Interaction Between Recent Case-law of the European Court of Human Rights and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*
Statement by Hans van Loon, Secretary General of the Hague Conference on Private International Law at the 41st Meeting of the Committee of Legal Advisers on Public International Law
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Introduction: The Relationship between the Council of Europe and the Hague Conference: Complementarity

1. The Council of Europe and the Hague Conference on Private International Law have a long-standing working relationship. The formal basis for our cooperation is a treaty of 13 December 1955[1]. This agreement also provides that the two organisations should avoid overlap in their work, and that the Committee of Ministers of the Council will, in principle, refer matters relating to the unification of private international law to the Hague Conference.

A glorious example of such a referral is the Hague *Convention of 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*. A proposal to simplify the legalisation requirement was originally proposed by the United Kingdom to the Council of Europe. It was then agreed that it was preferable that the Hague Conference include the topic on its agenda. Next month, the 1961 Apostille Convention, as it is now known, will have 100 States Parties.

2. This example also shows that the Hague Conference now has a truly global span. The organisation has 71 Member States, plus the European Union, representing 4.5 billion people. In addition, 60 more States are Parties to one or more of the almost 40 post-War Hague Conventions on private international law. All Members of the Council are Members of the Hague Conference, with the exception of *Andorra, Armenia, Azerbaijan, Liechtenstein, Moldova* and *San Marino*. But even these six States are Parties to one or more (up to six) Hague Conventions[2].

3. Cooperation between the Council of Europe and the Hague Conference has been fruitful. Sometimes we have had differing views, but we have usually been able to resolve such differences by agreement. In many respects our work has been complementary. At this very moment one of my colleagues is here to follow the work of the Council of Europe on the rights and status of children and parental responsibilities, the private international law aspects of which are on the agenda of the Hague Conference. Relocation of children is a topic of interest to the Council of Europe, but it is a global issue. There are many examples from the past of complementary work, in fields as diverse as access to justice, bankruptcy, protection of adults and adoption of children.

For example, the Council of Europe Convention on the Adoption of Children of 1967, and its 2008 revision, dealt with the substantive law aspects of adoption of children, whilst the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption deals with its private international law or cross-border aspects, i.e. with cooperation and protection of children in

[1] Published in *Tractatenblad van het Koninkrijk der Nederlanden*, 1958, 80
[2] See the website of the Conference, http://www.hcch.net.

the context of inter-country adoption. The 1993 Convention is a global instrument, in force for 83 States around the globe.

So there is complementarity along two dimensions: the Council of Europe's focus is on substantive law and regional work, the Hague Conference focuses on private international law and global work.

4. More recently, this double complementarity has made its appearance in the case-law of the European Court of Human Rights. That this could happen is due to the fact that several Hague Conventions may be seen as supporting and implementing global human rights norms, norms that are also found in the *Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950* (the European Convention on Human Rights).

Interaction between the European Convention on Human Rights and the Hague Child Abduction Convention

5. Of particular importance at this point in time is the interaction between the European Convention on Human Rights and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("the Child Abduction Convention"). With the exception of *Andorra, Azerbaijan, Liechtenstein* and the *Russian Federation*, all Member States of the Council of Europe and Parties to the European Convention on Human Rights, are also Parties to the Hague Convention. In addition, 41 other States around the world are Parties to the Child Abduction Convention, making up a total of 84 Contracting States.

6. Those Council of Europe States that are Parties to the European Convention on Human Rights and the Child Abduction Convention must, with respect to each Convention, respect their obligations *vis à vis* all other Contracting States to the Convention in question. Consistent interpretation and application by all States Parties of each Convention is vital to its sound operation.

7. The Child Abduction Convention addresses a growing global problem, i.e. the unilateral removal of children across borders, usually by one of the child's parents. Unfortunately, the wrongful removal and retention of children across international borders is an aspect of globalisation that causes increasing concern[3].

8. The Convention is specifically designed to protect children internationally from the harmful effects of their wrongful abduction or retention. It establishes machinery and procedures to ensure their prompt return to the State of their habitual residence, and to secure protection for rights of access. In many instances the Convention achieves this result in an amicable way, thanks to the cross-border cooperation between Central Authorities designated under the Convention. Where an amicable solution is not possible, i.e. in about 50 % of the cases, and a wrongful abduction or retention has occurred to a Contracting State, the authorities of that State are required to order the return of the child forthwith (Art 12).

[3] A statistical study carried out by Prof. Nigel Lowe from Cardiff University at the request of the Hague Conference which will soon be published shows an overall increase of 30% in return applications when the figures concerning applications made in 2008 are compared to those made in 2003.

9. The Convention is based on the general principle that it is in the child's best interests that the authorities of the child's habitual residence fully examine the child's circumstances and, on that basis, take a decision on the merits of custody issues. That is why the proceedings before the State of the abduction or retention can be characterized as *summary proceedings*, why they are to be *expeditious*, and why there is an express rule to the effect that the *return decision shall not be taken to be a determination on the merits of any custody issue* (Art 19).

10. The duty imposed by Article 12 is not mechanical or automatic, however. The Convention recognizes that there may be circumstances in which the return of the child would be contrary to his or her interests and it therefore provides a number of exceptions to the duty to order return, in particular Article 13(1) b: if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, then the requested State is not bound to return the child. Article 13(1) b is from time to time invoked before the courts, especially in cases – currently some 70% of cases brought before the courts – where the removing or retaining parent is the primary, or joint primary, care taker.

11. The Child Abduction Convention does not have a procedure for individual (or inter-State) complaints before an international judicial body. But the Hague Conference has established a wide range of tools to achieve effective implementation and consistency of operation of the Convention. First, the Child Abduction Convention establishes a system of reciprocal administrative cooperation through Central Authorities which each Contracting State must designate. This system is reinforced by regular review gatherings of these Central Authorities[4]. Second, the Conference has set up a variety of instruments and tools to assist with the implementation, and to monitor and support the proper operation of the Convention. Guides to Good Practice, advice to Central Authorities, an international case law database with comments on important decisions—these and other tools assist in ensuring consistency in the Convention's application. Finally, alongside the global network of administrative cooperation, a global network of judicial cooperation is emerging, supported by judicial conferences, and other means[5].

12. It remains true that an individual complaints procedure for the Convention is not available at the global level. And this explains why, in Europe, the mechanism of individual complaints under the European Convention on Human Rights has been used for complaints regarding violations of its Articles 6 and 8, in particular, as a result of the application of the Hague Child Abduction Convention.

The Case Law of the European Court of Human Rights

13. The European Court of Human Rights has, in a series of remarkable judgments since the beginning of this century, stressed the positive obligations of Council of Europe Members arising form Article 8 of the European Convention in both child

[4] Special Commission meetings to review the practical operation of the Convention have been held in 1989, 2001, 2002 and 2004. The next Special Commission meeting will be split into two parts, the first part of which will take place from 1-10 June 2011 at the Peace Palace in The Hague, and the second part will be held early in 2012.

[5] See the *Child Abduction Section* on the Hague Conference website (*supra*, fn.2)

abductions and trans-frontier contact cases. It has upheld challenges against States deemed not to have taken all necessary steps to facilitate the execution of Hague Convention return orders. On several occasions it has found Contracting States to the Child Abduction Convention to have failed in their positive obligations to act expeditiously or to enforce a return order. It has dismissed challenges by parents who have argued that enforcement measures, including coercive steps, have interfered with their rights to a family life. This large body of case law has helped considerably in reinforcing the operation of the Child Abduction Convention. And since the jurisprudence of the European Court of Human Rights has been in harmony with jurisprudence and good practice all over the world, these cases have helped to achieve a convergence of jurisprudence and to avoid frictions between the European Convention and the Hague Convention.

14. More recently, however, the Court's case law has given some cause for concern. The concern relates, in some cases, to the length of proceedings before the Court itself, but also, in particular, to a suggestion which may be found in the Court's recent case law, that the court seized with the return application is the appropriate court to enter into a broad examination of the merits that bear on substantive custody issues. In the *Raban v. Romania* case of 26 October 2010 the Court says that it *"must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."*

15. This is very broad language, suggesting that in each individual application for return brought under the 1980 Convention, the court should examine in depth the entire family situation and a wide variety of factors relating to the welfare of the child; in short a full 'best interests' test. However, the in-depth examination enjoined by the Court is appropriate when a domestic court is addressing the merits of the underlying issues relating to the long-term custody, contact and relocation arrangements for the child. But this is *not* the function of a court dealing with a return application under the 1980 Convention.

16. The *Raban* decision, if it were to be confirmed, would undermine the jurisdictional principle underlying the Hague Child Abduction Convention, which has also been accepted in other international instruments, including several Conventions drawn up by the Council of Europe (e.g. the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (Luxemburg, 20.V.1980) and the *Convention on contact concerning children* (Strasbourg, 15.V.2003)).

17. *Raban* may also be seen as rewarding the taking or retaining parent by conceding to him or her procedural advantages and by conferring authority to determine the merits of a dispute on the courts of the country in effect selected by that parent. It could also result in the slowing down of Hague return proceedings in order to allow adequate time to the court seized for a full consideration of the issue of best interests relating to the merits. It may affect the way in which return orders are managed by

judges, and could compromise the requirement of expeditious procedures and the principle of prompt return under the Convention.

18. One of the parties in the *Raban* case has requested the European Court of Human Rights to refer the case to the Grand Chamber. Two States Parties to the European Convention on Human Rights and to the Child Abduction Convention, Germany and the United Kingdom, have also requested a review by the Grand Chamber. It is not known at this point if the Court will accede to this request. It might not be willing to do so because it was only on 6 July 2010 that the Grand Chamber rendered a judgment in a similar but not quite identical case, the case of *Neulinger and Shuruk v. Switzerland*. Although that case also raises some concerns in and of itself (including concerning the length of proceedings before the Court) it is the subsequent use and interpretation of the *Neulinger* decision in *Raban* which causes the utmost concern. One of the differences between *Raban* and *Neulinger* is that in *Neulinger* it was clear that the full examination enjoined by the Court had to take place in the context of the Article 13(1)b defence of the Hague Child Abduction Convention.

19. Whether or not the Court will accept the request to review *Raban* – and I am not commenting on the actual outcome of that case, but only on the possible impact of some of the reasoning of a general nature regarding Hague proceedings made by the Court – it may be hoped that in its future case law, the Court will find an opportunity to dispel the doubts that *Raban* has raised. The Court has an impressive record in terms of assisting the Member States of the Council of Europe in achieving the aims of both the European Convention on Human Rights and the Hague Child Abduction. It is to be hoped that this jurisprudential consistency will confirm itself.

20. For the purpose of this meeting, we thought it was important to alert the Legal Advisers of the Council of Europe to the important phenomenon of interaction between the European Convention of Human Rights and the Hague Child Abduction Convention, to be aware of the specifics of both, and of the need to ensure that they are both applied in a consistent manner, and in harmony with each other.