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The Hague Convention: Who is Protecting the Child?

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The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is a multilateral treaty that seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. The 'Child Abduction Section' provides information about the operation of the Convention and the work of the Hague Conference in monitoring its implementation and promoting international co-operation in the area of child abduction. There are currently 58 member countries and 22 non-member countries. Australia signed the Convention five years after its introduction. The Family Law (Child Abduction) Regulations 1986 enshrined in Australian law the principles espoused in the Convention which came into force in 1987. The Regulations are to:

(a) secure the prompt return of children wrongfully removed to or retained in any contracting state, and
(b) ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states.

This paper shows that the failure of Family Courts to take account of the effects of their actions on the development and best interests of children whose return is secured can add to the psychological abuse of those who were removed from their home countries to avoid sexual abuse and violence. It suggests that the exceptions in the regulations that allow a child to remain in the new country with the primary caregiver are being ignored.

■ **Keywords:** Hague Convention, child protection, parental child abduction, international custody laws, brain development, childhood trauma

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction was established to return children to their country of habitual residence when wrongfully removed. Its purpose is not to decide custody issues or residence for the child, but to return them to the country from which they were taken for their case to be heard (Attorney-General's Department, 2007). The Convention bases itself on the premise that a court in the country from which the child was removed is best placed to deal with disputes regarding that child's custody and welfare. The strict nature of the 1986 Family Law (Child Abduction) Regulations is purposely designed to deter a parent from taking children to another country without the permission of the other parent. The problem is that, in some cases, implementing the Convention deprives the abducting parent of the child because that parent can be arrested upon return to the country for the abduction (Palmer, 2004); and in these cases the court may also be punishing and harming the child.

The Regulations are perceived as placing strict obligations on courts to return children to convention countries, but rarely used 'exceptions' may apply. Unlike cases under the Australian Family Law Act, the best interests of the child are not the paramount consideration in international child abduction cases (Rice, 2005). A child's removal is deemed to be unlawful if:

(a) the child was under 16 when removed;

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(b) the child was habitually resident in a convention country prior to being removed to another convention country;
(c) the person seeking the return of the child had rights and the child's removal or retention breached those rights of custody; and
(d) at the time of the removal the parent had a right of custody and the removal of the child breached those rights.

Exceptions to the court's obligation to order the return of a child concern whether or not the parent, who is now the primary carer, can establish that the person seeking the child's return:

(i) was not exercising rights of custody when the child was removed
(ii) had initially or subsequently agreed or acquiesced in the child being removed
(iii) *there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation* [author's italics].
(iv) if the child objects to being returned and shows a strength of feeling beyond the mere expression of a preference and the child is sufficiently mature for his or her views to be taken into account.

If an application is made more than a year after the child was removed, the court must order the child's return *unless the person opposing the return can satisfy the court that the child has settled in the new environment* [author's italics].

Convention countries are required to appoint a 'Central Authority' that is primarily responsible for making applications for the return of children. In Australia the Commonwealth Attorney General's Department is the Central Authority and the relevant child protection/family welfare departments are usually the designated state Central Authorities.

Amendments were made to the Regulations in December 2004 to clarify that applications for the return of a child to the country of origin may be brought by the Central Authority or by an individual or agency with rights of custody of the child. In other words, the Australian Federal Government will act on behalf of a parent who wishes to recover a child. Where an order is made, the child must be returned to the appropriate convention country within seven days and, where the applicant is the Central Authority, it must make the necessary travel arrangements.

This international legislation was created to discourage parents from taking children to live in other countries without the other parent's permission. Most parents who abduct children to protect them from abuse are unaware of these laws and are soon traced. In 2007 there were 107 reported cases of international child abduction in Australia (Attorney-General's Department, 2008). International parental child abduction became a problem with increasing migration and marriages between people of different ethnic groups (Chiancone, Girdner, & Hoff, 2001). The need for legislation arises when marriages break down and one parent returns to their homeland taking their children with them. The most publicised Australian case involved the abduction of Shahirah and Iddin Gillespie (aged 7 and 9 years) to Malaysia by their father, Prince Raja Bahrin, in 1992 (Hoare, 2006). The father was able to ignore Australian Family Court Orders with impunity because Malaysia was not a contracting state to the Hague Convention. The children were taken from a Melbourne hotel during an access visit, hidden in the back of a utility vehicle under a tarpaulin, and then driven to North Queensland where they were transferred to a boat which took them to Indonesian waters (Doherty, 2006). The father made a statement saying this was achieved in the name of Allah (Gill, 2006). Fourteen years later, Shahirah, aged 20, returned to be with her mother.

Rules are 'rigidly applied' and exceptions ignored

The primary goal of this legislation was to defeat the hoped-for advantages of the abductor, especially those ignoring an order of a Family Court. In most cases the child is returned to the Family Court in the country of origin and to the care of the parent who lodged the complaint unless otherwise requested to be put into state care (State of Queensland Department of Communities, 2007, Section 15.5).

Bruch (2004) claims that the Convention has been too rigidly and 'too well implemented [by Family Courts worldwide]. It was never intended to apply to all cases' (Bruch, 2004, p. 529). Judges and Central Authorities worldwide have sometimes wrongly assumed that the return of the child would always be in that child's best interests, although the authorised exceptions include situations where that may not be the case (Bruch, 2004).

Exceptions of the Convention require the definition of who is the primary caregiver in the child's particular circumstances. In cases where the exceptions apply, the return of the child is not required by law; however, it is still the decision of the judicial system (Bruch, 2004). If the petitioner continues to press for custody, the case can be heard in the court of the child's current home country. Furthermore, the court in the child's new home country is not obliged to return the child if the abductor is the child's custodian and the complainant only had visitation contact. If the complainant was the legal custodian but had not exercised custody, the child may be allowed to remain with the abductor who is now the primary caregiver. In theory, even if the complainant had the right to residence and was exercising it at the time of the abduction, there is no guarantee that the child will be returned (Bruch, 2004).

Caldwell (2008) shows that judges have tended to stick to 'the letter of the law' as originally written and children have been returned to the country of origin regardless of

evidence of domestic violence or sexual abuse perpetrated by the petitioner. Bruch (2004) suggests that a judge in one jurisdiction may be reluctant to act because it may imply that another system in another country was incapable of protecting the child from violence or sexual abuse in the first place. No proof of the judicial system's adequacy is required. The victim may be the only one who knows whether the return is safe and victims usually have no voice in the proceedings. If allegations have been made regarding abuse, such evidence is often not considered due to the speed of the processing, or the evidence can be blocked from proceedings resulting in unsubstantiated claims (Shetty & Edleson, 2005).The court states that 'no benefit can be gained from questioning children below the age of 6' (Palmer, 2004, p. 331). The consequence is that the courts upholding the convention have failed to give precedence to the child's best interests due to greater concern being given to the prompt return of the child.

This is confirmed by the High Court of Justice Family Division (1992) which pointed out how 'the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases'. In the USA the Department of Justice states that 'a Hague Convention case is not about the "best interests of the child" but rather is about returning the child to the jurisdiction that should hear the custody matter' (Chiancone et al., 2001, p. 2). Keris (2007) also confirms that the Convention sees 'non-disruption, prevention of abductions and speedy returns to familiar surroundings [as being] in the children's interests' (p. 140).

The problem is that the child is returned to the very same court and perhaps the judge who may have chosen to ignore the allegations of sexual and physical violence in the first place, prompting the protective parent to flee the country. In the same way, children may be returned with the notion that they would not need to live with the alleged abusing parent until a custody issue had been decided (Palmer, 2004). Equally, the court may never have had a previous opportunity to consider an application containing this information about the risk to the child.

Some children are abducted for their own protection

The Family Court may fail to take account of the fact that children are abducted by loving and protective parents to escape damaging experiences such as child sexual assault and life-threatening domestic violence (Wills, 2006). The abduction often occurs when a child victim is disabled or not sufficiently mature to be subjected to 'rigorous' cross-examination in a criminal court and the abusive parent or parent's partner is not prosecuted and convicted (Briggs, 2008). If there is no conviction, or state child protection services lack the resources to investigate the complaint, or the child is too nervous or afraid to disclose details to a stranger (social worker or police), the allegation is deemed to be 'unsubstantiated'.

The protective parent may then turn to the Family Court seeking an order to protect the child by either restricting or stopping contact with the accused parent. Without substantiation the Family Court may ignore reports of sexual abuse and violence and label the protective parent as vindictive. This has happened so often that some support groups now advise protective parents to avoid mentioning child abuse in the Family Court because of the risk that they will be accused of 'brainwashing' the child to believe that abuse occurred when it did not. There is then a risk that the abuser will be granted residence of the victim while the protective parent is restricted to occasional, supervised contact. The child may be banned from receiving counselling and the protective parent banned from reporting further evidence of abuse.

Recent changes to Family Law emphasise shared parenting (Bryant, 2006) and this has made it more difficult to stop contact in cases where abuse is not substantiated. However, the Australian Family Court does not have the facility to investigate such allegations with the consequence being that, in desperation, some parents, mostly mothers, have decided to take their children overseas in an attempt to protect them from abuse. This is usually traumatic given that the 'abductor' has to abandon friends, home, possessions, school and often family and support; in addition, the parent and child may have to take up new identities and go into hiding.

Children may be further abused by the Convention and Family Court

When the abductor is traced by Federal Police, the child may be physically snatched from the arms of the mother and placed into foster care with strangers. In the case of two young Australian-Swiss children, the mother claimed to have medical evidence that one child had been sexually abused by the father, but the judge chose to discount the paediatrician's report regarding the sexual abuse of the child. The mother fled to Switzerland, a country associated with children's rights. She took her case to the Swiss Family Court which was sympathetic, but the Australian Government insisted on the children's return and international law took precedence. Some three years after leaving Australia, the children were seized by police in the early hours of the morning and placed in an orphanage for a whole year with minimal contact with their mother. The matron of the orphanage alerted authorities to the mental ill-health of the two children; the girl lost her hair and the boy lost his speech. He also suffered from a rare form of eczema associated with stress. The then Attorney General was informed of this, ignored the illness and replied to the effect that the children would be returned to foster care in Australia (N. Levett, personal communication, 2004). Philip Ruddock (personal communication, 15 June 2005) confirmed that the 'Hague

Convention requires that where children are wrongly removed, they are to be returned in accordance with that Convention, normally to the children's country of habitual residence. This is in order for that country to determine the future living arrangements for these children.' He wrote to the Foreign Minister, Alexander Downer, that upon their return to Australia, appropriate arrangements were made to protect the welfare of the children by the State child protection service. An extract from Hansard of the Legislative Council WA (Barron-Sullivan, & Templeman, 2006) regarding this case states that the children were put into foster care in Australia due to experiencing language barriers because of their limited English; however, it also states in the extract that the children spoke fluent English. The children, during their time in Australia, were allowed limited and supervised access visits with their father; a representative from the department justified these actions to the court with the phrase 'where there is smoke there is fire'. In this instance the children were protected from possible further harm at the hands of their father; however, this was at the cost of being separated from their mother for a lengthy period of time. Clearly, Australia's Attorney General was not interested in exceptions, or indeed in his Office's contribution to the inevitable decline in the mental health of these two young children.

The children were removed to a detention centre and returned to Australia without saying goodbye to their mother. Australian Federal Police said that if she returned with them she would be arrested and could be imprisoned for several years. After they were placed in foster care, there were further reports of mental illness and the likelihood that effects would be long term. Interestingly, when this occurs, the abductor is blamed, not the Family Court Judge's decision.

The Swiss have been applying the Convention consistently without the exceptions (Palmer, 2004). Their approach in ruling for the return of children in cases that may involve hardship for those children was based on the need to address lawlessness, specifically to ensure that a kidnapper should not benefit from her actions, even if they were in the children's best interests (Palmer, 2004). The children were returned regardless of allegations of violence on the strength of the belief that they would not live with the father until the custody issue was decided.

When the mother was finally awarded custody of the children three years later it was revealed that 'the daughter was at risk of self-harm and depression if not allowed to return' (Darragh, 2006). The judge blamed the children's problems on the mother's behaviours, although she had not been allowed to live with them for three years, and their occasional telephone contact had been supervised. The father was allowed contact with the children via webcam phone calls and visits (Darragh, 2006).

In a case publicised in the *Irish Times* and the *Adelaide Advertiser* in 2008, an eight-year-old boy was asked which country he wished to live in – Australia or Ireland – despite the fact that he had not lived in Australia since he was five. When he said that he did not know, this seems to have been interpreted as if he didn't mind and he was ordered to return to Australia on 1 July 2008. His mother was told that she could not return with him because she would risk being arrested for disregarding an order of the Australian Family Court (Briggs, 2008).

There is also a case of two children aged 7 and 9 with dual citizenship who were ordered by the Australian Family Court to return to Bulgaria (Akerman, 2008). The children were born in Australia and had lived in Bulgaria for only $2\frac{1}{2}$ years. In Bulgaria, as in Ireland and Switzerland, the media publicised the story with images of the father labelled as a kidnapper. Both children told the Australian newspaper that they wanted to remain in Australia because Bulgaria is a poor and violent country.

In another case, the child's welfare seems to have come second to a prompt return to his country of origin. Two months after the child was born in New Zealand, his mother took him to live with her parents to protect him from the father's extreme violence during and after the mother's pregnancy. For the next six years the child had fortnightly weekend visits and spent half the school holidays with the father (High Court of Australia, 2008). In 2006, the mother moved from New Zealand to Sydney with her son. The father, jailed for violence against the mother in the child's presence, used the Hague Convention to have the child returned to New Zealand. Despite the child's age and the fact that the mother had been his primary caregiver throughout his life, the father won the case although, on appeal, the mother was granted custody. The judge's closing statements of the appeal were, 'I do not agree with this outcome . . . .abduction is rewarded' (despite the fact that his mother had been his long-time carer). 'The ultimate victims are the children' (Gleeson et al., 2008).

In a case in New South Wales, two children were brought back to Australia following a one-year holiday in Germany. Whilst in Germany their parents' marriage ended with the mother abandoning them for another partner. Although the children had been born in Australia and had spent their entire lives and schooling there, the Family Court of Australia deemed that the children were now residents of Germany. Although they had reported to their teachers that their mother and her new partner sexually abused them, the children were deported to live in Europe with their mother. She assured the Court that the children would have no contact with the accused man, but he met them at the airport, married her shortly afterwards and the children have lived with him since then. When the father returned to Germany to fight the case in the Family Court, he was arrested and jailed for abduction (Submission to the Family Law and Legal Assistance Division, Attorney General's Department, 5 January 2005).

In Australia an organisation called HUKO International has been formed to assist parents whose children have been abducted. HUKO provides support, at little or no cost to

parents, to help them get their children back to Australia (see www.hugurkids.com/index.php). HUKO focuses on the needs of the parent and their best outcomes rather than on those of the child.

Paradoxically, the Hague Convention was seen by governments around the world as a way of protecting children.

The harmful effects of the process on children

The harmful effects of the Hague process have been well documented (Greif & Hegar cited in Keris, 2007) and they are almost always adverse, including 'regression, bedwetting, or refusal to use the toilet in young children, interrupted sleep, clinging behaviour, fear of windows and doors, extreme fright, grief and rage about parental abandonment' (Keris, 2007, p. 142). Middlebrooks and Audage (2008) argue that, although all children experience times of stress in their lives, the type of stress can have different outcomes for their development. Positive stress, for example, occurs with short-lived experiences such as vaccination injections, meeting new people or being disciplined by having a toy taken away. From their experience of these forms of stress children are better able to manage and overcome more difficult forms of stress as they grow older (Middlebrooks & Audage, 2008).

Tolerable forms of stress are slightly more extreme than positive stress and they last for relatively short periods of time; for example, the death of a family member or pet, house fires, and earthquakes. If tolerable stress is dealt with effectively then it can become positive stress and a positive learning experience for the child. By contrast, serious forms of stress can become toxic and have long-lasting negative effects (Middlebrooks & Audage, 2008).

Toxic stress occurs when the child is in a constant state of stress over weeks, months or years. Causes of toxic stress can be physical violence to the child or a loved one, sexual abuse, neglect and emotional abuse and being separated from a primary caregiver in traumatic circumstances. These are the forms of stress that children are unable to manage, cope with and overcome on their own. Toxic stress can lead to permanent damage (Middlebrooks & Audage, 2008). Clearly, some judges who make critical decisions about children's lives are unaware or simply don't care about the possible consequences for the child.

Long-term toxic stress in a child's life can have many undesirable effects on future behaviour and learning. Such effects include damage to the central nervous system affecting the function of the brain, and increased production of stress hormones. All of this can affect the cognitive and emotional development of a child leading to more problems in their long-term development (Berk, 2006). Other outcomes include the development of a smaller brain, brain circuit damage causing a low threshold of stress and over-reaction in stressful experiences later in life, and high levels of cortisol suppressing the immune system and affecting learning and memory owing to its effect on the hippocampus. This continues into adulthood (Middlebrooks & Audage, 2008).

When young children are placed in traumatic situations the child's brain adapts to changes in emotional, behavioural and cognitive functioning to promote survival. In early childhood the brain is capable of changing in response to experiences. The brain can be modified in its early stages of systematic structure to reduce the harmful effects of neglect and abuse if there is early identification of the issue and is aggressively treated. Being snatched from a safe primary caregiver by police, placed in emergency foster care with strangers, sent on a 20+ hour plane journey to another country and again placed in foster care with strangers who may not even speak the same language, does not require a degree in child development to understand that this will cause massive trauma for children and will damage their psychological well-being. It is simply not good enough to blame the parent for taking the child to another country, least of all if the protection of the child was the reason for the abduction.

A secure relationship with the primary caregiver is essential for the provision of a secure base from which children can explore their world knowing that they have a safe person to come back to. The primary caregiver is also important to help scaffold the child's learning and support their questioning (Gowrie Adelaide, n.d.). The primary caregiver helps the child to form secure attachments (Berk, 2005). The primary caregiver also helps the child to regulate emotions and be comforted in times of stress. Displays of infant attachment to their primary caregiver can be seen from the age of six months (Berk, 2006). If the child is exposed to significant threats to that bond, maintaining behaviour, emotional or psychological equilibrium is challenged (Louw, 1998). By depriving children of their primary caregiver through either abduction or court proceedings, the children's education and normal development is at risk. The added trauma of the events surrounding child abduction will also affect brain development in young children, affecting their ability to learn (Anda et al., 2006). Although the role of a primary caregiver is to provide basics, such as food, this does not necessarily mean that a person who feeds a child will form an attachment (Berk, 2006). It will obviously be difficult for a parent who caused the removal of a child against that child's wishes to form a close bond. Therefore the child is likely to want to return or stay with the parent with whom they had the strongest bond. This is unlikely to be with the parent who has abused or sexually assaulted them.

Conclusion and discussion

The Hague Convention on the Civil Aspects of International Child Abduction states that signatories are firmly convinced that for children under the age of 16 'the interests of children are of paramount importance in matters relating to their custody' (Hague Conference on Private International Law, n.d.). In practice, some signatories to the Convention are ignoring this clause, causing irreparable harm to

children as shown in the examples mentioned above. While giving lip-service to the needs and interests of the child, they leave a strong suspicion that they have no understanding of what children's needs are. We have known from the work of Salter-Ainsworth and Bowlby (1991), the World Health Organisation and others that young children need consistent and secure care from a reliable primary caregiver. We have known for more than half a century that the lack of this can result in trauma, stress and long-term damage to mental health.

The Central Authority in Australia stated in May 2008, upon enquiry as to how the Hague Convention ensures that the child's best interests remain the focus, that the response from the Attorney General's office was that measures for the protection of children are 'in the early stages of development'. This is surely unacceptable from a government that signed the Convention more than 21 years ago.

The child abuse victim is in a no-win situation. In hiding, stress levels are always high. They lack the support of grandparents and often have to move from place to place and school to school making it difficult to create friendships. In the court proceedings, children do not know which parent will win or how long they will remain in foster care and they are damaged by insecurity.

The Hague Convention involves a lengthy traumatic process which can clearly contribute to the long-term psychological harm of children and to their brain development (Middlebrooks & Audage, 2008). The problem in the first instance seems to be that the Australian Family Court lacks the capacity to investigate allegations of child sexual abuse and other forms of abuse. The solution lies with the Australian Government to make sure their judicial systems are able to cope with the demands of hearing cases of child sex abuse, domestic violence and neglect victims, and also are able to gain evidence from children in a suitable environment, therefore solving issues before a caregiver feels the need to escape interstate or overseas. It may also lie with The Hague who monitors the application of the convention internationally; perhaps the convention needs rewriting given that the profile of the abducting parent has changed over the years since its inception and it is now primarily the resident parent who abducts the child.

In 1995, the National Association for the Prevention of Child Abuse and Neglect (NAPCAN) produced a report recommending that it be replaced by an inquisitorial system with judges who are trained in child abuse and child development. Because of the inadequacy of the (state) criminal court, interfamilial child abuse cases find their way into the Australian Family Court. Former Chief Justice Alastair Nicholson is on record as saying that these cases should not be heard in that court; it was not created for that purpose (Nicholson, 2010). He would prefer that cases were in a special court or even the youth court where judges are accustomed to putting children first. The irony is that, after up to six or even seven years of stress, most of the children mentioned in this paper were returned to their abductor's care but, sadly, the damage has already been done.

In conclusion, the international laws that were introduced to protect the welfare of the children are, in many cases, doing the opposite of what was intended. Reform needs to occur so that the welfare of the child is paramount once more.

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