to guarantee the safe and stable environment for the child, the return can be contrary to the child's best if the integration to the environment has already happened.

Article 13 of the Convention set the exceptions to the return of the child. It states that if the person who has been taken care of the child has not have the custody rights at the moment of removal or retention, or have somehow allowed or accepted the removal or retention, the authority is not bound to order the return of the child. Also, situation where the return of the child would cause physical or psychological problem or would place the child to an intolerable situation, the authority may refuse the return. The age of the children may also be the reason for refusal if the child has attained sufficient age and maturity. Article 20 have also exception to the return of the child: if the return is not permitted by the fundamental principles of the State which have received the request concerning the wrongfully removed child and those fundamental principles are related to the protection of human rights and fundamental freedoms, the return may be refused.

Among the risk of physical and psychological harm, the return of the child can be avoided under the Convention in the case of acquiescence, and if there is risk for child to end up to intolerable situation. Even there is defences open to interpretation to the Convention, the successful implementation of it requires that the use of this defences is limited, and the focus is still to return the child to his or her habitual residence. Member States of The Hague Conference must stress the

uniformity of the Convention and if one State continually rely on the defences, the co-operation between states will be frustrated.²⁵

2.1.1.4 Chapter IV – Rights of Access

As it is mentioned previously in the Chapter II which concerns Central Authorities, one obligation of Central Authority of a Contracting State is to organise and secure the effective exercise of rights of access. The co-operation between States is the basis for the peaceful enjoyment of access rights and any obstacles shall be removed by the Central Authorities when it is possible. The rights of access have defined in Convention as a right to take the child from the place of his habitual residence to another place for a limited period.

The Convention makes a great difference between rights of custody and rights of access. According to the Convention, breaching the rights of access would not lead to the return order, whereas breach of rights of custody will lead. This has been deliberate decision to separate these rights clearly from each other and the reasoning is that it cannot be put to same category when the custodian has taken the child abroad and by granting the same protection harbour for the custody and access rights, the position of the person who carries rights of access will be as significant as the custodian, which is not the purpose.²⁶

2.1.1.5 Chapter V – General Provisions

General provisions of the Convention include the information about the basic rules of the judicial proceedings. Any written document sent to the Central Authority of the requested State shall include a version made in the original language and a translation into the official language of a requested State or if that is not possible, a translation into English or French.

Article 25 determines that a person who is a habitual resident of any Contracting State shall have the same rights concerning the legal aid and advice in matters relating to the application of the Convention in any other Contracting State. That ensures the fairness and efficient implementation of the Convention.

²⁵ Silberman (1994), *supra nota* 18, p 233-236

²⁶ Freeman, M. Rights of Custody and Access under the Hague Child Abduction Convention - A Questionable Result, California Western International Law Journal vol. 31, no. 1, 2000, p 39-52

In Article 26 is set the framework concerning the costs of the process of child returning. The costs of the proceedings or costs which arises from the participation of legal counsel or advisers cannot be required from the applicant, but then again expenses arising from the implementing the returning of the child can be. It is also possible that the judicial or administrative authorities oblige that the person who removed or retained the child must pay, on behalf of the applicant, the costs of legal representation of the applicant, travel expenses and those costs which is caused when returning the child to the State of his or her origin.

In general provisions is also provided that if the application made to the Central Authority is not justified, a Central Authority is not obliged to accept the application and it must inform the applicant why the application is not accepted (Article 27). An application which is submitted to Central Authorities and which is in accordance with the Convention shall be admissible in the courts of the Contracting States (Article 30).

2.1.1.6 Chapter VI – Final Clauses

Any State can accede to the Convention. The Convention will remain in force for five years from the date it has entry into force. It shall be renewed automatically every five years unless there is any denunciation.

2.2. Guide to Good Practice – Preventive Measures

Global inter-governmental organisation The Hague Conference on Private International Law and especially the Permanent Bureau of The Hague Conference has served a general guide with four different parts how to apply the Convention as precisely as possible. The need to the guide has emerged during the Fourth Meeting of the Special Commission and the reasoning for the need is that when different States with diverse cultures, legal systems and traditions are applying the Convention, to attain the uniform implementation the need for detailed guide is obvious.²⁷ The first part includes Central Authority Practice, the second part includes Implementing Measures, the third part includes Preventive Measures and the last part of the guide includes Enforcement. The guide to Preventive Measures presents five main themes: creating a legal environment which reduces the risk of abduction, proactive measures when there is a heightened risk of abduction, reactive measures responding to a credible risk of abduction, provision and dissemination of information and the last theme is training and co-operation.

²⁷ HCCH, Guide to Good Practice Part III – Preventive Measures, 2005, p vi

In general, proactive measures means that States should create an environment which reduces the risk of abduction. Successfully implemented and effectively operated international instrument, in this case the Child Abduction Convention, may be efficient deterrent to the parent who has thought about abduction. When people are aware of the rules and the consequences, their threshold for the real action grows. Also, certain rules in domestic law helps to prevent the possibility of abduction or at least makes the wrongful process more difficult. Simple example is travel document: when a State requires separate travel document for children and before granting the document requires permission of both parents, the possibility of wrongful removals decreases. Other example is border controls. The stricter are border controls, the less possible is to smuggle a child to another State. In case of open borders, such as in European Union, if officials have the right to spot checks and they have a knowledge about possibility of child abduction cases, the prevention is possible.

The essence of the proactive measures is to recognize situations when the risk for abduction has increased. One of the obvious situation is family breakdown. In the time of legal separation, any kind of voluntary agreement between parents should be promoted by a State, because voluntariness and successful mediation is less likely to lead child abduction. Family mediation has proven to be the most efficient tool to prevent abductions, but the success of it is directly dependent on how early it has been used. Also, relocation is likely to create conflict between parents in both situations: when a custodial parent has moved to other State or when the child is visiting in the State where the parent with access rights has a permanent place of residence. These situations need a special safeguard from officials. One part of a legal environment which deters abduction is the mutual recognition relating to custody. If States recognises decisions, agreements and requirements made in other States, it will considerably prevent child abduction cases. If not, a State from where the child has been wrongfully removed, is quite powerless to do anything to promote the return of the child.²⁸

State authorities should have tools to respond to a credible risk of abduction. Those tools should be capable without delay to be effective as possible. In cross-border cases, any alert system concerning passports and identity cards is in significant role to prevent abductions. Withdrawal or revocation of an identity card or a passport of the child can be also an option in certain

²⁸ HCCH, Guide to Good Practice Part III – Preventive Measures (2005), *supra nota* 26, p 4, 8-11, 15-20

circumstances. Parents should have effective access, such as legal aid and translation of documents, to the courts also in out-of-hours if there is an emergency.

The important point of proactive measures is the provision of information. Both parents should have access to information of consequences of child abduction and measures what can be done if the child is abducted. General information about child abduction should point the harmful and serious effects of it and raise awareness of reactive measures what can be done if there is a high risk to abduction. Information can be shared in internet, by publicity campaigns, by presentations, or as a printed information. The importance of information is that it is available in every language and kept up-to-date.

The last theme is training and co-operation, which plays a key role in a scheme of prevention. Co-operation between States ensures the efficient implementation of preventive measures and professional officials have the required knowledge relating to the international child abduction. The Child Abduction Convention is the main tool to operate between States.²⁹

In general, these preventive measures are in the essential role when there is a risk that the parent would abduct the child to the State, which is not a Member State of The Hague Conference. Even the Convention is implemented well in many states and has proved to be an effective tool, the real problems begin when the child is not abducted to the Member State. When The Hague Convention is not applicable, the return of the child will come more difficult and expensive process. The Middle East is an excellent example when it comes to problems concerning return of the abducted child: Jordan, Egypt and Saudi Arabia are among the most frequent countries where children from the United States has been abducted and solving these cases is very difficult, because these states are either signatories to The Hague Convention either they have extradition treaties with the United States in a sense of IPKCA. Also, the essential differences between culture and legislation will complicate the process.

Because of these reasons, the role of prevention of child abductions cannot be underestimated. The goal is to intervene to the problems within family before the abduction really exists, which ensures that the problems with the return process is minimized.³⁰

²⁹ Guide to Good Practice Part III – Preventive Measures (2005), *supra nota* 26, 27, p. 41-48

³⁰ Zawadzki, D. The Role of Courts in Preventing International Child Abduction, *Cardozo Journal of International and Comparative Law* vol. 13, no. 1, 2005, p 353-386

3. PROCEDURAL SAFEGUARDS IN FINLAND

Procedural safeguards are obligations and rights set to the specific group of people. In Finland, there is Act on Child Custody and Rights of Access, where is defined domestic legislation concerning child abduction.³¹

3.1. Act on Child Custody and Right of Access

3.1.1. Chapter 5 – Return of a child under The Hague Convention

In Chapter 5 is determined the return of a child under The Hague Convention. Section 30 provides the return order and oblige that every child in Finland which are wrongfully removed from the State where is their habitual residence should be removed to that country if the country is a Contracting State in the Convention on the Civil Aspects of International Child Abduction. Section 31 determines that the competent court is Helsinki Court of Appeal. In Section 32 is explained wrongful removal and retention. It is similar with the definition in the Convention, because it is one of the key element of the Convention: States must have same definition to the process and same practice, so the Convention is applicable in every State. Rights of custody in section 33 are expressed as rights and obligations to take care of the child and every matter relating to him or her and for example a right to determine the child's habitual residence. This right is not part of the right of access, so based on the right, the person who has the right of custody has supremacy to decide the child's domicile and if any other person breaks the right of custody by wrongfully removing the child, it is a child abduction.

The last section of Chapter 5 set grounds for the refusal of a return order, which are also same as in The Hague Convention. As well as in the Convention, when the child attains the age of 16, he or she cannot be forced to return to the State of habitual residence against his or her own will. Even the age of consent is in Finland and in many other States 18 years, the Convention apply only to children under 16.

3.1.2. Chapter 6 – Procedure for the confirmation of a decision issued in a foreign state and for the return of a child

In Chapter 6 of the Act is regulated the procedure for the confirmation of a decision issued in a foreign state and for the return of a child. Section 35 defines that the Central Authority in Finland

³¹ *Oikeus.fi*, International Child Abduction, The Child has been abducted to a Contract State

is the Ministry of Justice, which purpose is those defined in The Hague Convention and are earlier mentioned in the Topic 2.1.1.2. Section 35 also obliges that the State social welfare authorities, the municipal social welfare authorities and the police must, when necessary, assist the processes concerning child abduction.

Section 36 regulates the application for the confirmation, recognition or enforceability in Finland of a decision issued in a foreign state. The person whose right of custody is violated, can submit the application. The application must be made in Finnish or in Swedish, and it should contain the basic information of the applicant, the child and the person with whom the child is suspected to be with.

The part that is not in The Hague Convention is section 39, which includes articles about hearing of the child. Before the Court of Appeal do any decisions about the return of a child, it must hear the opinion of the child itself. The Section applies if the child has such degree of maturity that the child can express his or her own individual opinion. It still does not mean that the will of the child is automatically the final decision, but it is one factor in the decision-making.

Section 40 states that the Court of Appeal have the right to issue an interim order when the process of the return of a child has not been completed yet. The Court have a right to name the person who is responsible for the ensuring the protection of a child and with whom the child will stay until the process is completed.

Every State that are Contracting State in the European Convention, must serve a free trial to the applicant in case of returning of a child and that is guaranteed also in the Section 41. Basically, the Court may require the opposite party, the person who has unlawfully removed the child from his or her habitual residence, to compensate the costs causing from the return of the child unless it would be unreasonable to the opposite party.

Section 42a concerns the relationship with the Brussels IIa Regulation and according to it, these earlier mentioned provisions (36-42 in the Act) are not applicable in the case in foreign state where the Brussels IIa Regulation is applied, which prevent duplications between two legislations.

3.1.3. Chapter 7 – Miscellaneous provisions

When the decision is not yet final, its enforceability is regulated in the Section 43. Even if the decision is not final, it is regulated that it is immediately enforceable unless there is determined something else in the decision itself.

Section 46 concerns the enforcement of a return order and it must be enforced without hearing the opposing party. It also determines that if an application concerning the wrongful removal or retention of the child has been submitted before the one-year limit, the application can be refused only if the child has reached such age and required maturity that he or she can be heard and his or her opinions can be considered. If the child has reached the age of 16, any kind of return cannot be enforced, because as well as this Act but also the Child Abduction Convention concerns only children under 16 years.

Chapter 7 includes interim measures in the Section 48a. According to it, a child may be taken by the police authority or the bailiff from the person having custody of a child if there is a legitimate reason to believe that the person's purpose is to wrongfully remove the child from the country of his or her habitual residence without the permission of the other caretaker of the child. This measure is used only in the urgent situations, where is believed that even the interim order would not be sufficient to prevent the removal of the child. The maximum time for the relocation of the child is one week.

The Act has entered into force on 1 January 1984 and it has concerned also children who has born before the entry into force of the Act.³²

3.2. Consular Services Act

Basically, if a child is abducted to the state, which is a member of The Hague Convention, the responsible authority is the Ministry of Justice. In case of international child abduction to the country which is not a member of the Convention, the responsible authority is the Ministry of Foreign Affairs. The Ministry for Foreign Affairs in Finland will assist the process of resolving the abduction case and the main tools are sections 31 and 32 of the Consular Services Act. The mission of the Ministry of Foreign Affairs is quite similar as the Ministry of Justice: the main

³² *Laki lapsen huollosta ja tapaamisoikeudesta* 361/1983

mission is to promote the voluntary return of the child, promote the communication between the parties of the case, seek information about the legislation of the state in question, and try to locate the whereabouts of the child.³³

Section 31 of Consular Services Act concerns preconditions for measures aiming at the return of a child. In general, when any other authority is not responsible for dealing with the return of a child, The Ministry of Foreign Affairs is the official body to turn. There has stated three conditions which must be fulfilled to the section Act to be applicable: at first, the child who has been unlawfully removed or his or her custodian must be Finnish citizen, secondly the removal is unauthorised according to the legislation of a State from where the child is removed or to which the child is not returned and thirdly the return process is not covered by any other authority.

Section 32 demonstrates measures which can be done by the authority to achieve successful return of the child. The key is to promote the voluntariness in the process of returning the child and the most important help what the mission can serve is to seek the local legislation of the State where the child is located and try to establish discussion link between local authorities and itself. It also helps to find necessary information and documents and when the return happens, the mission helps in practical arrangements.³⁴

3.3. Child Abduction as an Offence in Finland

The Criminal Code of Finland Chapter 25 includes offences against personal liberty. Section 5a is about child abduction.

“If in the unauthorized taking of the custody of a child

(1) the rights of custody of the child are violated by the removal of the child from his or her state of residence or by failure to return the child to said state,

(2) at the time that the child was removed, or the child was failed to return to his or her state of residence, the rights of custody of the child had in fact been used or would have been used but for the removal or failure to return,

the offender shall be sentenced for child abduction to a fine or to imprisonment for at most two years.” (The Criminal Code of Finland 39/1889)³⁵

³³ Ministry for Foreign Affairs of Finland, Child Abduction, 2015

³⁴ *Konsulipalvelulaki* 498/1999

³⁵ *Suomen rikoslaki* 39/1889

3.4. Child abduction statistics and researches

An association for abducted children “Kaapatut Lapset ry” has presented statistics about child abductions from Finland or to Finland. Statistics does not make difference between parental child abduction and child abduction by a stranger, but most of the abductions are made by a parent. The overall amount of abductions was 50 in 2015. 21 of the abducted children were returned by court decision or mutual agreement by the parents. The most common countries to abduct the child from Finland was Sweden (5 children) and Spain (4 children) and all in all, there were 12 old cases from the previous years and 26 new cases where the child was wrongfully removed from Finland. The number of children abducted from abroad to Finland was 7 old cases and 5 new one. In one abduction case, the whereabouts of the child is unknown.³⁶

The number of child abductions in Finland has increased. In comparison with the statistics from the years 2002 – 2012, which shows only abductions from Finland, not to Finland, abductions in previous years have varied between 20-31, but in 2015 the corresponding figure was 38, and in percentage terms it is quite a lot, when the figures are generally this low.³⁷

Kaapatut Lapset ry has made a short analysis concerning the strengths and operations need for development in Finland. In the analysis, the author has interviewed Police Inspector, the International Unit of the Ministry of Foreign Affairs, the Chairman of the association Kaapatut Lapset ry and the Executive Director of the same association. Based on those interviews, the analysis shows that the strengths in Finland are high workmanship when it comes to the police, co-operation between professionals, and the knowhow of the Ministry of Justice and the Ministry for Foreign Affairs. Also, rapid enforcement of decisions concerning the return of the child has been registered as a strength.

According to the analysis, issues which need more development to be as effective as possible are flow of information between authorities and unclear legislation in some situations. According to parents whose child has been abducted, the support from the social authorities has been deficient and there has been gaps in the knowledge of child welfare workers, which has been mentioned also by the authors itself and need to be fixed.³⁸

³⁶ *Kaapatut lapset Ry*, Statistics of Child Abduction

³⁷ *Kaapatut lapset Ry*, Child Abduction Cases

³⁸ *Kaapatut lapset Ry*, Analysis concerning the strengths and operations need for development in Finland, 2017

4. PROCEDURAL SAFEGUARDS IN THE UNITED STATES

The United States was suffering from increasing trend of international parental child abduction until The Hague Convention was signed in 1980. In addition, in US, there is also two other legal instruments to regulate child abduction: The International Child Abduction Remedies Act (ICARA) was signed in 1989, and because it was found that it is not enough to resolve prevailing problems, the US Congress signed the International Parental Kidnapping Crime Act in 1993 (IPKCA), in where the international parental child abduction was identified as a federal crime.

4.1 International Child Abduction Remedies Act (ICARA)

The main reason for ratifying ICARA was to complement The Hague Convention, because at the time the Act was signed not so many states were not members of the Convention and thus the effectiveness of the Convention was a little questionable.³⁹

At the first section of the Act, section 11601, there is presented findings and declarations what has been made by the Congress. Based on the section, a parent who has committed to child abduction, has not the right to get a custody of the child anymore. There is also written the basic facts of The Hague Convention and the increasing amount of child abductions is noticed, which requires special attention and effective co-operation within states.

Judicial remedies are in section 11603 and the concurrent original jurisdiction of actions is in the courts of the States and the United States district courts. Any person who is willing to initiate judicial proceedings concerning the return of the child or the exercise of rights of access is able to do so in any court where is authorization. Burdens of proof of a petitioner is defined in two cases: in the case concerning the return of the child a petitioner must give evidence that the child is unlawfully removed within the meaning of the Convention and the case concerning effective exercise of rights of access the petitioner must prove that he or she have such rights.

Provisional remedies set that protecting the well-being of the child and preventing any further removal of the child before the final decision of the court is one important function and necessary measures to reach that must be done by the court. On the other hand, provisional remedies set also

³⁹ Clemens, L. International Parental Child Abduction: Time for the United States to Take a Stand, *Syracuse Journal of International Law and Commerce* vol. 30, no. 1, 2003, p 151-178

limitations to the authors and determines that a child cannot be removed from the person with whom he or she is physically unless the requirements of State law are fulfilled.

Section 11605 regulates admissibility of documents, and according to it, any petition or application or other document addressed to the United States Central Authority concerning relief under the Convention should be admissible in court.

Section 11606 of the Act determines the United States Central Authority, which is Federal Agency and it is designated by the President. Basically, the functions of the Central Authority is already described earlier in the Convention. The Central Authority have the right to give regulations which promotes the meaning of the Central Authority and the Convention and thus are necessary to obtain successful work.

Regulations concerning costs and fees are described in the section 11607, and in line with The Hague Convention, no administrative costs or fees shall be charged from the petitioner by department, agency or any State or local government. When it comes to civil actions, such as the costs of legal counsel, some court costs and costs causing from the returning of the child can be charged from the petitioner, unless two exceptions are fulfilled. The first exception is that if the costs are covered by Federal, State, or local legal assistance, it cannot be bear from the petitioner. The second exception is when the costs caused from the return of the child, court costs, legal fees or any other costs would be unreasonable for the petitioner.

Next section, 11608 deals with collection, maintenance, and dissemination of information. In general, the United States Central Authority have the right to receive information concerning the location of the child from any department, agency or any local or foreign government and Central Authority has also right to transmit the information to applicant, petitioner or respondent. Also, the Central Authority have the right to request the information from any department, agency or instrumentality, and if the needed information is contained in any files or records of such institution, it must be transmitted immediately to the United States Central Authority, unless such information would affect the national security, or it would be prohibited under section 9 of title 13 of US code. In such case, the head of such department, agency or instrumentality should inform the Central Authority immediately about its invalidity to convey information.⁴⁰

⁴⁰ International Child Abduction Remedies Act 1988

Basically, ICARA does not alter from The Hague Convention, but merely supplement it, and nowadays when there are more states who have ratified the Convention, the role of ICARA is not so essential anymore.⁴¹⁴²

4.2 International Parental Kidnapping Crime Act (IPKCA)

The primary purpose of IPKCA was that in 1993 when it came into force, international parental child abduction came as a federal felony and the scale of penalties vary from fines up to three years of imprisonment. The meaning was to deter child abductions by using harsher punishment. The use of IPKCA has not been very popular from the time it came into force.⁴³

IPKCA, as well as other Acts concerning child abduction, defines that any person who removes a child under 16 years or is about to do so or keep a child outside the United States and thus unlawfully violates the other parent's rights of custody, is committed to a crime. There are some exceptions when the crime is not happened even the nature of child abduction is fulfilled in some respects. If a defendant has a valid court order concerning legal custody rights and it was in effect at the time of the offence, or the exit from the state or the unsuccessful return to the state is caused by the fact that the defendant was escaped the domestic violence, or the failure of returning the child is caused by unexpected circumstances which are not under the defendant's control and the defendant informed the failure within 24 hours from expiry of visitation period and returned the child as soon as possible, the crime is not actually happened.⁴⁴

4.3. Other legal instruments

In United States, there are also other legal instruments to regulate the child abduction. The International Child Abduction Prevention and Retention Act (ICAPRA) is signed in 2014 and its main function is in accordance its name: prevent new abductions, to return already abducted children as soon as possible, and to strengthen the application of The Hague Convention all over the world.

⁴¹ Stranko, W. A. International Child Abduction Remedies, Army Lawyer vol. 1993, no. 7, 1993, p 28-64

⁴² International Child Abduction Remedies Act (ICARA), Juvenile and Family Court Journal vol. 48, no. 2, 1997, p 41-48

⁴³ Kreston, S. Prosecuting International Parental Kidnapping, Notre Dame Journal of Law, Ethics & Public Policy vol. 15, no. 2, 2001, p 533-555

⁴⁴ International Parental Kidnapping Crime Act 1993

In addition to these Acts regulating international child abductions, there is also state laws to be applicable in national child abduction cases. Because the United States is huge in size and it consists of many states with their own legislation, there is legal tools to harmonize these state legislations and proceedings in the field of child abduction.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is enacted in 49 states of the United States. It has two major purposes and the first purpose is to unify complicated and inconsistent case law. The second purpose is to enforce child custody in interstate situations. UCCJEA does not determine standards for child custody or do any decision about visitations or any issues related to custody of the child, but determines which States' court have power and authority to hear and decide about these matters.⁴⁵

Originally, the UCCJA was applicable only in domestic parental child abduction, but later it was agreed that it will be applicable also in international parental child abduction. The UCCJEA is basically updated act and it is meant to take the place of the UCCJA.^{46 47}

In addition to UCCJEA, uniform state laws include the Uniform Child Abduction Prevention Act (UCAPA), which try to specify the possible factors which can lead to abduction and provisions which can be used in court orders to prevent the risk of abduction. In the United States has also notified that the prevention is the key element to secure children from wrongful removal and because the consequences of it are often serious, the court must have a tool to impose abduction prevention measures at any time. UCAPA is applicable to emergency situations, when there is a high risk of abduction.⁴⁸

Missing Children Laws includes are basically laws relating to locate abducted children. Parental Kidnapping Prevention Act allows that the authority can get an address information in the case when there is suspicion about parental kidnapping. Missing Children's Act and National Child Search Assistance Act requires that all possible information about the child must put into NCIC (FBI's database) as fast as possible when information about missing child has reached authorities.

⁴⁵ Uniform Child Custody Jurisdiction and Enforcement Act 1997

⁴⁶ McDonald, E. More Than Mere Child's Play: International Parental Abduction of Children, Dickinson Journal of International Law vol. 6, no. 2, 1988, p 298-302

⁴⁷ Clemens (2003), *supra nota* 38, p 161

⁴⁸ US Uniform Child Abduction Prevention Act

Two Parent Consent Law requires that both parents should allow the granting of a passport to a child under 16, which prevent the possible wrongful exit from the United States.⁴⁹

5. HOW THE PROCEDURAL SAFEGUARDS ARE IN RELATION TO THE INTERNATIONAL REQUIREMENTS?

A checklist for Hague Convention Cases describes the process in court which States, who has signed the Convention, should strive to follow. At first, the whole case should be finished within six weeks. To reach the solution, a court must emphasize in all its actions safety of the child. Also, important is to examine what are the timelines for the case and survey if parents would like to use mediation instead of court hearing to final the case. Consideration must include the basic criterion of the Convention: the age of the child, what country is the habitual residence of the child and is that country signed the Convention, is there any other contract between the United States and the other country concerning child abduction, when does the removal of the child has happened, have the left behind parent the rights of custody and was he or she is exercising rights of custody before the abduction. It must be clarified when the request for return was filed and is the one-year time limit exceeded. One important clarification concerns current conditions of the child. If the child has settled to his or her new environment and the removal would cause more harm than benefit, it should be carefully considered if the return of the child would be the most satisfactory solution when looking at the overall picture. If a return may cause a risk of physical or psychological problems or somehow violates the protection of human rights, a return might not be the outcome of the case.⁵⁰

5.1 The United States

When comparing The Hague Convention and its checklist to the legislation concerning the child abduction in the United States, obviously considerable compliance can be seen because the State has signed and ratified the International Convention, which sets frame for the national legislation and case law.

⁴⁹ U.S. Department of State, Bureau of Consular Affairs, International Parental Child Abduction, Legal Information

⁵⁰ Garbolino, D. 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges, Washington, D.C., Federal Judicial Center, Print, p 167-168

As it is mentioned before, there are still other legal instruments to regulate the child abduction in the United States, and the meaning of the Acts is to supplement The Hague Convention. The law of the United States is deviant from example of Finnish legislation, because the United States is a combination of fifty states and every state has its own laws, which can vary from each other. Because of the variety between legal practices of different states, The Hague Convention is very valuable to attain the equality in courts, and as well as in other countries which have signed and ratified the Convention, it is a primary legal source also in the United States.

Abbott v. Abbott

The implementation of The Hague Convention is easiest to demonstrate by the case law. The first Hague Abduction case in the United States which was considered by the Supreme Court was *Abbott v. Abbott* (2010), which concerns a parent's right to prevent a child to leave the country.

In the case, the issue concerned that the father, Mr. Abbott, who was non-custodial parent for his child had *a ne exeat* right under a Chilean statute, where he, his son and his ex-wife Ms. Abbott were living at the time of the infringement of the right of Mr. Abbott. A *ne exeat* right is right to restrain a person from leaving the country and under The Hague Convention it means a right to custody. In this case a *ne exeat* right was granted both Mr. and Ms. Abbott, because the background of the family was international: Mr. Abbott was a citizen of Great Britain, Ms. Abbott was a U.S. citizen, they married in England but moved at first to Hawaii, where their son born in 1995 and after that they moved to Chile in 2002, where they separated in 2003. The meaning of the granted right was to prevent a removal of the child from Chile to other countries, because there was a quite essential risk for that.

In 2005, Ms. Abbott removed her son from Chile to Texas without the permission of Mr. Abbott. At first, Mr. Abbott filed an action in Texas federal district court and required that his son must be returned to Chile under The Hague Convention and International Child Abduction Remedies Act (ICARA). The interpretation of the court was that under the Convention, Mr. Abbott's *ne exeat* right did not mean a right of custody and thus if the right of custody is not breached, a child is not needed to return to Chile because Ms. Abbott had the full care and custody of the child and that means that she has the right to change the habitual residence of the child from a state to another.

The case went to the U.S. Supreme Court which analyses the discrepancy relating to the definition of a *ne exeat* right. When contemplating the object of The Hague Convention, it clearly states that

the main purpose of it is “to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”⁵¹ The Supreme Court estimated the case based on the objects of the Convention, rulings of several foreign jurisdictions and also the fact that to be as effective as possible, it must be ensured that the international consistency of the Convention is confirmed. Instead of concentrating the actual term “*ne exeat*” a court must analyse the subject matter and look how Chile itself has characterized the right.

Based on these findings, the court identified that there is an emerging international consensus that a *ne exeat* right is equal to the rights of custody. This decision was in line with the House of Lords, the Supreme Court of Austria, the Constitutional Courts in South Africa and Germany, and appeal courts in Australia and Scotland. With this decision, the United States came into same line with other countries when it comes to defining the term “rights of custody”.

The important meaning of the Abbott case is that most of the abductor parents are custodial parents and the other parent have access rights, which does not lead to return remedy in case of abduction and that will cause situation where noncustodial parent has no control over the country of residence of the child. After case Abbott, access parent has also the right to control where is the habitual residence of the child and a custodial parent cannot move to another state without permission.⁵²

To analyse the role of the ICARA and The Hague Convention and their relation to each other, the Convention seems to consider the case stricter than ICARA, because without international convention the case may have been solved in favour of Ms. Abbott, because the first instance concentrated more on the actual term and did not take into consideration the meaning from the wider perspective. The meaning of The Hague Convention was thus very essential, because to meet the requirements and conformity of it, a court should regard other decisions made by foreign courts concerning same kind of issue and strive to correspondence with the earlier made decisions. The existence of The Hague Convention requires courts to examine the question in many respects and courts are in practice bound to follow the before made case law concerning the issues of international child abduction and determination of terms to reach the objects and aim of the Convention. What comes to defining terms in ICARA, it is narrower than in The Hague Convention. In that sense, the Convention is implemented well in the United States, but the local

⁵¹ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Article 1

⁵² Silberman, L. Abbott v. Abbott, American Journal of International Law vol. 105, no. 1, 2011, p 108-114

legislation does not fully mimic the acts in the Convention. Defining terms likewise in different states is one important factor so the treatment before the law would be as equal as possible and the effectiveness of The Hague Convention would be actual.

Murphy v. Sloan

One of the important cases concerning the application of The Hague Convention is Murphy v. Sloan, where the dispute was related to the Article 3 of the Convention, defining the habitual residence of the child.

American father and an Irish mother, who has married in 2000, get a child in the United States in 2005. The marriage ends in 2009 and the child was enrolled in a Californian pre-school. Next spring the mother decided to move to Ireland and was willing to get the child with her, which was allowed by the father. The child visited quite long periods in California. In 2013, the mother and the child visited in Asia without the permission made by the father and when the mother informed the father that she is planning to move to Asia with the children, the father took the children to the California without agreement made with the mother because he opposed that the child would have moved to the Asia. The mother demanded that the child must be returned to Ireland with her, but the application was dismissed by the United States District Court.

The reasoning of the court included analysis about the habitual residence and its definition. The court decisions concerning the habitual residence has varied in other states, and the concept of the term is extremely difficult to define nowadays, when movement of families has increased, and the permanent residency is not evident in every case. In this case, the court saw that even the child and the mother were moved to Ireland by the permission of the father, the child had not abandoned her habitual residence in the California, because she had lived in California since birth and the time period in Ireland had lasted only 34 months when the father removed the child from Ireland back to the California. Also, parents did not have any kind of agreement that staying in the Ireland would be definitive, but merely the father was in the belief that they will return to the United States, when the mother has finalised her studies, which was the prior reason to move to the Ireland.

Based on these findings, the Court support the decision made by the district court. In this case, there was not any fact which would have supported that the habitual residence of the child has changed from California to Ireland and the readjustment to the new state has happened in the way

that it can be clearly stated that the return to the United States would cause harm for the child. The facts supported the court decision that there was no wrongful retention by the father, because the child still had significant connection to the United States and socialization to the Ireland, so called acclimatization, has not been happened in that extent that the habitual residence of the child could have seen as changed.^{53 54}

In this case, the Supreme Court agreed with the decision made by district court, and the decision is in line with the international requirements set by The Hague Convention. To draw conclusions based on these two cases and the Acts of ICARA and IKCRA, the legislation of the United States is in line with the Convention and the objects of these legal instruments are parallel. The United States is one of the first countries who has signed the Convention and it has a real desire to intervene to the international parental abduction. The Hague Convention is signed and ratified in quite many countries and that makes it effectiveness to the national legislation quite essential. Interpretations concerning such as here mentioned right of access and habitual residence are estimated versatile by using foreign court decisions as a basis for the decisions, and the fairness and conformity have played a big role.

In general, to achieve the best possible effectiveness, conformity is the key element. No convention is efficient, if interpretation of the law differs in every state. Also, the meaning of The Hague Convention is to unify the legislation concerning international parental child abduction, thus it would be useless if states would prefer their own national legal system instead.

5.2 Finland

After ratified The Hague Convention on the Civil Aspects of International Child Abduction in 1993, Finland has made changes in its national law concerning child abductions to ensure the effectiveness of the Convention. The most important changes in Finnish legislation has been retroactivity of return of a child, set the Court of Appeal of Helsinki as the only competent court to receive applications concerning child abduction and the last significant change is that the 'fundamental principles' exception in Article 20 of the Convention is not justified to invoke against the application in Finnish return proceedings.

⁵³ Court decision, 25.8.2014, Murphy v Sloan, 765 F.3d 1144, HC/E/US 1298

⁵⁴ Gallagher, E. A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence, New York University Journal of International Law and Politics vol. 47, no. 2,2015, p 478-450

The Hague Convention enters into force in Finland rather late stage even Finland as a Member State of The Hague Conference was actively preparing The Hague Convention. In Finnish national law there was significant differences comparing to the Acts of the Convention and national legislation was therefore backward and needed reformation. It would have been difficult to determine terminology used in the Convention and thus the effectiveness of the Convention would have been at least questionable.

Also, one big challenge before the Convention has entered into force has been the atmosphere concerning especially abductions where a child has abducted to Finland and the abducted child is a Finnish citizen. In this kind of cases, the parent who has abducted the child has received sympathy and support and has been a hero by the public and because of this way of thinking, there have been a high risk that courts would not comply with the Convention. For example, a Finnish court could have interpreted that intolerable situation of a child or possibility to psychological harm can be caused simply by returning the child from Finland to his or her habitual residence, and that is distinctly contrary the object of the Convention.⁵⁵

There are some gaps in the Finnish Act, for example there is no definition for habitual residence, but the Act has adopted presumption settled in The Hague Convention. In general, in Finland there is used so called transformation techniques to implement the Acts of The Hague Convention. Instead of applying directly any provisions of the Convention, Finnish judicial and administrative authorities may apply the general substantive law, private international law, procedural law rules and the specific Finnish internal law rules concerning unlawful removals in the meaning of The Hague Convention. This transformation technique is meant to ease the use of the Convention for judges, because it is easier to understand domestic terminology and use the acts of The Hague Convention as inserted into Child Custody Act. Such technique includes still risks, because when a legal text is translated and customized to the internal law, the purpose and spirit of the original Convention may change and cause different interpretations by judges.⁵⁶

KKO:2011:260

There are couple of important cases concerning habitual residence of the child. Married Canadian couple get the child in 2008, which was birthed in Finland. After the mother and the child returned

⁵⁵ Savolainen, M. The Hague Convention on Child Abduction of 1980 and Its Implementation in Finland, *Nordic Journal of International Law* vol. 66, no. 1, 1997, p 101-110

⁵⁶ Savolainen (1997), *supra nota* 51, p 118-124

to Canada, the parents made simply agreement that the child will reside with the mother, and not any notice concerning right of access of the father. In 2010, the mother took the child to Finland and it had been agreed that the mother and the child will return until the end of the next month. The return delayed because of the illness of the mother and the ash cloud, which restricted air service and thus the mother and the child could not return due to date which was set.

After these constraints cancelled, the mother informed that she would not return, and she and the child will stay in Finland instead. The father issued Hague Convention proceedings because of the wrongful retention of the child and after that the mother appealed to the Supreme Court, but the appeal was dismissed, and the child was assigned to return to Canada because wrongful retention has had happened by the mother.

In a sense, this case is interesting and important because even the parents have agreed that the child would reside with the mother and in the light of that agreement, staying in Finland instead of returning to Canada would have been acceptable and probably without The Hague Convention, Finnish legal system have had decided otherwise.

As it is noticed several times before in this Thesis, The Hague Convention is meant to secure children from the harmful effects of wrongful removal, which can cause serious consequences not only for the child, but also for the left behind parent. When a child is removed from his habitual residence to a new country with new culture, language, social structure and different legal system, it will confuse a child and therefore wrongful removal is prohibited under the Convention. So, in this case, even the parents have agreed such contract that the mother have power concerning the place of residence of the child, it is contrary to the Convention to remove the child from his or her habitual residence when the removal is contrary to the will of the other parent. So, the centrepiece of this case is the child, not the agreement made between the parents.

Even the parents had planned to move to Finland and that they had the agreement concerning the residence of the child would be the same with the mother, a court noted that the habitual residence of the child had been Canada because the family has lived there such a long time and had also a flat there, and the agreement made between parents did not included detailed information that the mother and the child will move to Finland in a specific time period, and the mother had, according

to the original plan, booked also return tickets back to Canada, which supports the idea that the staying in Finland was intended as temporary.⁵⁷

KKO:2008:98

The other important case concerns also the definition of the habitual residence of the child. In the case, married couple moved from Finland to Scotland in October 2007 with their children. After six months, the mother travelled back to Finland with the children and the father petitioned for their return.

The first instance, the Helsinki Court of Appeal argued that the habitual residence of the children was in Scotland and it ordered the return of the children back to Scotland, because the mother wrongfully removed the children. The mother appealed, and the Supreme Court dismissed the return application because the court did not see any facts which had been supported the view that the children had integrated to Scotland in the sense that it could be seen as their habitual residence.

The reasoning of the Supreme Court was based on following facts: the original plan was that the family will stay in Scotland as a limited time period, but the father himself decided that the family will stay permanently in Scotland. Based on this fact, going to Scotland was not joint intention. Also, the family had not made address notification to the Finnish authorities, they had not registered to the health services of Scotland or used day care facilities and the children had not any social ties to Scotland because staying in there had not lasted very long compared to time period they had lived in Finland before moving to Scotland.⁵⁸

As it can be seen also in this case, the habitual residence of the child is not automatically the one where the family is currently living, if it can be shown that the child has stronger ties to another State. In this case, the family had lived in Finland when the children were born and based on previously written facts, staying in Scotland were not joint decision, so the mother had a legitimate reason to return to Finland with the children and in these circumstances shown above, wrongful removal of the children had not happened.

So, this case as well show the fact that parents cannot determine the habitual residence of the child if the facts of the case witness that the social and other ties are stronger in other state. Even The

⁵⁷ Court decision, 12.4.2011, KKO:2011:260, HC/E/FI 1091

⁵⁸ Court decision, 17.11.2011, KKO:2008:98, HC/E/FI 1089

Hague Convention promotes strongly that the child must always return to the habitual residence, the determination of habitual residence can change the outcome of the case essentially. These cases demonstrate well that the same interpretation of The Hague Convention in every state where the Convention is ratified is the most important tool to uniform the use of the Convention and makes it effective.

Even the Finnish legislation needed significant changes before there was any sense to ratify The Hague Convention, updated legislation and atmosphere concerning child abductions have adapted well the Convention, and based on the cases in INDICAT, the implementation of the Convention has been successful and Finnish legislation follow the objects of it. The transformation technique used to match the acts of the Convention into Finnish legislation has worked well, even there has been some risks.

6. COMPARISON OF FINNISH AND THE UNITED STATES CHILD ABDUCTION LAW

The most significant difference between Finnish and the United States child abduction legislation is that in the United States, there are several different laws regulating the issue while in Finland there is just one law, which of course reduce confusion and makes the system more simple and understandable.

The scope and complexity of law system of the United States is one feature which makes the effective use of it challenging, because in every state there is its own variations of laws and enumerating all of them in couple of pages is impossible. Children's rights have gone through a big change during the decades. The federal laws of United States concern every child, but in addition there are fifty different state laws which includes the rights and responsibilities of children and may differ from each other significantly.⁵⁹

Unlike in Finland where The Hague Convention is included in the national legislation, in the United States the Convention is as a separate legal tool and it is supplemented by the federal laws and state laws concerning child abduction. Because The Hague Convention does not provide any instructions what kind of sanctions are needed to punish the abductor, the International Parental Kidnapping Crime Act (IPKCA) provides a penalty scale for the crime. Equivalent law in Finnish legislation is the Criminal Code of Finland Act 25. In both states the minimum penalty for the abductor is fines and in the United States the maximum time of imprisonment can be three years, whereas in Finland the corresponding time is two years. Because the punishment tells a lot about the seriousness of the act, it can be interpreted that in the United States, attitude towards the international child abduction is stricter than in Finland. It can also indicate the fact that in Finland child abduction is not as widespread problem than in the United States, where there is a greater need to intervene with the threat of punishment. In general, a punishment has a preventive effect to the possible perpetrator and the strength of the penalty is in direct connection to the preventive effect: the longer is the possible punishment for the criminal act, the stronger is the preventive effect.

⁵⁹ Center, Y. Legal Rights of Children in the United States of America, Columbia Human Rights Law Review vol. 13, no. 2, 1981-82, p 675-679

It is also mentioned before that the atmosphere towards parental child abductions in Finland have been rather positive, whereas in the United States attitude has differed and been stricter. Also, this factor can cause the more lenient punishment scale in Finland. The need for international co-operation has distinctly been experienced more important and that might be the fundamental reason why the United States has signed and ratified the Convention among the first states in the world. The extent of the problems concerned parental child abduction in Finland has been a fraction in problems in the United States.

The law of the United States is obviously more detailed causing from the fact that there is more Acts regulating the child abduction than in Finland. International Child Abduction Remedies Act describes the procedure how to bring The Hague Convention case to the United States courts and determines the rights of the United States Central Authorities to use databases and locate the abducted child. The International Child Abduction Prevention and Return Act (ICAPRA) set the detailed framework concerning the return of the child and includes actions which is intended to prevent child abductions and promotes the efficiency of The Hague Convention.

As it is clarified in the second topic, also The Hague Conference on Private International Law have Guide to the Good Practice of The Hague Convention, which includes detailed information about how the Central Authorities and the judge should strive to operate with the child abduction cases including instructions to mediation, enforcement, preventive measures, implementing measures and Central Authority practice. This guide, even if it is well implemented at least in Finland and in the United States, is not still binding and theoretically the Member States of The Hague Conference do not have to act in line with the guide. Of course, if a State is not willing to follow the Guide to Good Practice, it can be asked why such State is willing to sign and ratify the Convention.

Notwithstanding, the legislation of the United States set requirements in ICARA for the issues which are also viewed in the Guide to Good Practice, but when the United States regulates these in the legislation, they become binding for every judge and Central Authority and are not nominally voluntary anymore. A similar Act cannot be found in Finnish legal system, which theoretically leaves more possibility of interpretation for the judge.

In the legislation of the United States, there is Acts concerning locating abducted children, as it is stated in the subtopic 4.3. These laws allow and in fact requires that the information about the

missing child must be saved into National Crime Information Center (NCIC), a database under FBI which includes crime-related information⁶⁰, even if the parent is not charged with a crime. For example, National Child Assistance Act requires that the information about the child must be in the NCIC database within two hours when local law enforcement agency has received the report of missing person. According to this national law, the age of children is until the age of 21, so it is far stricter than in The Hague Convention, where the corresponding age is 16. In the United States, there is also Parental Kidnapping Prevention Act, which includes statutes about obtaining address information in cases of parental kidnapping.⁶¹

In Finnish legislation, there is neither stricter acts concerning the age of the missing child nor any act which would regulates the information concerning the missing child. These findings support the view that the attitude towards parental child abduction and child abduction in general is in the United States more serious and the national legislation set additional, stricter criterion for example to the definition of the child. Based on the fact that there are some tens of cases per year in Finland, the need for fix the national legal system in the field of child abductions has perhaps been seen as unnecessary. Still, the number of cases has increased during the past ten years, which might require attention in future.

Even both Finland and the United States have signed and ratified The Hague Convention and work within the framework of it, there is major differences in the national law of these countries. One significant difference is of course the differences in the whole legal system, but also the amount of the acts regulating child abduction. The United States have tried to unify the legislation at least in the field of child custody and abduction, because the complexity of the legal system of the United States has possibly been also ineffective and time-consuming process.

Strength of Finnish legal system in the field of international child abductions is that there is one law which includes the Acts of The Hague Convention and for that reason a judge has just a one law to operate with the case. Also, the atmosphere concerning parental abductions to Finland has changed and the judgements made by the Supreme Court are in line with the requirements set in The Hague Convention. If the number of abduction cases increases in the future, it might be challenge for Finland and might require more emphasis on the development of national legislation, because on the contrary, in the United States the number of cases has decreased and there might

⁶⁰ Criminal Justice Information Services, National Crime Information Center NCIC

⁶¹ US National Child Search Assistance Act of 1990, title XXXVII

be connection between far stricter national law and attitude towards the abduction. Also, criminal sanctions in the United States are more serious than in Finland, which can be one preventive factor for parents who are intended to abduct their child.

CONCLUSION

The aim of the thesis is to research how the international legislation concerning international parental child abduction is implemented in target countries, the United States and Finland. Only the conformity of implementation of legislation can lead to effective result, so this topic is thereby interesting overview concerning current issue.

By analysing the literature, statistics and State Officials' analyses concerning the international child abduction, the main result is that in the United States, the attitude towards the problem of child abductions is more stricter and causing from that fact, the national legislation concerning this issue is more detailed and includes greater punishments than in Finland. In Finland, the international legislation is fitted on national law and there is only one Act regulating the crime of abduction whereas in the United States there are several different Acts.

Because the Hague Convention on the Civil Aspects of International Child Abduction does not set any rules concerning punishments, it is purely on the power of a state to regulate the penalty length. The length of the penalty has a preventive effect, and thereby punishments reflects well the attitude of a state towards child abductions. It can be deduced by the author, that in a state where punishments are more serious concerning child abductions, the willingness of follow the Convention is greater and more precise. When an issue is taken seriously, and the consequences are fierce, the inner will to intervene to the problem is possibly very high.

To gain the best possible outcome and to ensure the uniform interpretation of the Hague Convention on the Civil Aspects of International Child Abduction, there is also collected elements how the Act should be practised in national level. That ruling is called a Guide to Good Practice and there is quite detailed guidance how every official should act and how the Convention should be implemented in the contract State. One main observation the author has done in the thesis is that in the United States, also the national legislation defines the detailed framework for officials who are working in the field where abduction cases can occur. There is no similar legislation in Finland, and this lack of legislation leads to conclusion that in Finland the approach towards child abductions is more lenient and the implementation of the international Convention is thereby less detailed. In the United States, the problem is wider and that is the main reason why the state has regulated the whole process very detailed.

The weakness of the legislation of the United States is that the amount of national laws makes the interpretation challenging in certain situations. It is easier to follow just one regulation as in Finland, but the lack of the content may be the deficiency of Finnish legislation.

Based on these outcomings, there is strengths and weaknesses in both states' national legislation, but the Convention has unified the interpretation and made the process concerning international child abduction easier. There are still problems to solved, and the development point in Finland is to change the attitudes towards child abductions and through that way improve practices concerning the issue. In the United States the main challenge is complexity of national law, but when the state can solve that, the attitudes and consequences seem to be strict.

One point to ensure the similar practice of the Convention in different states would be the biding nature of "Guide to Good Practice". Because basically it does not require anything but is just as a guide, a state can ignore it and maintain its own, wrong kind of, interpretation of the contents of the Convention.

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