

OUTLINE

1980 HAGUE CHILD ABDUCTION CONVENTION



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

Introduction

Although international child abduction is not a new problem, the incidence of such abductions continue to grow with the ease of international travel, the increase in bi-cultural marriages and the rise in the divorce rate. International child abductions have serious consequences for both the child and the left-behind parent. The child is removed, not only from contact with the other parent, but also from his or her home environment and transplanted to a culture with which he or she may have had no prior ties. International abductors move the child to another State with a different legal system, social structure, culture and, often, language. These differences, plus the physical distance generally involved, can make locating, recovering and returning internationally abducted children complex and problematic.

The *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* seeks to combat parental child abduction by providing a system of co-operation between Central Authorities and a rapid procedure for the return of the child to the country of the child's habitual residence.

The return mechanism

The principal object of the Convention, aside from protecting rights of access, is to protect children from the harmful effects of cross-border abductions (and wrongful retentions) by providing a procedure designed to bring about the prompt return of such children to the State of their habitual residence.¹ The Convention is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interests of the child,² and that the return of the child to the State of the habitual residence will promote his or her interests by vindicating the right of the child to have contact with both parents,³ by supporting continuity in the child's life,⁴ and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principle of prompt return also serves as a deterrent to abductions and wrongful removals, and this is seen by the Convention to be in the interests of children generally. The return order is designed to restore the status quo which existed before the wrongful removal or protection, and to deprive the wrongful parent of any advantage that might otherwise be gained by the abduction.

A return order is not a custody determination. It is simply an order that the child be returned to the jurisdiction which is most appropriate to determine custody and access. It is clearly stated in Article 19 that a return decision is not a decision on the merits of any custody issue. It is this which justifies the requirement in Article 12 that the return order be made "forthwith", and of Article 16 that a court dealing with an abduction case is not permitted to decide on "the merits of rights of custody" until it has been decided that there exists a reason for not ordering return, or the application is not lodged within a reasonable time.

The requirements to be met by an applicant for a return order are strict. He / she must establish:

¹ See Article 1.

² Preamble. And see Article 11 of the *United Nations Convention on the Rights of the Child* (UNCRC), which is quoted in the text below.

³ See UNCRC Article 9.3:

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

⁴ See UNCRC, Article 8, quoted below in the text.

that the child was habitually residing in the other State; that the removal or retention of the child constituted a breach of custody rights attributed by the law of that State; and that the applicant was actually exercising those rights at the time of the wrongful removal or retention.

Once the applicant has established a *prima facie* case under Article 3 *b*, there remains the possibility of the application being rejected under Article 13 if consent or subsequent acquiescence to the removal can be shown, or there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Also under Article 13 the objections of the child, if he/she has attained sufficient age and maturity, may be a basis for refusal. Article 12 gives a discretion not to return a child if the application was made a year after the removal or retention and the child is now settled in his / her new environment. Finally, under Article 20 return may be refused if this would not be permitted by the fundamental rules relating to the protection of human rights and fundamental freedoms of the State addressed.

Co-operation

As is usual among the Hague Children's Conventions, Central Authorities in each Contracting State are given an integral role as the focus for administrative co-operation in achieving child protection. Central Authorities in each country assist in locating the child and in achieving, if possible, a voluntary return of the child or an amicable resolution of the issues. They also co-operate to prevent further harm to the child by initiating or helping to initiate proceedings for the return of the child, and by making necessary administrative arrangements to secure the child's safe return. Article 21 also gives the Central Authorities obligations to promote the peaceful enjoyment of access rights and to take steps to remove, as far as possible, obstacles to the exercise of such rights.

Significant post-Convention work has also been carried out on the 1980 Abduction Convention. A Special Commission for the Monitoring and Review of the Operation of the 1980 Abduction Convention has been set up and meets every few years to discuss developments. In addition, the Hague Conference has produced several Guides to Good Practice⁵ for the implementation and operation of the Convention and provides other resources such as a database of case law (INCADAT) and of statistics (INCASTAT) relating to international child abduction.

Protecting children and their rights

While pre-dating the CRC, the 1980 Hague Convention in part implements CRC Articles 11⁶ and 35;⁷ it helps to give effect to the fundamental rights of the child, such as those expressed in CRC Articles 9.3⁸ and 10.2,⁹ and has been found in a number of court decisions in different parts of the world to be consistent with national Constitutions, as well as regional and international human rights instruments.

The UN Committee on the Rights of the Child recommends CRC States to become Party to the 1980 Hague Convention as a means by which CRC Article 11 may be practically implemented.¹⁰

⁵ These Guides can be found under the "Child Abduction Section" of the HCCH website at < www.hcch.net >.

⁶ CRC Article 11: "1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements."

⁷ CRC Article 35: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form."

⁸ CRC Article 9.3: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

⁹ CRC Article 10.2: "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. [. . .]"

¹⁰ See, e.g., Concluding Observations of the Committee on the Rights of the Child: South Africa, 23/02/2000, CRC/C/15/Add.122 (Concluding Observations/Comments), para. 40: "The Committee notes the efforts of the State party to address the situation of the sale, trafficking and abduction of children, including the adoption of the Hague Convention on Civil Aspects of International Child Abduction, into domestic legislation. . . ." See also Implementation Handbook for the Convention on the Rights of the Child, United Nations Children's Fund, prepared for UNICEF by Rachel Hodgkin and Peter Newell, UNICEF 2002, at 153-58.

The 1980 Hague Convention has contributed to resolving thousands of abduction cases and has served as a deterrent to many others through the clarity of its message (abduction is harmful to children, who have a right to contact with both parents) and through the simplicity of its central remedy (the return order). With currently more than 90 Contracting States, the 1980 Hague Convention can be viewed as one of the most successful family law instruments to be completed under the auspices of the Hague Conference on Private International Law.

The operation of the 1980 Hague Convention has been further strengthened by complementing provisions in the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

The Child Abduction Section on the website of the Hague Conference contains the latest information about the status of the 1980 Convention, and the contact details of Central Authorities. For this, and much more information about the 1980 Convention, see < www.hcch.net >.