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REPRESENTING BATTERED RESPONDENTS UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

A Practice Guide for Attorneys and
Domestic Violence Victim Advocates

**Representing Battered Respondents under the Hague
Convention on the Civil Aspects of International Child
Abduction**

A Practice Guide
for Attorneys and
Domestic Violence
Victim Advocates

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INTERNATIONAL ACTION NETWORK
FOR GENDER EQUITY & LAW

.....*to Courageous Mothers*.....

The Hague Domestic Violence Project has created this Practice Guide, *Representing Battered Respondents under the Hague Convention on the Civil Aspects of International Child Abduction*, for attorneys, mothers, and domestic violence victim advocates who are confronted with a petition for return pursuant to the Hague Convention in cases involving women and children fleeing domestic violence.

Please visit www.haguedv.org for more information about the Hague Domestic Violence Project and for more resources on the Hague Convention and women and children fleeing domestic violence across international borders.

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**If you have accessed the online version of this Practice Guide the Appendices are attached. If, however, you have received a printed version of this Guide, please visit haguedv.org to access the Appendices in full.*

***This will be updated periodically and available both in the online version of the Guide and in the online Appendices available for those with a printed version of the Guide.*

INTRODUCTION

This Guide is intended to assist attorneys and domestic violence victim advocates in their representation and work with battered mother respondents in the United States in cases filed under the Hague Convention on the Civil Aspects of International Child Abduction.

The Hague Convention on the Civil Aspects of International Child Abduction¹ (“Hague Convention” or “Convention”) is an international treaty intended to protect children by providing a civil legal framework for the return of children to their habitual residence² when they are wrongfully removed or retained³ across international borders. In the United States, the Hague Convention is implemented through federal law, specifically the International Child Abduction Remedies Act⁴ (ICARA). ICARA establishes procedures to implement the Convention and its provisions are intended to be read in addition to the Convention, not in lieu of the Convention.

If one parent removes or retains a child across international borders, the other parent – the “left-behind” parent⁵ – may file a petition under the Hague Convention for that child’s return. The court presiding over a Hague Convention case must then determine if the countries involved are Contracting States,⁶ whether the removal or retention was wrongful,⁷ and, if it was wrongful, whether any exceptions to the Convention apply.⁸

The purpose of the Hague Convention is to ensure the prompt return of a child to his or her country of habitual residence, and legal proceedings under the Convention have developed and evolved in furtherance of that purpose. The exceptions to returning a child, also referred to as affirmative defenses, were drafted to be narrowly construed, and courts in the United States have followed this line. Domestic violence is not itself an exception to return, but rather can be thought of within the broader context of the exceptions and is relevant to a court’s consideration of whether a petition for return should be granted, which is the subject of much of this Guide.

The purpose of this Guide is to address Hague Convention cases involving allegations of domestic violence. Specifically, it focuses on petitions filed in the United States for the return of a child located in the United States (referred to as “incoming cases”), in which the respondent (the “taking” or “abducting” parent) alleges abuse by the petitioner (the left-behind parent). The focus on domestic violence and providing assistance to battered respondents is critical for a number of reasons. First, the Convention is founded, at least in part, on the principles that

¹ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (1981) [hereinafter Convention]. Full text available in Appendix A.

² For discussion of habitual residence *see* discussion *infra* Part IV, Section A.

³ For a discussion of wrongful removal or retention *see* discussion *infra* Part IV, Section A.1.

⁴ International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (2014). Full text available in Appendix B.

⁵ The remedy of return under the Convention is not limited to parents. Any person, institution, or any other body, having custody either jointly or alone may file a petition for return pursuant to the Convention.

⁶ *See* discussion *infra* Part III, Section A.3.

⁷ *See* discussion *infra* Part IV.

⁸ *See* discussion *infra* Part V.

international child abduction is harmful to the abducted child⁹ and that an abducting parent should not be able to gain a legal advantage in a custody matter by taking the child to a foreign country.¹⁰ Accordingly, the Convention was designed to facilitate the prompt return of a child wrongfully removed from his or her country of habitual residence. Consequently, Contracting States have developed resources geared toward the prompt return of children wrongfully removed from their country of habitual residence, and as a result there are generally more resources worldwide to assist left-behind parents than to assist taking parents. In some cases, however, the taking parent is fleeing domestic abuse, seeking safety in another country for her children and herself. In these cases, the removal of a child from his or her habitual residence may be less harmful than the abusive environment from which the child was taken. In these situations, the fleeing parent has left the habitual residence country seeking safety, but not a legal advantage. Nonetheless, resources for respondents may be limited.

Second, unlike federal legislation to prevent child abduction which provides an explicit defense for parents fleeing domestic violence,¹¹ both the Hague Convention and ICARA are silent on domestic violence. A parent who flees across international borders due to domestic violence often does so for reasons involving her own safety and security and the safety and security of her children. Instead, they frequently find themselves faced with a court battle under the Hague Convention in which they are viewed as an “abductor,” by a court that may not understand the dynamics of domestic violence or how those dynamics are relevant to the safety of the parties’ children and the exceptions to return under the Convention.

Thus, this Guide seeks to assist attorneys and domestic violence victim advocates both by outlining the law and jurisprudence central to a Hague Convention case in the United States and by highlighting the issues specific to cases alleging domestic violence perpetrated by the left-behind parent.

This Guide presumes three categories of users: (1) those with significant experience in domestic violence but not Hague Convention cases; (2) those with significant experience in Hague Convention cases but not domestic violence; and (3) those with no significant experience in either area. Our intention is that this Guide will be useful to all three categories because it covers Hague Convention law, dynamics of domestic violence, and the connection of the two. Although we do not expect every user to read the Guide from front cover to back cover, we do encourage each user to look through every section because much of the Guide covers the intersection of domestic violence and the Hague Convention.

⁹ Convention, *supra* note 1, at Preamble.

¹⁰ See Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, ¶11 (1982) (“...the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links...with a view to obtaining custody of a child.”) [hereinafter Pérez-Vera, Explanatory Report]. Full text available in Appendix C. See also 42 U.S.C. §11601(a)(2); Department of State Public Notice 957, Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,495 (1986) (“The international abductor is denied legal advantage from the abduction...”). [hereinafter Text and Legal Analysis]. Full text available in Appendix D.

¹¹ See International Parental Kidnapping Crime Act, 18 U.S.C. §1204(C)(2) (1993) [“It shall be an affirmative defense under this section that...the defendant was fleeing an incidence or pattern of domestic violence.”].

Finally, the authors of this Guide recognize that domestic violence is not limited to situations where men batter women and that domestic abuse can involve women's violence against men or abuse by same-sex partners. However, the evidence worldwide is that women bear the brunt of victimization in domestic abuse.¹² Therefore, this Guide is specifically intended to assist in the representation of a battered mother respondent in a Hague Convention Case.

¹² See generally World Health Organization, "Global and Regional Estimates of Violence against Women," World Health Organization Library, 2013, accessed at: http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf. See also World Health Organization. "Violence Against Women: Intimate Partner and Sexual Violence Against Women" WHO Fact Sheet No. 239, October 2013. Accessed on 14 October 2014 at: <http://www.who.int/mediacentre/factsheets/fs239/en/>.

THE HAGUE CONVENTION: AN OUTLINE

If a child is taken across international borders by one parent without the permission of the other parent, or remains in a foreign country with one parent without the permission of the other parent, the left-behind parent may file a petition for the return of that child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

1. JURISDICTION

- 1.1. A petition for return pursuant to the Hague Convention can be filed in **either** the state or federal court where **the child is located**.
- 1.2. The child at issue in the petition must be **under** the age of **sixteen** at the time the petition is filed.
- 1.3. The child at issue must have been removed or retained from a country that is a **Contracting State** to the Convention.
- 1.4. The Convention must be in force **between** the United States and the country from which the child was removed or retained.

2. PETITIONER'S *PRIMA FACIE* CASE FOR RETURN OF THE CHILD

- 2.1. The petitioner has the **burden** of proving by a **preponderance of the evidence**:
 - 2.1.1. That the child was removed or retained from his or her **country of habitual residence**;
 - 2.1.2. In breach of the petitioner's **rights of custody**; and
 - 2.1.3. That those custody rights were **actually exercised** at the time of removal or retention or **would have been exercised but for** the removal or retention.

3. RESPONDENT'S AFFIRMATIVE DEFENSES: EXCEPTIONS TO RETURN

- 3.1. Article 12: **One year** has passed and the child is **well-settled** in the new environment.
- 3.2. Article 13(a): The petitioner **consented** or **subsequently acquiesced** to the move.
- 3.3. Article 13(b): There is **grave risk of physical or psychological harm** to the child if he or she is returned or the return will place the child in an **intolerable situation**.
- 3.4. Article 13: The child has reached an **age of maturity** and **objects to return**.
- 3.5. Article 20: Return of the child would result in **violation of human rights and fundamental freedoms**.

THE HAGUE CONVENTION: GLOSSARY

KEY TERMS: QUICK REFERENCE TO IMPORTANT TERMINOLOGY

This section is intended to provide a quick reference to important Convention terminology. For an in-depth definition of a specific term or further understanding of how a term applies or operates in the legal context, please refer to the substantive sections within.

Contracting State: Contracting States are countries that are party to the Convention, meaning that the Convention is in force in that country. The Convention only applies to Contracting States. A country may become a Contracting State by ratifying or acceding to the Convention. As of January 2015, there were 93 Contracting States to the Convention and this number continues to expand. The Hague Conference on Private International Law maintains a Status Table of Contracting States which can be found on their website at www.hcch.net. For more on Contracting States see Part III, Section A.3.

Central Authority: Article 6 of the Convention directs each Contracting State to designate a Central Authority to facilitate the Convention's implementation. Central Authorities coordinate and cooperate with various agencies from both countries involved in order to secure the prompt return of a child or facilitate access to the child. The Central Authority's role is that of a facilitator and not a fact finder. If a dispute exists between the parties, the Central Authority has no power to order a child's return. The procedure of each Central Authority varies, and each is responsible for managing its own caseload and priorities. In the United States, the Department of State, Office of Children's Issues (CI), serves as the Central Authority.

Petition: For purposes of this Guide, this term refers to the complaint that has been filed by a left-behind parent in either state or federal court seeking the return of a child who has been brought to the United States from a foreign country.

Habitual Residence: The petitioner must prove that the left-behind country (often referred to as the requesting state) was the child's habitual residence in order to establish that the child's removal or retention was wrongful. Proving habitual residence is an element of the petitioner's *prima facie* case. Habitual residence is not defined by either the Convention or ICARA, and is interpreted by courts according to its "ordinary meaning." For more on Habitual Residence see Part IV, Section A.

Petitioner (left-behind parent): The petitioner is the person, institution, or any other body seeking the return of a child under the Convention. The petitioner may contact the U.S. Central authority, either directly or through the Central Authority in the country where he is located, or may file a petition pursuant to the Hague Convention in either state or federal court in the United States. For purposes of this Guide, the petitioner is the father of the child(ren) at issue and is located outside of the United States. Note a petitioner may also file to establish or enforce rights of access – see rights of access and access case below.

Respondent (taking-parent or abducting parent): The respondent is the parent who removed the child to a new location or retained the child in a new location and must respond to the petition. For purposes of this Guide, this person is the mother of the child(ren) at issue, is

located in the United States at the time the petition is filed, and has alleged domestic abuse by the petitioner.

Rights of Custody: Under Article 5 of the Convention, rights of custody “include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence....” Proving rights of custody is an element of the petitioner’s *prima facie* case for return. For more on Rights of Custody see Part IV, Section B.

Removal: Removal refers to a parent physically taking a child out of the country.

Retention: Retention refers to a parent keeping a child out of the country beyond a previously agreed upon time period.

Return Case: Cases in which a petition has been filed seeking the return of a child to his or her habitual residence. Return is a remedy available under the Convention in cases where the petitioner had rights of custody and was actually exercising those rights at the time of removal or retention or would have exercised those rights but for the removal or retention.

Rights of Access: Under Article 5 of the Convention, rights of access “include the right to take a child for a limited period of time to a place other than the child’s habitual residence.” Where rights of access are at issue the remedy of return does not apply. This Guide does not address cases involving rights of access in depth. For more on rights of access compared to rights of custody see Part IV, Section B.

Access Case: An access case is brought by a petitioner seeking to establish or enforce rights of access. Alternatively, a petitioner may file a petition for return but fail to prove that he enjoyed rights of custody, therefore the case may begin as a return case but become an access case. This Guide does not address rights of access in depth.

Incoming Cases: Incoming cases are cases where the child has been removed to or retained in the United States.

Outgoing Cases: Outgoing cases are cases where the child has been removed from or retained outside of the United States and is located in another country at the time the petition is filed. This Guide does not address outgoing cases.

Explanatory Report: Elisa Pérez-Vera’s Explanatory Report, Appendix C, is recognized as the official history and commentary to the Hague Convention and is often looked to by courts for guidance in interpreting the Convention, although it was never adopted in the Convention. In *Abbott v. Abbott*, 560 U.S. 1 (2010), the Supreme Court, while noting that the Pérez-Vera Report supported its conclusion, declined to decide whether the Report should be given greater weight than a scholarly commentary.

Text and Legal Analysis: The Hague International Child Abduction Convention; Text and Legal Analysis, Appendix D, was drafted by the U.S. State Department before the Convention was in force in the United States and, like Pérez-Vera’s Explanatory Report, courts often rely on it for support in treaty interpretation. In *Abbott*, for example, the Court clearly states its decision was both supported and informed by the State Department’s Analysis.