

## PSYCHOLOGICAL ASSESSMENT AND INTERNATIONAL LAW: CROSS-BORDER RELOCATIONS AND ABDUCTION OF CHILDREN

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*Globalisation has produced a new world order of profound socio-economic transformations that have caused dramatic changes, unprecedented in history, and together with the women's revolution they have introduced new challenges for the model of family and society. Divorce between spouses of different nationalities has significantly increased the number of international relocations of children - with or without abduction-, affecting both the judicial decision-making regarding the care and custody, as well as the forensic psychological evaluations. The objective of this article is to reflect upon the task of the expert forensic psychologist in cases of international transfers or child abduction that will help to deepen our understanding of these cases, for which it is necessary to understand the current legislative framework, among other issues.*

**Key words:** Child custody evaluation, Divorce ad litem, International relocations, Child abduction.

*La globalización ha producido un nuevo orden mundial de profundas transformaciones socio-económicas que han propiciado vertiginosos cambios sin precedentes en la historia y, que junto a la revolución de la mujer, han aglutinado nuevos desafíos para el modelo de familia y sociedad. Los divorcios entre cónyuges de distinta nacionalidad ha incrementado ostensiblemente el número de traslados internacionales de menores –con o sin sustracción-, afectando tanto a la toma de decisiones judiciales sobre la guarda y custodia, como a las evaluaciones psicológicas forenses. El objetivo de este artículo es hacer una reflexión que ayude a profundizar sobre la tarea pericial del psicólogo forense en casos de traslados o sustracción de menores internacionales; para ello es necesario conocer entre otras cuestiones el marco legislativo actual.*

**Palabras clave:** Evaluación custodia de menores, Divorcio ad litem, Traslados internacionales, Sustracción de menores.

**G**lobalisation has led to a new world economic order. These financial and social transformations have brought changes that are unprecedented in history. New technologies have moulded values that affect individual identity and cultural identity (Villoro, 1998). We know that the recognition of identity implies the recognition of otherness and difference (Martín-Barbero, 2003). Added to globalisation is the revolution of women, linking new challenges with the liberalisation of the traditional models of family and society (Villoro, 1998), migration and mixed marriage (Peñafort & Arbulo, 2002). Therefore, a number of authors have expressed concerns about certain international measures because they question the contemporary paradigm of cooperative and complementary co-parenting between parents (Shear & Drozd, 2013). Certain differences may spring to mind here, for example the bi-nuclear or extended family, multiculturalism, or ethnic or religious differences. A recent report has shown that parental abduction has become a global problem, among the causes of which are

divorces of mixed marriages, judicial nationalism, the abuse of visitation rights and child maltreatment. Despite the existence of international treaties, "from Canada to Argentina there are 3,384,000 infants that have been internationally abducted" (UNICEF, 2013).

One study (Finkelhor, Hotaling, & Sedlak, 1991), based on the results of a national survey in the USA, of 10,544 families in which 20,505 children were involved as part of the National Incidence Study of Missing, Abducted, Runaway and Thrownaway Children. They estimated that approximately 354,100 children were taken by a member of their own family. In other studies, it was observed that a majority percentage of child abductions were carried out by the noncustodial parent that had less contact with the child than the holder of custody, whose right was infringed by the international abduction (Blanco, 2008).

The judge of the General Council of the Judiciary, González Vicente (2007), indicates a number of relevant circumstances:

- a) A progressive increase in illicit relocations or retentions of children, not only in Spain but also in all countries generally.
- b) An increase in family crises, of a widespread nature.

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- c) Difficulties in achieving the return of the children, especially regarding compliance with the resolutions agreed upon.  
 d) The sensitive nature of the field affected, i.e., minors.

In Spain, according to the INE [National Institute of Statistics] (2013), there were 103,854 divorces in 2012, of which 11.5% were between spouses of different nationalities (Table 1). Of these divorces, 58.37% were between Spanish men/women and American men/women, followed by 18.25% between Spanish men/women and African men/women. Another study found that, in the period 2007-2011, mixed marriages with children almost doubled the number of dissolutions in the first five years of marriage in comparison with married couples with children where both spouses were Spanish (Domínguez, 2014).

The Best Interest of the Minor (BIM) has the rank of supremacy and rule (Del Niño, 1990). It is an indeterminate concept that is specified in each particular case. In law, the implementing acts are indeterminate *ab initio* because uncertainty is evidenced in the conditioning experience, i.e., in the passing of the general rule, the BIM, to the particular decision of the specific case (Kelsen, 2005). The possibility of excluding a parent with regards to shared parenting can lead the parent to adopt a position where the beliefs or conceptions of what is good may differ across cultures, eras, political regimes or different moral or religious conceptions, culminating in the infringement of the rights of the children (Lucero-Montaño, 2008).

The fundamental rights of the individual are above all others relating to the family's interest (de Torres, 2011), and the rights of the child prevail in case of conflict, due to the preeminence legally sanctioned in the UN Convention of 20 November 1989 on children's rights and ratified by Spain on 30 November 1990 (UN, 1989) to ensure the child's right not to be separated from his or her parents; to family reunification; to visiting rights regardless of the country where they reside; not to be illicitly relocated abroad; to the parents' obligations to co-parent or, in the absence of family relationships, to state protection or adoption (Conani, 2012).

In recent decades, there has been significant demand for psychologists to carry out child custody evaluations (CCE). Therefore, one of the requirements of the forensic guidelines for issuing psychological expert reports (PER) refers to the maintenance of professional competence and

permanent scientific updating of CCEs in both the psychological and in the legal aspects (APA, 2012 a; APA, 2012 b). In order to perform an international child custody evaluation (ICCE), whether due to an international relocation or abduction, arising from a divorce between spouses of different nationalities, the forensic psychologist must know the legislation and be able to carry out the report differently from the processing of a national CCE. Additional factors have been highlighted in the ICCE, since the laws of the foreign country, the judicial practices, the education system and the political conditions create a climate that may be favourable or hostile to the BIM, the visitation rights of the child with the noncustodial parent, and the intentions of the Court which issued the original custodial orders. These are aspects that require of the evaluator greater rigour and analysis of the co-parenting and the reasons for the proposed regime of visitation and transfers to the noncustodial parent (Warshak, 2013). When the child's parents live in different countries, there are complex synergistic challenges related to the place, culture, distance and jurisdiction requiring further detail in ICCEs, which often omit vital elements of the future history of the child that cannot be evaluated in the same way in an international relocation as in a regular CCE (Shear & Drozd, 2013).

TABLE 1  
 DIVORCES ACCORDING TO NATIONALITY OF SPOUSES IN 2012

Nationality of husband	Nationality of wife	Units in absolute values	Accumulated absolute values
Spanish	Rest of E.U.	813	
Spanish	Other European countries	160	973
Spanish	Asian	133	1106
Spanish	Oceania	10	1116
Spanish	African	480	1596
Spanish	American	3689	5285
Rest of E.U.	Spanish	827	6112
Other European countries	Spanish	135	6247
Asian	Spanish	322	6569
Oceania	Spanish	16	6585
African	Spanish	1407	7992
American	Spanish	2345	10337

Note: Source: INE [National Institute of Statistics] 2013



Various studies have indicated the importance of improving the ICCE through knowledge from the review and analysis of cases (AFCC, 2011; Austin, Kirkpatrick, & Flens, 2011; Kaufman & Lee, 2001; Kaufman & Pickar, 2013).

One objective of this study is to present the legal aspects related to international agreements; to present a number of cases of international transfers; to present a case that reveals serious discrepancies between States on international child abduction; and to reflect on a number of differences between the CCE and the ICCE to help guide the forensic psychologist who wishes to specialise in international evaluations.

The selection of cases come from a sample of 111 court records of contentious divorces in which the psychological expert reports were studied and court rulings filed at Family Courts No. 15, 16, 17, 18, 19, 45 and 51 of the city of Barcelona, between January 2007 and December 2013 (Rodríguez-Domínguez, Jarne & Carbonell, 2015a; 2015b; 2015c, in press). The study was evaluated by the Ethics Committee of the University Ramon Llull and authorised by the clerks of the Family Courts. Cases 1-4, which belong to the study, are merely illustrative of a complex reality, but the reader is warned that it is not possible to make a general extrapolation.

## INTERNATIONAL LEGISLATION

Many countries, aware of the rights of children, have legislated international agreements to try to protect, regulate and combat international child abduction, which consists of the removal of a child from one State to another, across borders, violating or preventing the exercise of the rights of custody and/or visitation (Sabido, 2004).

Among the Rights of the Child, the UN (1989) states in its Art. 11:

1. *State Parties shall take measures to combat the illicit transfer and non-return of children abroad.*
2. *To this end, State Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.*

## THE HAGUE CONVENTION OF 1980 (HC 1980)

In the last four decades there have been numerous violations due to international child abduction that led to 75 member states signing the HC 1980. Spain has been a member since 1987. There are 68 other states that are

not members of HC 1980, although they have signed, ratified or acceded to one or more Hague Conventions.

The preamble of HC 1980 states the following:

*Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,*

*Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,...*

Therefore, the main purpose of HC 1980 is the maintaining of the *status quo* prior to the abduction, since the return of the child is prioritized in Art. 1a) and the maintaining of the validity and effectiveness of custody or access rights previously established in Art. 1b). Return simply means the return to the previous situation without the need, *a priori*, to question who is entitled to custody. However, if it were deemed necessary to raise further proceedings on the matter, by returning the child it would be attempted to ensure that it is the courts of the former habitual residence that will hear the custody case (Blanco, 2008).

The HC 1980 delimits its scope of application to the illicit transfer of children resident in one state party, of HC 1980, to another state party. Illicit transfer means the displacement of a person under the age of sixteen, in breach of the custody rights granted either by court order issued in the state party and enforceable in that state prior to the relocation or after it occurred, or by agreement having legal effect under the law of that state, as indicated in Art. 3, HC 1980. It is also established in Art. 3b) that the custody rights must have been actually being exercised at the time of removal or that these rights were not able to be exercised as a result of the relocation. According to Art. 8.3 of HC 1980 it shall be deemed unlawful relocation in the event that the child, after completing the period of exercise of visiting rights or a temporary visit in a State other than that in which he has his habitual residence, does not return to the State where he habitually resides. The HC 1980 merely regulates the direct act of returning the child as a tool for legitimising the protection of the BIM and the effective intervention of custody rights (Sabido, 2004). Certain features must be present, however, under HC 1980: a) the timing: in the course of a year, the return of the child shall be immediate whenever custody is performed effectively and the child is



not at serious physical or mental risk; b) in the event that more than one year has elapsed since the unlawful retention, the return would take place if the child were not integrated into the new habitual residence with identical requirements to the previous supposition; c) Art. 11 requires the contracting States to act, as a matter of urgency, implementing procedures for the return of children, within six weeks from the date of initiation of proceedings (Sabido, 2004).

Art. 13 of HC 1980 indicates that:

*The judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*

*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*

Legally there are three options for dealing with cases of international abduction: a) in the State to which the child has been moved, to seek recognition and enforcement of the judgement of custody rights and visitation regime that was dictated by the authority of the State where the child resided before the transfer; b) to request the return of the child directly to the competent authority of the State in which the child is living after the transfer; and c) to initiate proceedings on child protection measures in the state to which he or she has been moved.

In Spain, Regulation 2201/03 which complements HC 1980 (see Table 2), aims at determining the jurisdiction and the recognition and enforcement of judgements in matters of separation, divorce or annulment, on the one hand and, on the other hand, parental responsibility (Sabido, 2004).

## CASES OF INTERNATIONAL TRANSFERS

### Case No. 1

A marriage between a Mexican woman and Spanish man, with a child of 13 years old, who lived in Spain for

16 years. When they moved to Mexico in 2004, the husband did not adapt to the change and they separated. The mother was awarded custody and decided to stay with the child in her country. The father did not return the child after a return trip to Spain. The mother filed a complaint for abduction. The ICCE determined that the child was suffering from an anxiety disorder and conflicting loyalties due to not being adequately protected from the marital conflict. The Spanish Court agreed to the restitution, due to the wrongful removal of the child, to Mexico under HC 1980, dismissing the appeal of the father. The ICCE proposed to find appropriate measures

**TABLE 2**  
**THE RETURN OF THE CHILD**

Main rules of HC 1980	Main rules of the Regulation
<b>Article 12:</b> The court of the Member State to which the child has been relocated shall in principle order the immediate return of the child if less than a year has passed since the abduction occurred	<b>Article 11 (2 - 5):</b> The Regulation confirms and reinforces this principle.
<b>Letter b of Paragraph 1 of Article 13:</b> The court is not bound to order the return if there is a serious risk that returning would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.	<b>Paragraph 4 of Article 11:</b> The court shall order the return of the child even if it would put the child at risk, if it is established that the authorities of the Member State shall guarantee their protection after restitution.
<b>Paragraph 2 of Article 13:</b> The court is not bound to order the return if the child opposes it and has reached a certain age and maturity.	<b>Paragraph 2 of Article 11:</b> The court shall ensure that the child is given opportunity to be heard, unless this is not considered desirable because of their age and maturity.
(No provision)	<b>Paragraph 5 of Article 11:</b> The courts cannot refuse the return of a child when the person who requested the return has been given an opportunity to be heard.
<b>Article 11:</b> The court shall act expeditiously for the return of minors. If the judicial authority has not reached a decision within 6 weeks, a statement of the reasons for the delay may be requested.	<b>Article 11(3):</b> The court shall use the most expeditious procedures available in national law. The court shall issue its decision within a maximum of six weeks after the filing of the complaint, unless there are exceptional circumstances that make it impossible.
<p>Note: The rules of the Regulation (Sections 2-5 of Art. 11) prevail over the relevant rules of the Convention. Source: Practical Guide for the implementation of the Brussels II Regulation (EC) 2201/2003. Commission Services in Consultation with the European Judicial Network on Civil and Commercial matters. (Adapted by Rodríguez-Domínguez et al.)</p>	



for the child's needs, a reduction in the conflict and attempts to achieve mutual agreements, suggestions accepted in the judgement. If the mother returned to Spain, custody rights would fall to her and visitation rights to the father. If she remained in Mexico, custody would be awarded to the father and visitation to the mother. A restraining order regime of contact between the father and the child at the supervised meeting point was removed, changing the meeting point to the Mexican Consulate, establishing a webcam video conferencing system. We observe how the task of the ICCE can go beyond the evaluation and try to help reduce the chronic conflict between the parents, which had lasted more than five years. In cases with abduction potential, the judges must balance the risk of unduly restricting the relationship of the child with a parent against the risk of abduction that would deprive the child of its relationship with the other parent. The obstacles to the recovery of children abroad can be very high, sometimes even insurmountable. In such situations, those responsible for making the decisions should be cautious and they must be very well informed about this reality (Shear & Shear, 2013).

#### Case No. 2

The couple were a Spanish woman and a Gabonese man with a daughter of nine years old. They resided in Libreville until 2006. Sociocultural differences, ignorance of the language, norms and habits of Arab culture, along with feelings of loneliness, led the mother to decide to return to Spain with her daughter. They came to reside in a coastal town and the father to another city where he set up an international business for which he frequently travelled between the two States. In the contested divorce an ICCE was carried out, where several issues were explored, among which the most notable are that the child had roots that linked her to two different cultures, that the child had the right and need, for the proper configuration of her identity to receive both within the context of the greatest possible educational consistency. Initially visitation between the noncustodial parent -the father- and the child took place at the "supervised meeting point" to prevent a possible abduction, a fear the mother had and as a precaution, given the possibility of ablation. Once these issues were discarded, the case modification of prior measures maintained the award of custody to the mother, lifted the ban on the defendant to leave the country with his daughter and allowed the extension of

the contact regime of the child with the noncustodial parent. These aspects contributed to decreasing the tension of the conflict and attempting to reach more favourable agreements.

#### Case No. 3

Marriage between a Panamanian woman and a Spanish man with three daughters aged 11, 9 and 7 years. Coinciding with the start of the economic crisis, the couple divorced and the mother went to live in another Spanish city to work, the daughters having to travel to visit the other parent. In this context, the mother wanted to go to Panama, with the possibility of opening a business, to which the father refused reasoning that in that country there was social unrest, that it was inappropriate for the development of the children, and that it was a scheme by the mother to take the children away from the father. In previous interlocutory injunctions the children were prohibited from leaving the country without the father's consent or judicial authorization. The ICCE focused on the parenting and the process of adapting to change and clarifying the doubts about the impact of the change, the children were heard, and expressed their desire to know their mother's country of origin. It was determined that, in the co-parenting, the daughters had not been properly preserved from the parental conflict, which generated in them a conflict of loyalties. The ruling overturned the ban to leave the country that had been previously agreed. It suggested the division of the house shared by the two parents. It regulated the possibility that the noncustodial parent should travel to Panama and the daughters would travel to Spain during school holidays. It regulated the contacts with the father via webcam. Also, any change of address or school should be notified by the mother to the father appropriately.

#### Case No. 4

A mother of Cuban nationality, resident in Spain, married to a Spanish man, with a child of three years old, filed for divorce requesting sole custody and transfer with the child to Norway where she had family. The respondent opposed the application and requested joint custody. In the precautionary measures, a prohibition to remove the child from the country without court approval was established. Previous complaints had been filed for domestic violence or gender violence. The ICCE proved to be in favour of the exclusive custody to the mother under



the reasoning that the attitude of the defendant was not sympathetic to the needs of the child, that the mother was the adult of reference and primary caregiver, and that the father lacked the necessary abilities due to a lack of parenting skills and an attitude that did not respect the mother figure. Family mediation was proposed and a progressive system of visits to reinforce or strengthen the father-child bond. The judgement gave sole custody to the mother, authorising the transfer of the mother and child to Norway. The judgement argued that despite the right to visit deriving from the right to a relationship with the parents, contained in Art. 160 CC, as "visitation rights" regulated in Art. 94 of the same law, this is not a true and proper law, but a combination of a right and a duty, the fulfilment of which is not intended solely to satisfy the desires or rights of parents, but also to meet the emotional and educational needs of children for the sake of their balanced development, evoked by the Court in this case, referring to SAPB 190/09.

## **A CASE EXHIBITING INTERNATIONAL DISCREPANCIES AND LEGAL DIFFICULTIES**

### **Case No. 5**

Unfortunately, there are international cases with serious problems arising from different sentences decreed in the two countries (Pozzi, 2009). A Spanish woman, a lawyer, married an American man in 1999, the spouses separated and filed a claim for annulment in 2004, she in Spain and he in both countries. When trying to renew her passport in 2005, the mother was informed of a lawsuit filed by the father, for the supposed abduction of their daughter. The father came to Spain to file a claim against the mother; the competent court in Valencia did not rule in his favour, so the mother continued to have the custody of the child. In Spain, there was no reason to consider the child had been abducted; under the established regime of contact the father was even able to visit his daughter. The father appealed the decision, but the Provincial Court upheld the sentence (SAP 199, 2007) and later the 2nd Chamber of the Constitutional Court refused the plaintiff's application to appeal (TC 6375, 2007). In order to prove these facts to the American authorities, the mother travelled to the US; and in New Jersey, the judge withdrew the mother's passport and demanded that she hand over the child who was in Spain, a demand that the mother could not comply with because the daughter's passport was retained by the Spanish authorities until the

child reached the age of maturity. The mother was imprisoned and sentenced to 14 years in 2006, for the Contempt of Court and Kidnapping.

## **DISCUSSION**

Cross-border child abduction cases tend to involve high levels of stress between the parties. The disfavoured parent, damaged by the sudden loss, may think he or she will never see his or her child, while the abducting parent, foreseeing the consequences of his or her illegal act, may fear legal action, the inevitable restitution and a possible detrimental impact on the custody process.

In the contentious divorce, at the preventive level, the evaluator can generate an emergency interim report to analyse the risk factors and the potential harmful repercussions for the child, when there is reason to suspect the possibility of abduction or wrongful removal of the minor, so that the Court can determine what precautionary measures to take. Protective factors and behaviour in relation to shared parenting will also be analysed.

Additional studies are needed to reveal the possible profiles of the abductors. One difference of the ICCE in relation to the CCE is that its deadlines require the report to be produced in less than six weeks, if the court must be provided with a report in which the risks of returning the child to the country of origin are indicated, in accordance with paragraph 1 of Art. 13 of the HC 1980. The ICCE must take into account the existence of serious risks to the child that may exist in two situations: a) when returning puts the minor in imminent danger, such as when the child goes back to an area of war, famine, or diseases, and b) when the return involves the abuse or neglect of the child and the country to which he or she is returning is unable to properly protect him or her. The serious risk of harm is established only if it is proved that the child may suffer 'serious abuse' upon being returned (Melcher, 2013); and here the forensic evaluation is particularly appropriate.

One of the requirements in the application of Regulation (EC 2201, 2003) on the hearing of the child, Arts. 23, 41, 42, lies in the importance that children may have a say in the processes that affect them, but it is not necessary for them to express their opinion to the jurisdiction, but instead it may be deemed appropriate by the competent authority that a specialist in ICCE should hear the child. In addition, the child can oppose the



return, since he or she has the right to be heard under Paragraph 2 of Art. 13, and the psychological report shall evaluate this appropriately, depending on the child's age, and determine his or her degree of maturity.

The ICCE, based on the BIM should recommend measures appropriate to the needs of the child, as well as trying to contribute to the reduction of conflict and seek mutual agreements. Potential abduction by a parent will be analysed, to the extent that this is possible; and the recommendation to restrict or expand relations between a parent and the child will also be analysed.

The ICCE should consider an examination of the psychosocial situation of the child; his or her level of adaptation to change and integration; his or her roots in both cultures; as well as the appropriate configuration of the child's identity; knowledge of the language in both countries; his or her relationship with both parents and whether or not it could, to any extent, be detrimental to the child.

In determining the risk to the child, the psychologist should report on the laws and procedures of the foreign country and whether it is part of HC 1980, as well as whether there is a history of credible and reliable information regarding the recognition and enforcement of custody orders issued by the court, which will be respected and implemented in the foreign country. Evaluators should require the lawyers to produce sufficient evidence to enable the consideration of such issues. The fact that a foreign country is a signatory state of HC 1980 does not necessarily mean that the country will recognise and implement a custody order. The legal system of a foreign country may operate differently. Determining whether the country of destination is part of HC 1980 is only the first step. The Convention is an international treaty, but different countries vary greatly in their application of it. Countries such as the UK, Australia and New Zealand tend to return children quickly and efficiently; others much more slowly, as in the case of Mexico, Costa Rica and Guatemala (Morley, 2013); and others do not comply with the agreement, as is the case in Bahamas (UNICEF, 2013).

According to the evidence of the statistical data (Conani, 2012; Domínguez, 2014; UNICEF, 2013), it is likely that in the coming years forensic psychologists will receive an increase in ICCE lawsuits, so we recommend as stated in the guidelines (APA, 2012a; APA, 2012b), that spaces be opened for training and reflection in this area related to the rights of children.

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