



## **Combating International Child Abduction: Understanding the Benefits and Drawbacks Created by the Hague Convention**

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The words “child kidnapping” may conjure the image of a white van with a “free candy” sign on the side, but in the United States, a significant majority of kidnappings are perpetrated not by a stranger but instead by a family member (Child Crime Prevention & Safety Center, *n.d.*). Unsurprisingly, family abductions pose unique concerns, and when it comes to parental kidnapping, the severe and long-lasting psychological ramifications to the child can be extreme (Child Crime Prevention & Safety Center, *n.d.*; Healthy Place, 2008).

While international child abduction by a family member is not as common as intranational child abduction by a family member, the concerns involved in international child abduction are particularly concerning given the inevitable legal hurdles created by the global context (Child Crime Prevention & Safety Center, *n.d.*; HCCH, *n.d.*, Outline). Hoping to combat these international child abductions, the Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention”), an international treaty, entered into force in 1980 (Morley, 2021). Although consisting of only a mere 45 short articles (approximately nine pages of text), the Hague Convention has a lofty goal at its core: “protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return to the State of their habitual residence, as well as to secure protection for rights of access” (Morley, 2021, p. 1).<sup>1</sup> As of today, 103 countries, including the United States, have become a member to the Hague Convention (HCCH, *n.d.*, Status Table).

International child kidnapping still occurs at an alarming rate and, as detailed in this article, understanding the mechanics of the current solution – the Hague Convention – as well as the strengths and weaknesses is critical to lowering the number of abductions and returning children to their home country.

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<sup>1</sup> The Hague Convention permits a parent to request the (1) return of their child from one country to another and/or (2) access to their child while in another country. This article primarily focuses on the former.

## History and Evolution of the Hague Convention

The Hague Convention was seen as “a revolutionary document” when it was signed in 1980 (Morley, 2021, p. 2). The drafters of the Convention feared that parents – in particular, “noncustodial fathers” – were kidnapping children, removing them to other countries with more favorable custody laws, and subsequently seeking custody under these more favorable laws (Morley, 2021, p. 3; Edelson, 2010, p. 20). Aside from disapproving of this immoral behavior, the drafters also feared these abductions of a child from one country to another would diminish the child’s psychological and physical well-being (HCCH, *n.d.*, Outline; HCCH, 2020).

The drafters decided that if a kidnapping parent was unable to use the potentially more favorable custody laws of the country where the parent took the child, there would be less of a reason to take the child in the first place, and thus, decided to draft the Convention in order to make the differences in various countries’ custody laws a moot point (Morley, 2021). Aside from deterring abductions, the drafters also believed that the child’s home country, as opposed to the country the child was taken to, would be in the best position to make standard custody determinations (United States Department of State, *n.d.*, Important Features; HCCH, 2020).

To implement this solution, the Hague Convention created a mechanism for a child to be returned *before* the custody determination, as doing so would (1) make the difference in custody laws moot and (2) permit custody to be determined in the child’s place of habitual residence (Morley, 2021; Edelson; 2010). This solution, however, is not perfect. Despite periodic meetings of signatory countries and the evolution of non-binding practice guides, one of the Hague Convention’s greatest drawbacks is its lackluster evolution, including its outdated fear of abductions by non-custodial fathers and the failure to account for advances in “social science research on domestic violence and its effects on children” (HCCH, 2005; HCCH, *n.d.*, Special Commission Meetings; Edelson, 2010, p. 16).

## Practical Application of the Hague Convention

For the Hague Convention to apply, both the country of the child’s habitual residence and the country the child was removed to must have accepted the Hague Convention at the time of the abduction (Morley, 2021; United States Department of State, *n.d.*, Important Features). Adding nuance, in many instances, the country that earlier acceded or ratified the Hague Convention must have specifically agreed to the later country’s accession (Morley, 2021; United States Department of State, *n.d.*, Important Features). Assuming the Hague Convention applies, the country where the child was removed to—as opposed to an international court or group of authorities—is responsible for its application (Morley, 2021).

### **A. Making a Case as the “Left-Behind Parent” – *Prima Facie* Case**

In deciding whether to order return of a child, courts must evaluate whether the left-behind parent made the requisite showing (*prima facie* case) (HCCH, 2020). Absent an adequate affirmative defense (which arise only in “exceptional circumstances”), if the left-behind parent makes this showing, a court must order the child’s return (HCCH, 2020; Morley, 2021, p. 18). Importantly, when engaging in this return analysis, a court must avoid making underlying custody decisions and should move quickly in coming to a decision (HCCH, 2020; HCCH, 1980, Article 11).

According to Article 3, there are three elements within the *prima facie* case that the “left-behind parent” must establish (HCCH, 1980; HCCH, 2020, p. 10)<sup>2</sup>:

- **Habitual Residence.** The Hague Convention fails to define habitual residence (HCCH, 1980). In the United States, the determination of habitual residence requires courts to take everything (parental intent, child’s history, etc.) into account (Morley, 2021).
- **Rights of Custody.** The Hague Convention defines “rights of custody,” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence” (HCCH, 1980, Article 5). The Supreme Court has added the “right to prevent international travel” to this list (Morley, 2021, p. 17). To prove this element, a parent must show, according to a law, order, or similar directive of the country of the child’s habitual residence, that they had the right to care for the child and determine where the child would reside (HCCH, 1980, Article 3).
- **Exercising Custody.** At the time the “taking parent” wrongfully removed or retained the child in another country, the left-behind parent (1) must have been exercising custody or (2) show that they would have been exercising custody had the taking parent not committed the abduction (HCCH, 2020, p. 10; HCCH, 1980, Article 3).

#### B. Making a Case as the “Taking Parent” – Affirmative Defenses

If the taking parent can show one of the following affirmative defenses, return is no longer mandated; instead, it is within the discretion of the court whether to order return (Morley, 2021). Importantly, these affirmative defenses arise only in “specific, extreme and unusual cases,” and require an exceptionally strong argument from the taking parent as to their applicability (Morley, 2021, p. 13; HCCH, 2020; Pérez-Vera, 1980). The possible affirmative defenses are:

- **The Well-Settled Defense.** If (1) more than one year has passed from when the child was wrongfully removed to when the Hague Convention case began *and* (2) the taking parent can prove the child is well-settled in the new country, a judge can deny return (Morley, 2021; HCCH 1980, Article 12).
- **The Consent or Acquiescence Defense.** If the taking parent proves the left-behind parent agreed to the child living (not merely traveling) abroad, or the left-behind parent formally withdrew their rights of custody, a judge can deny return (HCCH, 1980, Article 13(a)). To determine this agreement, courts can look at the left-behind parent’s “subjective intent” (Morley, 2021, p. 19).
- **The Grave Risk Defense.** If the taking parent proves that the return of the child would pose “a grave risk . . . [of] physical or psychological harm or otherwise place the child in an intolerable situation,” a judge can deny return (HCCH, 1980, Article 13(b)). The potential *future* harm must be so severe “that [the] individual child should not be expected to tolerate” it, and the risk of its *future* occurrence *after* the child returns must be “real” and “serious[]” (as the name suggests, the risk must be “grave”) (HCCH, 2020, p. 26). Notably,

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<sup>2</sup> The child who is the subject of the Hague Convention application must also be under 16 years of age (HCCH, 1980, Article 4).

the analysis of the risk and harm are intertwined, as the risk need not be as real or as serious if the harm is more severe (HCCH, 2020). This defense is argued frequently, but it rarely finds success (Morley, 2021).

- ***The Mature Child’s Objection Defense.*** If the taking parent proves that the child (1) is mature enough for the child’s opinions to carry weight and (2) does not want to be returned, a judge can deny return (HCCH, 1980, Article 13). The Hague Convention does not specify a particular age at which a child is mature enough; instead, a judge looks at the child’s general “maturity level,” noting whether there has been significant influence on the child’s opinion by the taking parent (Morley, 2021, p. 20).
- ***The Public Policy Defense.*** If the taking parent proves the child’s return “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms,” a judge can deny return (HCCH, 1980, Article 20). Worded differently, if ordering return “would utterly shock the conscience of the court or offend all notions of due process,” a judge can deny return (Morley, 2021, p. 20). Given this incredibly high standard, it is infrequently used (Morley, 2021).

Notably absent from either the list of *prima facie* elements or the list of affirmative defenses is an argument focused on the child’s “best interests” – that concern is relevant only to custody determinations, not return (Morley, 2021, p. 3; HCCH, 2020).

### **Benefits and Drawbacks of the Hague Convention**

The ultimate goal of the Convention – decrease child abduction by returning kidnapped children – is unquestionably an admirable one. However, as with any complex legal document, much less one that is enforced globally and applies to minors, there are areas in which the Convention succeeds and areas where the Convention could be improved.

#### **A. Strengths of the Hague Convention**

International child abduction has awful, long-lasting impacts on the children that are kidnapped. According to the Supreme Court, “[s]ome child psychologists believe that the trauma children suffer from these [international] abductions is one of the worst forms of child abuse.” (Morley, 2021, p. 3). Providing support for that belief, the Court explained (1) “studies have shown that separation by [international] abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues;” (2) young children in particular may “experience loss of community and stability, leading to loneliness, anger, and fear of abandonment;” and (3) “abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child’s ability to mature” (Morley, 2021, p. 3). In the same vein, the Hague Conference on Private International Law (“HCCH”) notes the danger of removing children from their place of habitual residence as doing so takes them from the place where they have the strongest connections (HCCH, *n.d.*, Outline). The U.S. Helsinki Commission has also cited the idea that “[p]arental child abduction is considered . . . to be a form of child abuse” and associated with “life-long emotional and relational difficulties.” (Commission on Security and Cooperation in Europe, *n.d.*, para. 1).

Likewise, international child abduction can have awful, long-lasting impacts on the left-behind parent. In many instances of international child abduction, a parent may be met with the reality that they may never

see their child again, causing immense emotional pain (Commission on Security and Cooperation in Europe, *n.d.*). Moreover, locating the child and subsequently proceeding in a legal battle over the child's return may be extremely exhausting, physically, mentally, and financially (Commission on Security and Cooperation in Europe, *n.d.*).

Given the aforementioned negative effects of international child abduction, if the Hague Convention can deter even just one international child abduction, that is a significant benefit of the treaty. Moreover, its creation of a clear procedure for return may reduce the negative effects of abduction. The emphasis on timely action could greatly minimize the amount of time children and the left-behind parent are separated, thereby decreasing in severity some of the aforementioned impacts.

In addition to combatting international child abduction (and its associated effects), the Hague Convention's "return" mandate is also beneficial because it arguably increases the odds that a proper custody determination is reached. By returning the child back to the place of habitual residence, the Hague Convention attempts to make sure the court most fit for making the custody determination (the courts in the place of habitual residence) does so (HCCH, *n.d.*, Outline).

## **B. Drawbacks of the Hague Convention**

Although the Hague Convention has the admirable goal of deterring international child abduction, sometimes its steadfast return mechanism can produce unfortunate results. For example, sometimes return is required, "even in the face of public opinion and a judge's own sense of right and wrong" (Morley, 2021, p. 2). Sometimes the mandated return would not be in the "child's best interests" (Morley, 2021, p. 2). And sometimes the return is required "even in the face of a parent's frantic pleas that they brought the child 'home' to avoid injustice overseas" (Morley, 2021, p. 2). These situations arise because the Hague Convention relies on "the 'greater good' theory," which rationalizes ordering return in some less-than-optimal situations by arguing doing so will "discourage child abduction in general," thereby ultimately helping more children (Morley, 2021, pp. 2, 13).

Unfortunately, this greater good rationale is unlikely to ever reach its full potential. For the greater good theory to work, return must consistently be ordered so that there is a widespread message that international abduction will yield little gain—without consistent return, there can be no deterrence. Consistent application, however, is unlikely to occur across numerous jurisdictions, each with their own idiosyncratic ways of addressing these cases. For example, within the United States, courts have varying rules and levels of experience with Hague Convention cases. And the situation abroad is no different; in fact, less than half of the American children who are victims of international child abduction are returned to the United States (Commission on Security and Cooperation in Europe, *n.d.*). This inconsistency of return weakens the deterrent force of the Convention and demonstrates the flaws of the greater good theory.

In addition to inconsistent application, the Hague Convention's utility is also minimized by its inadequate response to domestic violence. The treaty arguably fails to take appropriate action in protecting abused mothers who feel that escaping to another country is the only available option but do not want to leave their children behind. Although the Hague Convention permits domestic violence arguments to be made—namely, in the grave risk context—the argument must focus on the impact to the *child* (HCCH, 2020). The taking parent must demonstrate "the effect of the domestic violence on the child upon his or her return," likely through arguing the child had witnessed/will witness the abuse or will lose the ability to receive care

from the abused parent due to the abuse (HCCH, 2020, p. 38). Demonstrating the extremity of such argument, the HCCH explains, “harm to a parent, . . . could, in some *exceptional circumstances* [emphasis added], create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” (HCCH, 2020, p. 26).

Another glaring weakness arises from the vastly different laws relating to custody. The Hague Convention mandates that the country where the child is removed to avoid handling custody; instead, assuming return is ordered, the country of the child’s place of habitual residence (often where the child was removed from), determines custody. Countries, however, might stop agreeing to defer custody decisions if they believe that other countries will not adequately determine custody, especially as more countries (with their own custody laws that may conflict with other countries’ laws) are added to the Hague Convention (Morley, 2021). If countries begin to feel that custody will not be handled “correctly” in other places, their approval of the Hague Convention will waver.

### **Summary**

Ultimately, the Hague Convention is a strong weapon against international child abduction. International child abduction can have terrible results, so the Hague Convention’s ability to deter the abduction in the first place (thereby eliminating these results) and create mechanisms to allow for the return of abducted children (thereby minimizing these results), is a positive. However, the Hague Convention’s failure to evolve greatly limits its utility.

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