



# International Parental Child Abduction



**Centre for Child and Youth Justice,  
NALSAR University of Law, Hyderabad**

in collaboration with CRY under project on  
“Access to Justice for Children through systems strengthening on child protection issues”



# INTERNATIONAL PARENTAL CHILD ABDUCTION (MONOGRAPH)

Edited by  
Dr. D. Bala Krishna  
Prof. V. Kesava Rao  
Aishwariya Sinha  
Raja Chandra

**Centre for Child and Youth Justice,  
NALSAR University of Law, Hyderabad, India**

*Edited by*

*Dr. D. Bala Krishna*, Faculty and Coordinator, Centre for Child & Youth Justice, NALSAR University of Law, Hyderabad

*Prof. V. Kesava Rao*, Adjunct Professor and Director, IQAC, NALSAR University of Law, Hyderabad

*Aishwariya Sinha*, Research Assistant, Centre for Child & Youth Justice, NALSAR University of Law, Hyderabad

*Raja Chandra*, Research Assistant, Centre for Child & Youth Justice, NALSAR University of Law, Hyderabad

*Published and printed by*

The Registrar, NALSAR University of Law,

Post Box No. 1, Justice City, Shameerpet,

Medchal-Malkajgiri District, Telangana – 500101, INDIA

Email: registrar@nalsar.ac.in; Phone: +91 40 23498104

*First published in India 2026*

© The copyright in this Monograph shall remain jointly vested with the Author(s) and the Centre for Child and Youth Justice (CCYJ), NALSAR University of Law. Any person desiring to use material from the monograph for educational purposes, research, or private study may do so with prior written permission of the publisher. The monograph is published as open access and is freely available for reading, downloading, and sharing online at <https://www.ccyj.nalsar.ac.in>

Please note that no part of this monograph may be used or reproduced in any manner for the purpose of training artificial intelligence technologies or systems.

The Monograph on International Parental Child Abduction is the outcome of a collaboration between the Centre for Child and Youth Justice (CCYJ), NALSAR University of Law, Hyderabad, and CRY (Child Rights and You), undertaken as part of the project “Access to Justice for Children through Systems Strengthening on Child Protection Issues.”

*Disclaimer: The views and opinions expressed in this volume are those of the individual contributors and do not necessarily reflect the official policy or position of the institution. While the publisher, authors, and editors have made every effort to ensure the accuracy of the content at the time of publication, they assume no responsibility for any errors or omissions.*

**ISBN 978-81-993138-4-2 (Paperback)**

**ISBN 978-81-993138-9-7 (e-Book)**



25 Years of Excellence  
in Legal Education

## NALSAR UNIVERSITY OF LAW, HYDERABAD

National Academy of Legal Studies and Research University

**Professor Srikrishna Deva Rao**

**Vice Chancellor**

### MESSAGE FROM THE VICE-CHANCELLOR

The National Academy of Legal Studies and Research (NALSAR) University of Law, established in 1998, has consistently pursued the idea of law as a means of social transformation. Over the years, the University has contributed to critical engagement with issues of justice through teaching, research, and public dialogue across diverse fields such as criminal justice, international law, land rights, disability studies, and child and youth justice. With a strong academic community drawn from across the country and abroad, NALSAR continues to build a culture of legal scholarship grounded in constitutional values and the rule of law. Within this broader institutional commitment, the Centre for Child and Youth Justice (CCYJ) stands as a dedicated initiative to address the legal and social concerns of children and young persons through research, policy engagement, and capacity building, in collaboration with state institutions, civil society organisations and international bodies.

International Parental Child Abduction presents complex challenges that cut across jurisdictions, legal systems, and social realities. For children caught in such disputes, the consequences are often profound, affecting their sense of stability, identity, and well-being. In an increasingly interconnected world, cross-border family disputes call for legal responses that are attentive to parental claims while keeping the child's welfare at the centre. This monograph addresses an area that remains under-examined in the Indian context, and brings in comparative and international perspectives.

I congratulate the Centre for Child and Youth Justice, Child Rights and You (CRY) and the editorial team for bringing out this timely and meaningful monograph. It is expected to contribute to ongoing discussions on international parental child abduction, particularly in contexts where legal responses remain uncertain or fragmented. I believe this publication will be useful to policymakers, academics, legal practitioners and institutions working on child rights in cross-border custody cases.

**Prof. Srikrishna Deva Rao,**  
**Vice Chancellor,**  
**NALSAR University of Law, Hyderabad**

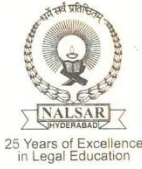
(University established by an Act No. 34 of 1998)

Justice City, Shameerpet, Medchal District, Hyderabad - 500 101, Telangana, India.

**Ph : Off : +91 40 23498102 Res : +91 40 23498157**

**E-mail : [vc@nalsar.ac.in](mailto:vc@nalsar.ac.in), [psrikrishnadevarao@gmail.com](mailto:psrikrishnadevarao@gmail.com) Website : [www.nalsar.ac.in](http://www.nalsar.ac.in)**





# NALSAR University of Law, Hyderabad

National Academy of Legal Studies and Research University

**Professor N. Vasanthi**  
Professor of Law & Registrar Incharge

## Message from the Registrar (I/c) NALSAR University of Law, Hyderabad

I extend my congratulations to the Centre for Child and Youth Justice and all those associated with the preparation of this Monograph on International Parental Child Abduction. This publication grows out of a series of discussions and consultations with international counterparts, particularly with officials working on child protection and consular matters across jurisdictions. It is heartening to see these conversations take the form of a carefully curated publication that is attentive not only to legal doctrine, but also to the lived consequences of legal choices for children and families.

International parental child abduction is often located within private international law or international family law, but it cannot be understood only through technical rules of jurisdiction or procedure. The subject draws attention to how legal systems respond when family relationships cross borders, when state boundaries complicate access to justice, and when private disputes acquire public significance. Comparative studies in this area have repeatedly shown that the absence of uniform legal structures does not result in neutrality, rather it produces uneven outcomes shaped by power, mobility, and institutional capacity. The discussions that informed this monograph reflect an awareness of these tensions and the limits of purely domestic solutions.

This volume follows NALSAR's continuing engagement with questions that lie at the intersection of law, governance, and human experience. I hope it will prompt further reflection on how legal systems can respond more coherently to family disputes that extend across national boundaries without losing sight of the child at the centre of them. I commend the authors and the editorial team for contributing to a body of work that invites dialogue rather than closure and that treats law as a continuing conversation rather than a settled answer.

*N. Vasanthi*

**Prof. N. Vasanthi**  
Registrar (I/c) & Professor of Law  
NALSAR University of Law, Hyderabad

(University established by Act 34 of 1998)

'Justice City', Shameerpet, Medchal-Malkajgiri District - 500 101, Telangana, India.  
Tel : +91-40-23498104 / 23498437 Mobile : 9849356663 E-mail : registrar@nalsar.ac.in  
Website : www.nalsar.ac.in





### Message of CEO of Child Rights and You for Monograph

At Child Rights and You (CRY), our work has consistently reminded us that access to justice for children is not merely about the presence of law, but about how system responds when children find themselves at the intersection of vulnerability, institutional complexity, and power imbalances. The Monograph on International Parental Child Abduction is an important contribution in this direction. We are proud to have collaborated with the Centre for Child and You Justice (CCYJ), NALSAR University of Law under the project “Access to Justice for Children through Systems Strengthening on Child Protection Issues” to publish this.

The Indian Constitution recognizes the rights to life, liberty, and dignity for all children and the country has been an early signatory to the UN Convention on the Rights of the Child to uphold them. Yet, in areas such as Hague Convention on Civil Aspects of International Child Abduction, India continues to remain unsigned and there persist some gaps in child protection measures that extend beyond domestic borders. As cross-national families become more common across the globe, the absence of such formal commitments and regulations adds urgency to domestic child protection systems to strengthen overall support to children vulnerable in these families.

This monograph is a reflection of CRY’s commitment to move beyond legal analysis and engage with comparative perspectives and evolving jurisprudence within the broader child protection frameworks. By doing so, the monograph encourages a more informed and child-centric approach to addressing transnational family disputes.

For CRY, this work aligns closely with our approach to supporting system strengthening by bridging research, practice, and policy. I believe that meaningful reforms emerge when rigorous legal scholarship is done to contribute to policy dialogues where children’s best interests guide institutional action.

As India and other countries work towards addressing challenges of transnational family disputes, this monograph offers timely insights for scholars, practitioners, and policy makers. I extend my appreciation to CCYJ, the authors, editors, and all contributors who have made this monograph possible. I hope it sparks meaningful reflections on how justice systems can respond to cross-border complexities, while keeping children at the center of all decisions.

With hope and goodwill,

Puja Marwaha

CEO, CRY





## PREFACE

The Centre for Child and Youth Justice (CCYJ), NALSAR University of Law, Hyderabad, is delighted to present its first monograph, *Monograph on International Parental Child Abduction*. This publication has emerged from a meaningful collaboration between CCYJ and CRY (Child Rights and You) under the project “*Access to Justice for Children through Systems Strengthening on Child Protection Issues*.”

At the heart of international parental child abduction cases are children who are often caught in the middle of adult conflict, legal uncertainty and cross-border dispute systems that do not always speak to one another. These disputes are rarely just legal battles; they are deeply personal, emotionally charged and life altering for children and families alike. As transnational families become more common among the globe, the challenges surrounding cross-border child removal have grown more complex, especially in contexts of countries such as India, which is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.

This monograph is conceived with the intention of moving beyond abstract legal debates to engage with the lived realities behind international parental child abduction. It brings together voices from different jurisdictions and disciplines to examine how law responds or sometimes fails to respond, to the needs of children, particularly in disputes involving domestic violence, migration and displacement. Throughout the monograph, the central concern remains clear: how can legal systems better protect children while ensuring fairness, sensitivity and access to justice for them.

This scholarly book focusses on the single specialized topic on International Parental Child Abduction. A small group of author/co-authors have collaborated on this monograph. This monograph presents a unified argument, analysis and perspective throughout.

Each component of the monograph approaches the issue through a distinct yet interconnected perspective.

The Part 1, “*Parental Child Abduction to India: An International Hot Potato?*” by Stutee Nag, discusses India’s position in international child abduction disputes, particularly in the context of its non-accession to the Hague Convention. This part situates Indian judicial responses within broader diplomatic and legal pressures.

In Part 2, “*India and the Hague Divide: A Comparative Inquiry on International Parental Child Abduction*”, Riya Koul and Neelam Tholia compare India’s approach with that of Hague Convention countries. This segment examines differences in legal structure and their consequences for decision-making and outcomes through extensive analysis of available data.

Part 3, “*The Case for a Regulatory Law in Brazil: Analysis of the Brazilian Superior Court of Justice’s Jurisprudence on International Child Abduction*” by Rodrigo Santos Meira and Gabriel Teles Pontes, turns to the jurisprudence of the Brazilian Superior Court of Justice. The authors draw on case law to point out recurring gaps and argue for a clearer legal framework in this area.

Part 4 this Monograph, “*Risk of Harm and Domestic Violence: How the Hague Convention on the Civil Aspects of International Child Abduction Dismisses the Gender Violence Epidemic?*” by Lizbeth del Carmen Valencia Mariscal, addresses the treatment of domestic violence within international child abduction mechanisms. This section questions how far existing legal approaches take account of the realities faced by survivors.

In Part 5, “*Trapped Between Laws: The Conflict between Refugee Law and International Child Abduction Law in Domestic Violence Cases?*”, Jwalika Balaji explores situations where refugee law and child abduction law intersect. This part focuses on the difficult positions faced by survivors when legal regimes pull in different directions.

The monograph concludes with Part 6, “*Inter-Parental Child Removal to India: Challenges, Safeguards and Remedies*” by Anil Malhotra and Ankit Malhotra. This segment examines the uncertainty in Indian legal responses arising from the absence of a uniform framework and sets out detailed safeguards and procedural measures, to guide courts and parties in such cases.

As CCYJ’s first monograph, this work represents an important step in the Centre’s ongoing efforts to strengthen child protection systems through research, dialogue and collaboration. This specialized book on International Parental Child Abduction (IPCA) embodies in depth scholarly work focused on a sole issue of IPCA, with new insights advancing expertise in the field of child protection.

We hope that this monograph will resonate not only with scholars and practitioners, but also with anyone concerned about the well-being of children affected by cross-border family disputes. Above all, we hope it contributes modestly to legal dialogue and reforms that place children, their safety and their dignity at the centre of the cross-border disputes.



# Contents

S. No.	Topic	Page No.
1.	Part-1, Parental Child Abduction to India: An International Hot Potato! <i>by Stutee Nag</i>	1
2.	Part-2, India and The Hague Divide: A Comparative Inquiry on International Parental Child Abduction <i>by Riya Koul and Neelam Tholia</i>	31
3.	Part-3, The Case for a Regulatory Law in Brazil: Analysis of the Brazilian Superior Court of Justice's Jurisprudence on International Child Abduction <i>by Rodrigo Santos Meira &amp; Gabriel Tele Pontes</i>	62
4.	Part-4, Risk of harm and domestic violence: How the Hague Convention on the Civil aspects of International Child Abduction dismisses the gender violence epidemic <i>by Lizbeth del Carmen Valencia Mariscal</i>	86
5.	Part- 5, Trapped between Laws: The Conflict between Refugee Law and the International Child Abduction Law in Domestic Violence Cases <i>by Jvalika Balaji</i>	109
6.	Part-6, Inter Parental Child Removal to India: Challenges, Safeguards and Remedies <i>by Anil Malhotra &amp; Ankit Malhotra</i>	140
7.	Appendix: Convention on the Civil Aspects of International Child Abduction ( <i>The Hague Convention</i> )	176



# **PART-1**

## **PARENTAL CHILD ABDUCTION TO INDIA: AN INTERNATIONAL HOT POTATO!**

*Stutee Nag\**

### **Introduction**

If one were to view the current global scenario with respect to international child custody disputes, a proverbial see-saw comes to mind, with India on one end, and perhaps all the other major legal systems on the other. While gender based custodial preferences still find place in India, countries like the U.S., Australia, Canada, or England have long abolished the tender years doctrine. Why this matters is because India forms the world's largest diaspora. Nine out of the top ten countries to which Indians move have signed the Hague Abduction Convention. Indians comprise the second largest immigrant group in the United States of America (U.S.). Thus, children with ties to both countries often become the subject of international parental kidnapping, when the parent(s) of Indian origin no longer wishes to continue their marriage. This presents a very tricky scenario for the taking parent, the left-behind parent, and most importantly, the child.

---

\* Stutee Nag is an attorney admitted to practice in India, New York, and New Jersey. She focuses on international family law, with particular emphasis on cross-border child custody disputes, international parental child abduction, and jurisdictional conflicts involving India and the United States. Her work examines the intersection of domestic family law, private international law, and comparative judicial approaches to child welfare. She is currently writing a book on India and international family law for the American Bar Association and appears as an expert on international family law issues. She can be reached at [stutee\\_nag@hotmail.com](mailto:stutee_nag@hotmail.com)

This article discusses the various aspects of international parental child abduction, its impact on the concerned child, and why India might benefit from addressing this issue by signing the Hague Abduction Convention. It delves into the important features of the Convention. It discusses what a Hague trial typically entails, and whether there are any defences to it. It throws light at India's reasons for not having signed the Convention, addresses those reasons while providing possible solutions. It describes the current Indian way to address such issues, draws comparison with the current Indian system and the Hague Convention, and elaborates on the need for India to sign the Convention.

*Child Abduction is Child Abuse* - Child abduction is the most severe form of child abuse and can have devastating effects on a child's mental health.<sup>1</sup> It may result to depression, acute stress disorder, post-traumatic stress disorder, and issues related to identity.<sup>2</sup> An abducted child often experiences feelings disconnection and instability, which can manifest as loneliness, anger, fear of abandonment. This situation may hinder the child's ability to form a healthy relationship with the parent who has not been involved in the abduction.<sup>3</sup> Furthermore, children who are kidnapped are at a greater risk for long-term complications, including anxiety, eating disorders, nightmares, mood fluctuations, sleep problems, and aggressive behavior.<sup>4</sup> As they grow

---

<sup>1</sup> *Abbott v. Abbott*, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010).

<sup>2</sup> *Abbott*, 130 S.Ct. at 1996.

<sup>3</sup> *Id.*

<sup>4</sup> Criminal Division, U.S. Dept. of Justice, *International Parental Kidnapping: Child Victims of International Parental Kidnapping*,

<https://www.justice.gov/criminal/criminal-ceos/international-parental-kidnapping>,

into adulthood, individuals who were victims of parental kidnapping may face ongoing challenges related to their identity, relationships, and family dynamics.<sup>5</sup>

National Center for Missing and Exploited Children estimates family abductions as the second most common reason for children to go missing in the U.S.<sup>6</sup> Family Abduction is commonly referred to as parental child abduction.

Parental child abduction often occurs amidst intense marital disagreements or during various phases of divorce and custody battles. When children are abducted, they are frequently taken away from their familiar surroundings and isolated from their regular environment, which can lead to prolonged absences from school—sometimes lasting months or even years. The child may be moved between different locations to evade detection or avoid contact with the left-behind parent. In certain situations, their name, birth date, and physical features might be changed or hidden to maintain anonymity. These circumstances can have serious negative impacts on a child's well-being.

*International child abduction* is generally considered worse than a standard child abduction because it adds a layer of complexity due to different legal jurisdictions, making it harder to recover the child and potentially causing greater emotional distress for the family due to the added

---

(Last visited: Feb. 7, 2025).

<sup>5</sup> *Id.*

<sup>6</sup> National Center For Missing And Exploited Children, *Our Impact: 2023*, <https://www.missingkids.org/ourwork/impact#:~:text=Children%20who%20run%20away%20make,child%20victims%20and%20their%20families>, (Last visited: Feb. 7, 2023).

barrier of distance and navigating foreign legal systems; essentially, it is considered more severe because of the challenges involved in retrieving a child from another country.<sup>7</sup>

Yet the world is divided into two groups concerning this issue. On the one hand, there are 103 countries<sup>8</sup> that have signed the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980,<sup>9</sup> (the “Hague Abduction Convention”, or the “Convention”), and consider child abduction to be a serious crime. On the other hand, there are the countries that are extremely reluctant to sign the Convention because they feel obligated to safeguard the survivors of domestic violence (typically the mothers who return to their home countries with their child because they fear domestic abuse at the hands of their partner.)

### **Hague Abduction Convention**

The Hague Abduction Convention is an international treaty that seeks prompt return of a child who has been wrongfully removed to or retained across international boundaries.<sup>10</sup>

---

<sup>7</sup> Government of Canada, International Child Abductions: A guide for affected parents (Introduction), <https://travel.gc.ca/travelling/publications/international-child-abductions>. (Last visited: Feb 7, 2025).

<sup>8</sup> Hague Conference on Private International Law, *Status Table (of Contracting Parties)*, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, (Last visited: Feb. 6, 2025).

<sup>9</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, (the “Hague Abduction Convention,” or the “Convention), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>, (Last visited: Feb 8, 2025).

<sup>10</sup> Hague Conference on Private International Law, *Child Abduction Section*, <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction>, (Last visited: Feb. 6, 2025).

The Hague Abduction Convention, as indicated by its name, serves as a civil remedy. However, it's important to note that child abduction, often referred to as parental kidnapping, is also regarded as a criminal offense in numerous countries, each with its own definition of the crime. Typically, the criminal aspects of child abduction do not align with its civil aspects. For example, in the United States, International Parental Kidnapping is classified as a federal crime.<sup>11</sup> Consequently, U.S. prosecutors may take action to investigate and prosecute the parent involved in the abduction. However, “prosecutors generally have no control over the custodial decisions affecting the child or whether foreign authorities will order the return of the child.”<sup>12</sup>

### **Preliminary requirements before invoking the Hague Abduction Convention**

The Hague Abduction Convention generally comes into play with respect to families with international dimensions, typically where one (or both) of the parents of a child have ties to a country other than the country where the child lives. The Convention is often invoked when one of the parents of a child in an international family, unilaterally removes her from her country of habitual residence to another (often the taking parent's country of origin), in violation of the left-behind parent's rights of custody.

One of the primary requirements for the Hague Abduction

---

<sup>11</sup> International Parental Kidnapping Act, 18 U.S.C. § 1204.

<sup>12</sup> Criminal Division, U.S. Dept. Of Justice, *International Parental Kidnapping: Legal Hurdles and the Return of a Kidnapped Child to the United States*, <https://www.justice.gov/criminal/criminal-ceos/international-parental-kidnapping>, (Last visited: Feb. 7, 2025).

Convention to apply is that both the countries concerned must be signatories to the Convention (typically referred to as the “Contracting States”). However, there are additional requirements. For instance, with respect to the U.S., the provisions of the Hague Abduction Convention can only be invoked with respect to a country that is not only a Contracting State, but is *also a treaty partner* with the U.S. Thus, even though Russia is a Hague signatory, the Convention will still not apply between Russia and the U.S. because both the countries are not treaty partners. The U.S. is treaty partners with 81 out of the total 103 Contracting States.<sup>13</sup>

Another requirement is that the abducted child must be under the age of 16, for the Convention to apply.<sup>14</sup> Additionally, the Convention will not apply to an international child relocation which is done pursuant to a court order allowing the parent to do so. In other words, if the child relocation was not done in violation of the left-behind parent’s rights of custody, the Convention won’t apply. Lastly, having rights of custody alone is not sufficient to allege violation, the left-behind parent must also be able to demonstrate that he or she was exercising his or her rights of custody at the time of wrongful removal of the child.

### **Primary object of the Hague Abduction Convention**

The main purpose of the Hague Abduction Convention is to facilitate

---

<sup>13</sup> U.S. Dept. of State, Bureau of Consular Affairs, *U.S. Hague Convention Treaty Partners 1980 Hague Convention on the Civil Aspects of International Child Abduction*, <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html>, (Last visited: Feb. 6, 2025).

<sup>14</sup> Hague Abduction Convention, *supra* note 10, art. 4.

the swift return of children who have been abducted and to protect the custody and access rights recognized by one Contracting State in other Contracting States.<sup>15</sup> Essentially, the Convention is designed to discourage parents from manipulating international jurisdictions to gain custody of a child.<sup>16</sup> In other words, it seeks to prevent the practice of forum shopping in custody cases.

Thus, if a parent unlawfully takes or keeps their child in another country without the other parent's consent or a court order from the child's "habitual residence", this action infringes on the other parent's "rights of custody". In such cases, the child should be returned to their habitual residence unless one of the six exceptions outlined in the Convention is applicable.

### **Key terms under the Hague Abduction Convention**

**Rights of Custody:** For the purposes of the Convention, "rights of custody" shall 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.<sup>17</sup> The petitioner/left-behind parent does not need a custody order from the country of the child's habitual residence to seek a return under the Hague Abduction Convention.<sup>18</sup> He or she may

---

<sup>15</sup> Hague Abduction Convention, *supra* note 10, art. 1.

<sup>16</sup> Elisa Pérez-Vera, Explanatory Report by Elisa Pérez-Vera, the Hague Conference Permanent Bureau at 3, ¶ 11, <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>, (Last visited: Feb. 6, 2025).

<sup>17</sup> Hague Abduction Convention, *Supra* note 10, *Article 5*.

<sup>18</sup> U.S. Dept. of State, Bureau Of Consular Affairs, *Getting Your Custody Order Recognized & Enforced in the U.S. Abduction cases where no court order exists*, <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/getting-custody-order-enforced-in-US.html#:~:text=Your%20attorney%20will%20advise%20you,may%20differ%20f>

show evidence of custodial rights through other civil documents, including a birth certificate.<sup>19</sup>

**Wrongful removal or retention:** The Convention provides that the removal or the retention of a child is wrongful where “it is in breach of rights of custody” of another; and *where* at the “time of such removal or retention those rights were actually exercised.”<sup>20</sup> In the U.S., the term “wrongful removal or retention” includes a removal or retention of a child before the entry of a custody order regarding that child.<sup>21</sup> In other words, a custody order is not required for a left-behind parent to prove that his or her child has been wrongfully removed or retained in the U.S.

**Habitual Residence:** The term “Habitual Residence” is not defined in the Convention, or the concerned implementing act in the U.S. (*discussed infra*). It is open for judicial interpretation and is often the center of legal debates in many jurisdictions. In the U.S., the applicable test to determine that habitual residence is that of the “totality-of-the-circumstances.”<sup>22</sup> Essentially, it means that all relevant factors will be considered by the court in determining whether the foreign country

---

rom%20the%20UCCJEA.&text=You%20do%20not%20need%20a,the%20UCCJEA's%20expedited%20enforcement%20procedures, (Last visited: Feb. 7, 2025).

<sup>19</sup> U.S. Dept. of State, Bureau of Consular Affairs, *Completing the Hague Abduction Convention Application: Supporting Documents*, <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/guidance-hague-application.html>, (Last visited: Feb. 7, 2025).

<sup>20</sup> Hague Abduction Convention, *supra* note 10, *Article 3*.

<sup>21</sup> International Child Abduction Remedies Act, *Section 11603(f)(2)*, [https://travel.state.gov/content/dam/childabduction/International\\_Child\\_Abduction\\_Remedies\\_Act.pdf](https://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf), (Last visited: Feb. 7, 2025).

<sup>22</sup> *Monasky v. Taglieri*, 140 S. Ct. 719, 726–27.

from where the child is alleged to have been abducted was the concerned child's home.

### **Exceptions/Defenses under the Hague Abduction Convention**

Under the Convention, a court may deny return of an abducted child if one of the following defenses apply:

1. "There is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."<sup>23</sup>
2. When "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".<sup>24</sup>
3. Where a period of more than one year has elapsed from the date of the wrongful removal or retention, and the commencement of the proceedings, and "the child is now settled in its new environment."<sup>25</sup>
4. Where the person seeking return "consented to or subsequently acquiesced in the removal or retention."<sup>26</sup>
5. The return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."<sup>27</sup>

---

<sup>23</sup> Hague Abduction Convention, *supra* note 10, art. 13(b).

<sup>24</sup> Hague Abduction Convention, *supra* note 10, art 13.

<sup>25</sup> Hague Abduction Convention, *supra* note 10, art 12.

<sup>26</sup> Hague Abduction Convention, *supra* note 10, art 13(a).

<sup>27</sup> Hague Abduction Convention, *supra* note 10, art. 20.

6. Where the person seeking return “was not actually exercising the custody rights at the time of removal or retention.”<sup>28</sup>

### **Burden of Proof for the Hague defenses in the U.S.**

**High burden of proof on the respondent in certain defenses:** In the case of an action for the return of a child, a respondent who opposes the return of the child by taking the defense of either *grave risk of harm* or the *violation of fundamental principles of human rights* has the burden to prove by “clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies.”<sup>29</sup> However, while on one hand the defense of grave risk of harm is the most commonly sought after defense in Hague return cases, there are not many reported cases which have successfully argued the defense of violation of fundamental principles of human rights.

For the rest of the defenses the burden of proof on the Respondent is that of the *preponderance of the evidence*, which has a relatively lower threshold.<sup>30</sup>

### **Landmark judgments by the U.S. Supreme Court concerning the Convention**

**Abbott v. Abbott**<sup>31</sup>: It was the first Hague case to ever reach the U.S. Supreme Court. The case concerned a Chilean mother who had brought the parties’ child to Texas, U.S. from Chile, without the

---

<sup>28</sup> Hague Abduction Convention, *supra* note 10, art. 13(a).

<sup>29</sup> International Child Abduction Remedies Act, *Section 11603(e)(2)(A)*, [https://travel.state.gov/content/dam/childabduction/International\\_Child\\_Abduction\\_Remedies\\_Act.pdf](https://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf), (Last visited: Feb. 7, 2025).

<sup>30</sup> *Id.*, *Section 11603(e)(2)(B)*.

<sup>31</sup> *Abbott*, 560 U.S. 13, 130 S. Ct. P. 1983, 1996 (U.S. 2010).

knowledge or consent of the father. The father brought a Hague case before the Texas District Court and lost. The first appellate court, i.e., the Fifth Circuit affirmed. The matter finally reached the U.S. Supreme Court, and the court decided in favor of the father, while holding that the father's *ne exeat* right (right to prevent departure of the child from Chile) which was granted to him by the Chilean court amounted to "rights of custody" under the Convention. In its judgment the Supreme Court also discussed at length the harmful impact of child abduction on children in general.<sup>32</sup>

***Chafin v. Chafin***<sup>33</sup>: This case involved the return of a child who had been abducted from Alabama, U.S., back to Scotland. The mother filed a Hague petition against the father, claiming he wrongfully kept the child in Alabama. The District Court ruled that the child's habitual residence was Scotland and decided in favor of the mother, allowing her to take the child back to Scotland. After returning, the mother started custody proceedings in Scotland, obtaining an order that prevented the father from taking the child out of the country. Meanwhile, the father appealed the District Court's decision, but the Eleventh Circuit Court deemed the appeal moot since the child was already in Scotland. Eventually, the father succeeded in obtaining a writ of certiorari from the U.S. Supreme Court. The Supreme Court determined that the father's appeal against the District Court order to return the child to Scotland was not moot simply because the mother had already brought the child back. In its ruling, the Supreme Court

---

<sup>32</sup> Discussed *supra* note 4.

<sup>33</sup> *Chafin v. Chafin*, 133 S.Ct. 1017 (U.S. 2013).

emphasized the importance of expediting Hague proceedings and allowing for stays when appropriate.

**Lozano v. Alvarez**<sup>34</sup>: This case involved the return of a child from New York, U.S., to the United Kingdom. The father initiated Hague proceedings after the child had been in New York for about 16 months. The mother raised the defense of having settled in New York for over a year. Both the District Court and the United States Court of Appeals for the Second Circuit ruled in favor of the mother. The father then appealed to the U.S. Supreme Court, arguing that the one-year period should be extended due to the mother's concealment of the child. The Supreme Court rejected this claim, stating that the one-year timeframe could not be extended through equitable tolling, as this concept is primarily recognized in the U.S. and is not applicable in many international jurisdictions.

**Golan v. Saada**<sup>35</sup>: This very highly contested case concerned New York, U.S. and Italy. The U.S. Supreme Court ruled in *Golan* that if a court determines that returning a child to their country of habitual residence would pose a serious risk of harm, it is not mandatory for the court to explore all possible measures to mitigate that risk before rejecting the petition for the child's return. The court also emphasized that the child's best interests are served when custody decisions are made by the court in the child's country of habitual residence.

**Monasky v. Taglieri**<sup>36</sup>: The Father filed a Hague return petition

---

<sup>34</sup> *Lozano v. Alvarez*, 134 S. Ct. 1224 (U.S. 2014).

<sup>35</sup> *Golan v. Saada*, 142 S.Ct. 1880 (U.S. 2022).

<sup>36</sup> *Monasky v. Taglieri*, 140 S.Ct. 719 (U.S. 2020).

before the District Court, Ohio for the return of the abducted child to Italy. This case set forth the governing standard on appeal for determining the Habitual Residence of a child. Such standard was set to be the “totality-of-circumstances,” where no one factor was dispositive of the outcome. Prior to *Monasky*, different Circuits had held different standards for such review, e.g. the last shared intent of the parents, the child’s circumstances and experiences, or a mix of both. *Monasky* effectively put an end to varied approaches and determined that the “totality-of-circumstances,” was to be the governing standard in such reviews.

### **Role of the Hague Court**

The courts handling a Hague abduction case do not make a custody determination.<sup>37</sup> The role of the courts under the Convention is simply to decide whether or not an internationally abducted child should be returned to their country of habitual residence, so that the courts in that country can then decide on the custodial aspects of the case. The Convention seeks to prevent the courts of the country to where a child is abducted from getting into a full plenary custody determination, e.g. a full and final custody determination based on the standard of the child’s best interest. The Convention’s core principle behind this is for only the concerned court in the child’s habitual residence to make that determination instead.

### **How is the Convention Implemented?**

The Convention requires each Contracting State to have a Central

---

<sup>37</sup> Hague Abduction Convention, *supra* note 10, art. 19.

Authority.<sup>38</sup>

The Australian Government Attorney-General's Department is the central authority for Australia.<sup>39</sup> In Canada, there is a Central Authority in each province and territory, as well as a federal Central Authority.<sup>40</sup> The International Child Abduction and Contact Unit (ICACU), Office of the Official Solicitor & Public Trustee, is the Central Authority for England.<sup>41</sup> In the U.S., the Office of Children's Issues serves as the Central Authority.

The Central Authority is the main point of contact for parents and other governments. The Central Authority has many responsibilities. They help locate abducted children. They encourage parents to find amicable solutions to abduction cases, and they help facilitate the safe return of children as appropriate.

In the U.S., when a left-behind parent files for return under the Convention to the U.S. Central Authority, it then forwards the application to their counterparts in the concerned foreign central authority where the child is believed to be located.<sup>42</sup> After confirming

---

<sup>38</sup> Hague Abduction Convention, *supra* note 10, art. 6.

<sup>39</sup> Federal Circuit and Family Court of Australia, *The Hague Convention on the Civil Aspects of International Child Abduction*, [www.fcjcoa.gov.au/fl/children/relocation-travel#:~:text=The%20Hague%20Convention%20on%20the,the%20central%20authority%20for%20Australia](http://www.fcjcoa.gov.au/fl/children/relocation-travel#:~:text=The%20Hague%20Convention%20on%20the,the%20central%20authority%20for%20Australia), (Last visited: Feb 7, 2025).

<sup>40</sup> Government of Canada, *International Child Abductions: A guide for affected parents: Glossary*, <https://travel.gc.ca/travelling/publications/international-child-abductions>, (Last visited: Feb 7, 2025).

<sup>41</sup> HCCH, United Kingdom-Central Authority, <https://www.hcch.net/en/states/authorities/details3/?aid=132>, (Last visited: Feb. 7, 2025).

<sup>42</sup> Dept. of State, Bureau of Consular Affairs, *Annual Report on International Child Abduction 2024*, Page 12, [https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2024%20Annual%](https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2024%20Annual%20Report.pdf)

the location of the child, the foreign central authority typically seeks a voluntary resolution, or mediation between the parents.<sup>43</sup> If the parents cannot reach a voluntary agreement, then the case generally moves to the judicial phase, during which a judge decides whether the child should return to the place of habitual residence.<sup>44</sup> In certain countries (e.g. Australia), the Central Authority brings judicial proceedings as an applicant in Hague Convention cases.<sup>45</sup> However, the left-behind parent has the option to bring the application themselves.<sup>46</sup>

In the U.S., documents submitted with a return application to the Central Authority are generally accepted as evidence in court without needing the typical formalities required for foreign documents. This streamlined process aims to avoid lengthy procedures and to fulfill the Convention's main purpose of ensuring the swift return of abducted children. However, some countries impose stricter procedural standards. For example, in Australia, if the documents included with a return application do not adhere to the stringent requirements set by the Federal Circuit and Family Court of Australia, the court may not accept them.

---

20Report%20International%20Child%20Abduction.pdf, (Last visited: Feb. 7, 2025).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Australian Govt., Attorney General's Dept., *The Hague application process for children in Australia*, [https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/international-parental-child-abduction#:~:text=An%20overseas%20parent%20\(the%20requesting,respondents%20to%20seek%20legal%20advice](https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/international-parental-child-abduction#:~:text=An%20overseas%20parent%20(the%20requesting,respondents%20to%20seek%20legal%20advice), (Last visited: Feb. 8, 2025).

<sup>46</sup> *Id.*

## What is an Implementing Act?

Generally, the Hague Convention is implemented in a Contracting State through an “Implementing Act”. In Australia, the implementing act for the Convention is essentially the Family Law Act 1975, which incorporates the necessary provisions to enforce the Convention.<sup>47</sup> It is implemented in England through the Child Abduction and Custody Act 1985.<sup>48</sup> Whereas in Canada, each Canadian province and territory has its own implementing act regarding the Convention. The International Child Abduction Remedies Act (“ICARA”) establishes the procedures for the implementation of the Convention in the United States.

## How do different courts function under the Convention?

ICARA provides that both U.S. State and U.S. District Court (“Federal Court”) shall have concurrent original jurisdiction of actions arising under the Convention.<sup>49</sup> In other words, when a child is internationally

---

<sup>47</sup> Report: International Parental Child Abduction To And From Australia, Implementation and operation of the Hague Convention in Australia, Page 7, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/childabduction/report/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2010-13/child\\_abduction/report/c02.ashx#:~:text=2.38%20Where%20a%20child%20who,the%20Family%20Court%20of%20Australia.&text=an%20overseas%20court%2C%20he%20or,Law%20Act%20and%20the%20Regulations,\(Last%20visited%20Feb.7,2025\).](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/childabduction/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/child_abduction/report/c02.ashx#:~:text=2.38%20Where%20a%20child%20who,the%20Family%20Court%20of%20Australia.&text=an%20overseas%20court%2C%20he%20or,Law%20Act%20and%20the%20Regulations,(Last%20visited%20Feb.7,2025).)

<sup>48</sup> Ministry of Justice, Practice Direction 12f – International Child Abduction, *The Central Authority for England and Wales Sec 2.6*, [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12f#:~:text=The%20Child%20Abduction%20and%20Custody,the%20Luxembourg%20Convention\),\(Last%20visited%20Feb.7,2026\).](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12f#:~:text=The%20Child%20Abduction%20and%20Custody,the%20Luxembourg%20Convention),(Last%20visited%20Feb.7,2026).)

<sup>49</sup> International Child Abduction Remedies Act, *Section 11603(a)*, [https://travel.state.gov/content/dam/childabduction/International\\_Child\\_Abduct](https://travel.state.gov/content/dam/childabduction/International_Child_Abduct)

abducted into the U.S., the left-behind parent/petitioner has the option to initiate a Hague return petition either in the State Court, or the Federal court of the concerned jurisdiction in the U.S. However, if a case is brought before the concerned U.S. State Court, the respondent will have the right to remove that case to the Federal court.<sup>50</sup> This right, however, will not be available where a respondent is merely trying to “forum shop,” after an adverse ruling from the State court.

The Convention mandates the courts in Contracting States to “act expeditiously” and reach a decision within six weeks of the commencement of proceedings.<sup>51</sup> However, in practice, it usually takes longer than that.

In the event that a U.S. court issues an order for the return of a child under a Hague petition, it can require the respondent or taking parent to cover necessary expenses incurred by the petitioner or left-behind parent. This includes court costs, legal fees, expenses for foster care or other forms of care during the proceedings, and transportation costs associated with the child's return, unless the respondent can clearly demonstrate that such an order would be inappropriate.<sup>52</sup>

---

ion\_Remedies\_Act.pdf, (Last visited: Feb. 7, 2025).

<sup>50</sup> 28 USC 1441(A): Removal of civil actions, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1441&num=0&edition=prelim>, (Last visited: Feb 7, 2025).

<sup>51</sup> Hague Abduction Convention, *supra* note 9, art. 11.

<sup>52</sup> International Child Abduction Remedies Act, *Section 11603(a)*, [https://travel.state.gov/content/dam/childabduction/International\\_Child\\_Abduction\\_Remedies\\_Act.pdf](https://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf), (Last visited: Feb. 7, 2025).

## India and International Parental Child Abduction

India has long wrestled with the idea of signing the Convention. But despite significant international pressure, and despite the Hon'ble Indian Law Commission's recommendation in 2009 that India must accede to the Convention,<sup>53</sup> India is yet to sign it.

After years of back and forth on the issue, in 2018, upon the recommendation of the Committee formed under the Chairmanship of Hon'ble Justice Rajesh Bindal (the "Bindal Committee/the Committee"), India refused to sign the Hague Convention.<sup>54</sup> It was argued in the Bindal Committee Report that signing the Convention would deprive the Indian courts of their discretion to refuse the return of a child in a Hague case where such a return is not in the "best interest of the child."<sup>55</sup> In addition, and more significantly (it appears), that India had concerns about cases where the taking parent (generally the mother) was "fleeing from any incidence of domestic violence or any mental or physical cruelty or harassment."<sup>56</sup> Various unidentified

---

<sup>53</sup> Law Commission of India, *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)* at 10 (2009), <http://indiankanoon.org/doc/175662555/>, (Last visited: Feb 6, 2025).

<sup>54</sup> Rajesh Bindal, *Report of Justice Rajesh Bindal Committee to Examine the Civil Aspects of International Child Abduction Bill, 2016, and The Protection of Children (Inter-Country Removal and Retention) Bill, 2016*, P. 190, <https://images.assettype.com/barandbench/import/2018/05/Justice-Rajesh-Bindal-Committee-Report-on-Civil-Aspects-of-International-Child-Abduction-Bill1.pdf>, (Last visited: Feb. 8, 2025).

<sup>55</sup> The Bindal Committee Report, *supra note 48*, P. 220. Section 24(a) The Protection of Children (Inter-country Removal and Retention) Bill, 2018. (As part of its recommendations, to create a "robust mechanism ... under the domestic laws in India" for the prompt return of wrongfully returned children, this bill was the draft legislation put forth by the Bindal Committee).

<sup>56</sup> The Bindal Committee Report, *supra note 48*, Page 220. Section 24(d), The Protection of Children (Inter-country Removal and Retention) Bill, 2018.

individuals and stakeholder organizations, whose comments were duly noted by the Bindal Committee also stressed that, “India should bat for considerable amendments in the Hague Convention on the Civil Aspects of International Child Abduction ...”<sup>57</sup>

The Bindal Committee Report proposed a pan-India draft legislation,<sup>58</sup> and recommended that an Inter Country Parental Child Removal Disputes Resolution Authority must be established to resolve cases of inter-country removal and retention of children.<sup>59</sup> The Committee also recommended that the parties to such disputes should try and resolve their matters through mediation. Accordingly, a Mediation Cell was established in 2018 under the auspices of the National Commission for the Protection of Child Rights.<sup>60</sup>

Nearly seven years have passed since the release of the Bindal Committee’s Report, yet the Proposed Bill remains unsigned, the Proposed Authority has not been established, and the Mediation Cell has not addressed any abduction cases—specifically between the United States and India.<sup>61</sup> Meanwhile, incidents of international child removal to and from India continue to increase.

### **Why must India revisit its reasons for having declined signing the Convention?**

**The concept of “best interest” is *almost universally* considered**

---

<sup>57</sup> The Bindal Committee Report, *supra* note 48, P. 158.

<sup>58</sup> The Protection of Children (Inter-Country Removal and Retention) Bill, 2018, The Bindal Committee Report, *supra* note 48, P. 205.

<sup>59</sup> The Bindal Committee Report, *supra* note 48, P. 192.

<sup>60</sup> State Dept., Annual Report, *supra* note 36, P. 38

<sup>61</sup> *Id.*

**the most important factor when it comes to making decisions for children.**<sup>62</sup> This standard is applied in child custody determination matters in all the developed legal systems of the world, and to most Hague countries. Thus, if India was a Contracting State and ordered the return of an abducted child to another Contracting State (e.g., NY, U.S.), irrespective of where a child custody determination is made the best interest of child standard will apply, nevertheless.<sup>63</sup> Same principle would apply if a child is abducted from New York to India, and the New York court then orders a return.

**Only concentrated cooperation pursuant to an international agreement can effectively combat this problem.** Thus, even if the Bindal Committee's proposed bill becomes the law, it cannot still prevent a foreign court from exercising child custody jurisdiction over a child who was wrongfully removed to India, and neither can it prevent the left-behind parent from initiating criminal proceedings against the taking parent for the offense of international parental kidnapping in the concerned foreign country.<sup>64</sup> Thus, such a pan-India legislation might still be unable to "protect" a taking parent in India. On the contrary, the Hague Convention has the required global backing. Contracting States are required to cooperate with each other to secure the prompt, safe, and voluntary return of children.<sup>65</sup> But no

---

<sup>62</sup> Littlechild, B.; Housman, C., *Applying Universal Principles of 'Best Interest': Practice Challenges across Transnational Jurisdictions, Cultural Norms, and Values*, 2023, 10, 537. <https://doi.org/10.3390/children10030537>, (Last visited: Feb. 8, 2025).

<sup>63</sup> Nag, S, *India – Is it time to sign the 1980 Hague Abduction Convention?* <https://www.familylawweek.co.uk/articles/india-is-it-time-to-sign-the-1980-hague-abduction-convention/>, (Last visited: Feb. 8, 2025).

<sup>64</sup> *Id.*

<sup>65</sup> Hague Abduction Convention, *supra* note 9, art. 7.

foreign court will not be under any obligation to honor Indian judgments in this regard.

**Non-Resident Indian (NRI) women experiencing domestic violence (DV) abroad often cite difficulties in formally reporting such conduct to the local police or in seeking assistance from the DV victims support groups.** Historically, some of the commonly attributed factors for immigrant women's inability to seek help included institutional racism, restrictive immigration laws, religious and cultural barriers, and lack of diversity within frontline services. However, over the years, the overall DV survivor support system has seen significant transformation globally and continues to evolve to meet the needs of survivors.

**In the U.S., for instance, immediate as well as long-term planned assistance is available to DV victims irrespective of their immigration status, income level, gender, race, sexual orientation, or nationality.** There are highly effective and strong laws in place to address DV issues.<sup>66</sup> Several dedicated non-profit organizations are working towards the safety and healing of DV victims.<sup>67</sup> These organizations provide crisis intervention, safety planning, emergency shelter, permanent housing, health care,

---

<sup>66</sup> NY Courts, Court Help, *Domestic Violence Order of Protection Basics*, <https://nycourts.gov/CourtHelp/Safety/OP.shtml>; State of New Jersey, Dept. of Law & Public Safety, Office of Attorney General, *Domestic Violence*, <https://www.nj.gov/njsp/division/operations/domestic-violence-info.shtml> (Purposely limited examples of only 2 States) (Last visited: Feb. 8, 2025).

<sup>67</sup> National Domestic Violence Hotline, <https://www.thehotline.org/>; Sanctuary for Families, <https://sanctuaryforfamilies.org/>; WomanKind, <http://iamwomankind.org/>; SafeHorizon, <https://www.safehorizon.org/>.

counseling, culturally sensitive legal representation, and economic empowerment. Legal representation through attorneys associated with these organizations includes - but is not limited to - seeking orders of protection, filing for an independent immigration status for the victim, initiating divorce, child custody, or visitation proceedings. Help is often available in the language that the victim speaks.

**For emergency purposes, including reporting a crime in progress, an impending threat, fear of violence, or past domestic violence, victims can call 911.** Upon arrival, the police will determine whether the victim was subjected to a serious criminal act. If so, the police in certain states (including New York and New Jersey) must arrest the abuser, also generally referred to as the “mandatory arrest” law. The police must also arrest the accused for a less serious offense, if committed in violation of an existing court order of protection. Shortly after the arrest, the accused will be charged and presented before the court. Depending on several factors, the accused may be eligible for bail, pending a criminal trial. If found guilty, subsequently, the abuser will be sentenced accordingly.

**In most cases, the courts will issue a Temporary Restraining Order** against the abuser. Within a few days thereafter, another court hearing will be scheduled where the judge will decide whether to issue a Final Restraining Order. The terms “protective order”, “restraining order”, or an “order of protection” are often used interchangeably.

**The purpose of an order of protection** is to restrict the actions of an individual who has harmed or threatens to harm another person. Its primary aim is to enhance safety, particularly in cases of domestic

violence. This order can prohibit the abuser from injuring, threatening, or harassing the victim or anyone named in the document. Additionally, it may require the abuser to vacate a shared residence, adhere to custody arrangements for any children involved, and fulfill child support obligations.

**Under circumstances which do not amount to an emergency**, the victim can approach the family court concerned and file a family offense petition, seeking an order of protection. She can also commence a criminal complaint against the accused by going to the police or the district attorney. It is generally easier to get an order of protection from a family court instead of a criminal court because it requires a lower level of proof.

**Commencing a family offense petition against a spouse will also likely trigger a decision to file for divorce.** Either party can submit a divorce petition to the appropriate court. The victim must inform the court that a family offense petition is also pending concerning the parties. This will likely result in both cases being handled together in an Integrated Domestic Violence (IDV) court, where a single judge will oversee both matters.

Most other Hague countries such as the U.K.,<sup>68</sup> Australia,<sup>69</sup> Canada,<sup>70</sup>

---

<sup>68</sup> Gov.UK, Domestic Abuse: How to Get Help, November, <https://www.gov.uk/guidance/domestic-abuse-how-to-get-help>, (Last visited: Feb. 8, 2025).

<sup>69</sup> Australian Government, *Family and Domestic Violence*, <https://www.servicesaustralia.gov.au/family-and-domestic-violence>, (Last visited: Feb. 8, 2025).

<sup>70</sup> Government of Canada, *Find family violence resources and services in your area*, <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/services.html>, (Last visited: Feb. 8, 2025).

or New Zealand,<sup>71</sup> have effective mechanisms in place against domestic violence.

**Nevertheless, in many cases, NRI women do not formally report domestic violence and prefer returning to India instead.** In the present day and age, a decision to return, instead of seeking legal help, defies logic, but it is likely an offshoot of centuries-long conditioning of women to prefer flight over fight or our cultural acceptance of domestic abuse. Poor financial planning, lack of an emergency fund, being cash-poor, inability to find timely and effective legal resources, and the temptation of fighting legal battles on their home turf - all such factors add up.

**However, if the NRI woman brings the couple's child(ren) to India without the father's knowledge or consent, she risks committing International Parental Child Abduction under the laws of countries such as the U.S., which is considered a serious felony.** A U.S. court will uphold its authority in child custody cases, regardless of the child's physical location outside the U.S. The court can require the mother to bring the child back immediately. If she fails to comply, the father may be granted sole legal and physical custody, and the mother could face contempt charges. Moreover, the father might file a criminal complaint against her, which could result in a Red Corner Notice or an Interpol alert being issued.<sup>72</sup>

---

<sup>71</sup> New Zealand Government, *Domestic and Family Violence*, <https://www.govt.nz/browse/law-crime-and-justice/abuse-harassment-domestic-violence/domestic-and-family-violence/>, (Last visited: Feb. 8, 2025).

<sup>72</sup> Nag. S., The Tribune, *Navigating divorce across borders: Don't just opt, make a choice*, Dec. 19, 2024, <https://www.tribuneindia.com/news/diaspora/navigating-divorce-across-borders-dont-just-opt-make-a-choice/>, (Last visited: Feb. 8, 2025).

### **How does India currently handle such cases?**

When a child is abducted to India, there is no set procedure for the left-behind parent to follow. One of the very limited options before such a parent is to initiate a writ of habeas corpus under the Indian court's *parens patriae* or under its emergency jurisdiction. In stark contrast to what a Hague court would do (i.e., conduct a quick trial to see if any of the defenses applied, otherwise order the return of the child), the Indian court would conduct a summary or a detailed inquiry into the custodial aspects of the case, while applying the best interest of the child standard.

However, it is peculiar to note, the similarity between the applicable factors in a writ of Habeas Corpus and those of the defenses<sup>73</sup> under the Hague Abduction Convention. The most common factors which determine the outcome of a Writ of Habeas Corpus include the alacrity with which a parent moved the concerned Indian court; the age and opinion of the child; the time that the child has spent in India since the alleged wrongful removal; allegations of domestic violence, sexual misconduct, substance abuse, the consent of the left-behind parent in allowing the child's removal to India; the existence of a foreign custody order; the fact that the taking-parent had initiated or participated in the foreign custody matter, and the left-behind parent's association with the child.<sup>74</sup> These factors present almost a spitting image of the

---

<sup>73</sup> Discussed *supra*.

<sup>74</sup> Nag, S., The Journal of the American Association of Matrimonial Lawyers, International Child Custody Disputes Between India and the United States: No Hague, So Vague!, Vol. 36, 2024, P. 474, [https://www.aaml.org/wp-content/uploads/02\\_MAT\\_36\\_2\\_Article-8\\_Child-Custody.pdf](https://www.aaml.org/wp-content/uploads/02_MAT_36_2_Article-8_Child-Custody.pdf), (Last visited: Feb. 8, 2025).

defenses provided under the Convention.

However, where even unsubstantiated allegations of sexual abuse with respect to the father and the child are made by the taking mother, it is highly likely that, the Indian court will not order the return of the child. At least in two cases from the past two years,<sup>75</sup> the mother was successful in retaining the child in India, despite the fact that she fully participated in the foreign court's child custody proceedings, that the allegations of sexual abuse were unfounded by the concerned authorities in the U.S., and that majority of the other remaining factors favored the father.

In *Nathan*, the father even quickly appealed the High Court's order before the Supreme Court of India but he was instead ordered to appear before the lower family court for a full custody trial.<sup>76</sup> It has been years since his child was abducted to India, and I am informed that he has only seen her once (a supervised visit in the courtroom), and that the child is sufficiently brain-washed against him.

### **Why should Indian sign the Convention?**

From a global perspective, to allow a taking parent to invoke the *parens patriae* jurisdiction of the Indian court and for the Indian courts to then

---

<sup>75</sup> *Nathan v. State of Haryana*, Punjab & Haryana High Court (Aug. 21, 2023) CRWP 1671 of 2023 (O&M), <https://indiankanoon.org/doc/171491290/>, (Last visited: Feb. 15, 2025).; *Katphal v. UOI*, Delhi High Court (Dec. 23, 2024), CRL.M.A. 2007/2024 in W.P.(CRL) 2049/2022, <https://indiankanoon.org/doc/144158501/>, (Last visited: Feb. 15, 2025).

<sup>76</sup> *Nathan v. State of Haryana*, Supreme Court of India (Oct 16, 2023) Petition(s) for Special Leave to Appeal (Crl.) No(s). 13243/2023 (India), <https://www.casemine.com/judgment/in/652e176d72480234280e04a5>, (Last visited: Feb. 15, 2025).

conduct a de-novo custody determination while applying the standard of the best interest of the child (which is usually reserved for the court conducting a custody trial) may be considered disrespectful to the court that had primary jurisdiction as it would suggest that that country did not have an effective legal system to protect the welfare of the child in question.

It would reduce the burden on an already over-burdened Indian judiciary that does not need to devote significant resources to a subsequent consideration of a matter that (has already been) should or will be litigated in the concerned foreign country.

A clear stance from the Indian judiciary on this issue would amount to significant reduction in exorbitant legal fees. The litigating parties do not need to expend gigantic amounts on parallel litigations in two countries.

The concerned parties will not have to undergo the stress of securing and producing relevant evidence in a forum far away from where the child's home. If there is no possibility of a parallel jurisdiction, the parties will not be expected to provide evidence for a subsequent civil/criminal action, and it would further eliminate the possibility of inconsistent results from the execution of multiple judgments.

India would lose the unbecoming global tags of a noncompliant country, a safe haven for child abduction, or a lesser developed legal system.

### **Options for the parent who wishes to relocate to another country**

The parent who wishes to relocate to another country when their

relationship with the other parent dissolves, and when they have sufficient supporting material to prove that they will be able to provide a better life for the child in their home country (such as by securing a job, and having the much-needed support system of family and friends, or where the other parent has put the child in physical danger, or has serious substance abuse issues) should apply to the concerned court for international child relocation.

Alternatively, carefully drafted Separation Agreements, in the form of a court order, can play a meaningful role in facilitating the continuation of a meaningful relationship for a child with both of their parents when the parents are living in different countries.

### **What the left-behind parent must never do?**

In times of extreme stress, some parents might resort to unlawful methods to recover their child, such as traveling to the foreign country to “nab” the child. Although these approaches, like hiring individuals to help, may seem quicker and easier, they often break the laws of both nations and can complicate the situation further. For example, if the taking parent has obtained a custody order from Indian courts, the left-behind parent's direct removal of the child from India could lead to their arrest or even imprisonment. Furthermore, any illegal attempt to recover a child may adversely affect the left-behind parent's custodial rights.

### **Conclusion: Let us not be an ostrich!**

We can no longer bury our head in the sand. International parental child abduction is not a theoretical or marginal problem for India. It is

a recurring, deeply human crisis that arises at the intersection of family breakdown, migration, gendered expectations, and legal fragmentation. As India's global diaspora continues to expand, so too does the frequency with which children find themselves caught between competing jurisdictions, inconsistent judicial approaches, and prolonged uncertainty that no child should be expected to endure.

India's continued non-accession to the Hague Abduction Convention has created a system that is well-intentioned but structurally inadequate. While Indian courts rightly emphasize the best interests of the child, the absence of a uniform, internationally coordinated return mechanism has resulted in prolonged litigation, parallel proceedings, and outcomes that vary widely depending on the forum seized first. In practice, this has often meant that allegations, substantiated or otherwise, are litigated years after a child's removal, long after the damage of disruption, alienation, and instability has already taken root.

Concerns surrounding domestic violence, particularly the protection of NRI women, are legitimate and must never be minimized. Yet the Hague framework does not require blind or mechanical returns. Its carefully crafted defenses, coupled with evolving and robust domestic-violence protections in most Contracting States, are designed precisely to ensure that children are not returned to situations of grave risk. What the Convention seeks to prevent is not protection, but unilateral self-help that replaces judicial process with irreversible *fait accompli*.

Absent accession, India remains outside a global system of reciprocity and cooperation that is specifically designed to discourage forum shopping, reduce judicial burden, and restore children swiftly to the

courts best placed to decide their long-term welfare. Domestic legislative proposals, however well-drafted, cannot substitute for international obligation, nor can they compel foreign courts to defer to Indian judgments in abduction cases.

Ultimately, this is not a question of sovereignty versus submission, or mothers versus fathers. It is a question of whether children should bear the cost of legal uncertainty created by adults and institutions. A principled re-engagement with the Hague Abduction Convention, grounded in India's constitutional values, judicial discretion, and child-centric ethos, would not weaken India's legal system. It would strengthen it, restore credibility, and, most importantly, align it with a global consensus that child abduction is not a custody strategy, but a harm that demands swift, coordinated, and humane resolution.

## PART-2

### INDIA AND THE HAGUE DIVIDE: A COMPARATIVE INQUIRY ON INTERNATIONAL PARENTAL CHILD ABDUCTION

*Ms. Riya Koul\* and Ms. Neelam Tholia♦*

#### Introduction

International Parental Child Abduction (IPCA) has emerged as a pressing global issue due to reasons such as mobility, transnational marriages, and cross-border custody disputes. IPCA can be defined as the unilateral removal or retention of a child across borders by one parent, often against the will of the other. Questions regarding welfare of children, rights of parents and international legal cooperation are raised. The Hague Convention of 1980 that addresses the Civil Aspects of International Child Abduction provides a procedural guideline to IPCA. Its effectiveness however relies on ratification by the signatory states and whether it is enforced by them. Even though India has a growing diaspora and has witnessed more cases of cross-national conflicts, it has not signed the Convention. Rather, it is based on domestic custody schemes developed through the Guardians and Wards Act, 1890 and judicial interpretation. This non-participation gives rise to delayed and unequal results but also indicates that India is prioritizing the interests of maternal custodial agreements, cultural

---

\* Riya Koul is an assistant professor at Greater Noida Academy of Legal studies & Research, GNIOT Group of Institutes, Noida, INDIA. She can be contacted at [riyakoulrk@gmail.com](mailto:riyakoulrk@gmail.com)

♦ Neelam Tholia is a research scholar at Bennett University, Greater Noida, INDIA. She can be reached at [L24.SOLP0007@bennett.edu.in](mailto:L24.SOLP0007@bennett.edu.in)

independence, and sovereignty issues. This research paper examines the tendencies of migration and custody disputes statistics and annual reports published by the U.S. Department of State, and the judicial pronouncement and also compares the status of India with the Hague signatories.

It dwells upon the Cross-jurisdictional comparisons with the Hague signatories such as the United Kingdom, Australia and others which show that there are glaring differences in the rate of returns and time of resolution. It sheds light on structural gap between the treaty and purely domestic responses. The results indicate that even though the Indian structure is conducive to its own citizens, it compromises uniformity and predictability in the settlement of disputes. The possible policy options that can be followed by India are the measures such as bilateral agreements, formal statutory frameworks, and even enhanced consular interventions. All this would strike a balance between the issue of sovereignty and the need to protect the best interests of the child, therefore, positioning India in a more constructive international discourse on IPCA.

## **I. Case Studies on International Parental Child Abduction: An Introduction**

Children are often silent victims when parental disputes cross international borders. The consequences are profound, emotional, legal, and diplomatic. When one parent wrongfully removes or retains a child across national borders without the consent of the other parent or in violation of custody rights, it is known as International Parental

Child Abduction (*hereinafter referred to as IPCA*)<sup>1</sup>. The impact of IPCA is serious. For children, abduction can cause long-term emotional and psychological harm, as they are forced to adapt to a new environment while being caught in parental conflicts. For left-behind parents, the process of securing the child's return is expensive, uncertain, and emotionally draining, especially when pursued in an unfamiliar legal system. IPCA creates sudden disruption in a child's life, often separating them from their familiar home, community, and education. It also produces complex legal disputes, because courts of more than one country can claim the authority to decide custody. Upon studying these global court decisions offer critical insights into the practical realities of IPCA and the impact of treaty adherence.

In India, *V. Ravi Chandran v. Union of India* (2010)<sup>2</sup> emphasized the problem of handling IPCA in the domestic courts. The Supreme Court exercised its jurisdiction when an Indian child was moved to a foreign country and stressed the need of cooperation and involvement of India with its foreign counterparts. The Court also gave a hint towards the usefulness of international treaty frameworks, to provide predictable and timely resolutions. The case has highlighted a very important fact: that the welfare and stability of children should be the most important and that international obligations should be considered by the courts, to avoid a long-term trauma.

Although the judiciary is mindful of the fact that the lack of formal

---

<sup>1</sup> International Parental Child Abduction, U.S. Dep't of State, <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html> (last visited Sept. 23, 2025).

<sup>2</sup> *V. Ravi Chandran v. Union of India*, (2010) 1 SCC 174 (India).

international systems may transform cases of custody into years of battles. The case of *Vikram Jagtiani and his daughter Nikhita*<sup>3</sup>. tragedy reflects this. In 2013, her mother abducted four-year old Nikhita to Mumbai even though they had shared custody and habitual residence in New York. The kidnapping was organized with great precision: the mother went on a one-way ticket, took Nikhita out of school, and refused to obey the orders of American courts. The quest of Vikram to seek justice meant that he had to manoeuvre not only around the Indian legal red-taping but also around the jurisdictional arbitrage by having the mother initiate various civil and criminal cases to torment him and his extended family. The emotional battle was enormous. A completely innocent child, Nikhita, turned out to be a chess piece in a cross-border legal game, as her father had to spend years of his life in uncertainty and institutional barriers. His appearance before the U.S Congress marked the inability of India to acknowledge IPCA as a form of human rights breach and the extensive human cost of left-behind parents. In the absence of enforceable international frameworks, a child such as Nikhita will not have protection and the parents will be left to go on an uphill battle with complicated legal systems.

The same struggles have been experienced across the world. The *Goldman Case (2004–2009)*<sup>4</sup> in Brazil illustrates the logistical and

---

<sup>3</sup> Vikram Jagtiani, Testimony Before the H. Comm. on Foreign Affs., Subcomm. on Glob. Hum. Rts., The Goldman Act to Return Abducted American Children: Enforcement Is Not Optional, 115th Cong. 3 (Apr. 6, 2017), <https://www.congress.gov/115/meeting/house/105845/witnesses/HHRG-115-FA16-Wstate-JagtianiV-20170406.pdf> (last visited Sept. 23, 2025).

<sup>4</sup> Edecio Martinez, Brazil Custody Case: Boy Ordered Returned to American Father David Goldman, CBS News (Dec. 23, 2009), <https://www.cbsnews.com/news/brazil-custody-case-boy-ordered-returned-to->

emotional problems of IPCA. Ean Goldman who was kidnapped by his mother and was held by his step father after the death of his mother spent almost six years without seeing his father. It took a long litigation process, diplomatic intervention and intervention of U.S Congress before the Brazilian Supreme Court ordered the returns of Sean. The case shows that even in nations where there is a commitment to follow the international treaties, enforcement can turn out to be slow, lengthy and emotionally challenging thus the importance of strong international law regimes.

In *Vikrama P. V. Mocherl v. State of Rajasthan* (2024)<sup>5</sup>, a child of U.S. origin held captive in India, State of Rajasthan needed an elegant juggling between international and child welfare. The father was allowed to have custody but the mother was allowed to have maternal contact. Though this ruling serves to show the judicial care, it also highlights the weakness of national strategies that act alone in addressing cross-border kidnappings. The human aspect is also emphasized in the case of an Indian cricketer Shikhar Dhawan. His mother separated and took him to Australia with his son, Zoravar. Dhawan has never seen his son though Delhi court orders have given him the right to visit his son. The case highlights one of the recurrent trends: despite the responsible take of the courts, the lack of enforceable international mechanisms prolongs uncertainties and leaves children and parents in a state of emotional limbo.<sup>6</sup>

---

american-father-david-goldman (last visited Sept. 23, 2025).

<sup>5</sup> *Vikrama P. V. Mocherla v. State of Rajasthan*, 2024 SCC OnLine Raj 3423 (Raj. H.C.) (India).

<sup>6</sup> Vaibhav Tiwari, *Shikhar Dhawan Opens Up Emotionally About Son Zoravar*,

## II. The Hague Convention and Global Responses to International Parental Child Abduction

**A. Origins and Objectives of The Hague Convention:** In the post–World War II era, international mobility had increased dramatically due to labour migration, educational opportunities, and transnational marriages. This in turn has produced a growing number of cases in which one parent, often in the midst of a custody dispute, unilaterally removed the child to another jurisdiction without the consent of other parent or in the violation of their custody rights to a jurisdiction that is more favourable to them or to a place where they believe that courts are more likely to rule in their favour (*commonly referred to as forum shopping*). As a result, Courts were faced with conflicting custody decrees; parents engaged in forum shopping and children subjected to abrupt displacement.

The drafters of the Convention sought to respond to these challenges by developing a treaty that would restore predictability to family law and thus the Hague Convention came into being. The Hague Convention, adopted on October 25, 1980, under the auspices of the Hague Conference on Private International Law (HCCH), addresses the civil aspects of IPCA by establishing a cooperative framework

---

Says "I Just Want Him to Know...," LiveMint (May 24, 2025), <https://www.livemint.com/sports/shikhar-dhawan-opens-up-emotionally-about-son-zoravar-says-i-just-want-him-to-know-11748140492421.html> (last visited Sept. 23, 2025); see also Times of India, Shikhar Dhawan Shares Heartfelt Advice for Son Zoravar Amidst Divorce Challenges (May 29, 2025), <https://timesofindia.indiatimes.com/sports/cricket/news/shikhar-dhawan-shares-heartfelt-advice-for-son-zoravar-amidst-divorce-challenges/articleshow/121487954.cms> (last visited Sept. 23, 2025).

among contracting states. Its central objectives is to ensure the prompt return of children who are wrongfully removed or retained in the jurisdiction of a contracting state to the place of their habitual residence and to assure that rights of custody and access under the law of one contracting state are respected in other contracting states as well<sup>7</sup>. The Convention applies to children under 16 years who are habitual residents of a contracting state immediately before any breach of custody rights<sup>8</sup>.

**B. Core Principles and Procedural Architecture:** The Convention rests upon three interlocking principles. These principles are: -

1 *Doctrine Of Habitual Residence:* -

Jurisdiction is pegged in the state most closely affiliated with the child through the doctrine of habitual residence. The Convention does not consider the citizenship or residence of the parent but emphasizes on the ordinary place of life of the child, which is why the Convention does not introduce complicated issues regarding the law but encourages to remain in the stable environment of the child.

2 *The Principle of Prompt Return:* -

Second is the principle of prompt return that requires the courts to operate speedily and preferably adjudicate the return petitions within six weeks<sup>9</sup>. This is a time-based structure that shows the realization that the longer a child is in a new jurisdiction, the greater the chances of a

---

<sup>7</sup> Hague Convention on the Civil Aspects of International Child Abduction, art. 1, Oct. 25, 1980, 1343 U.N.T.S. 89.

<sup>8</sup>Id., art. 4

<sup>9</sup> Id., art. 11.

new normal will be established that will threaten repatriation.

In the case of *Nisbet v. Bridger* (2023)<sup>10</sup> the U.S District Courts for the District of Oregon assisted in developing the procedural structure in the course of which the Hague petitions are developed. It affirmed that the courts should be able to ease the evidentiary the rules to respect the Convention command of speed and efficiency, and retain a high standard of proof on parties' invocations of exceptions such as grave risk. It reaffirmed that Hague proceedings are not trials of custody, but emergency measures needed to put back in place the status quo ante without causing any harm to the children.

### **3 Exceptions: -**

The third principle is the narrowly defined exceptions under Article 13. Courts may refuse return only if the left-behind parent consented or acquiesced, if the child objects and is of sufficient maturity, or if return would expose the child to a grave risk of physical or psychological harm. The limited scope of these exceptions reflects the Convention's deterrent function: parents are discouraged from unilateral removals by the knowledge that foreign courts will not entertain custody claims on the merits.

Recent years have seen Hague Convention cases that have made the hard line that courts have to tread in international parental child abduction cases. In *Kelly v. Turner* (2025)<sup>11</sup>, where a father wanted his

---

<sup>10</sup> Andrew Charles Nisbet v. Spirit Rose Bridger, No. 3:23-cv-00850-IM, 2023 WL 6994648 (D. Or. Oct. 24, 2023), aff'd, No. 23-3877, 2024 WL 5178814 (9th Cir. Dec. 20, 2024).

<sup>11</sup> Kelly v. Turner, No. 3:25-cv-00247-SI (D. Or. Apr. 25, 2025),

young daughter back to Mexico stating that the mother had taken her away illegally. However, the court was faced with alarming facts of continued domestic violence, violent tantrums, and threats that left both the mother and child in a state of terror. The videos, witness testimony, and the credible version of the mother created a picture of a child growing up with rage and intimidation. In the end, the court rejected the petition of the father and ruled that returning the little girl would place her at a serious risk of physical and mental harm. The ruling highlighted a bitter reality that even though the Hague Convention stresses on prompt return, it cannot disregard the lived reality of children who would be put in danger had they been returned.

In *Armand v. Armand* (2025)<sup>12</sup>, The court was guided by the facts to a different conclusion (Armand, 2025). In this case, a mother had left France secretly with her two children and had returned to Missouri, claiming that she had escaped a house of horrors and that the children would be put in danger by going back home. The father wanted them back to France that they considered their usual home after close to seven years of schooling, friendships and community relations in France. Although the mother has claimed both emotional and physical abuse, her assertions were weakly supported and not corroborated as per the law to pose a serious risk defence. The court held that France was obviously the home of the children and sent them back which

---

[https://www.govinfo.gov/content/pkg/USCOURTS-ord-3\\_25-cv-00247/pdf/USCOURTS-ord-3\\_25-cv-00247-0.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-ord-3_25-cv-00247/pdf/USCOURTS-ord-3_25-cv-00247-0.pdf) (last visited Sept. 23, 2025)

<sup>12</sup> *Armand v. Armand*, No. 4:24-cv-00974-HEA, 2025 WL 1934921 (E.D. Mo. Apr. 30, 2025), INCADAT HC/E/US 1622, <https://www.incadat.com/en/case/1622> (last visited Sept. 23, 2025).

upheld the principle that the issues of custody have to be adjudicated in the right place, and not in the country that a parent is more comfortable with. As one analyses, the cases narrate a remarkable tale of the ongoing development of international parental child abduction law. The rule of return, which is required to protect the individual welfare of the child, may incur serious bodily or psychological damages upon the child, or where a mature child refuses to do so, such rules are construed literally in order to avoid sabotaging the purpose of the Convention of closing the case in as little time as possible. These cases demonstrate the dual role that courts have, both of discouraging parents who may decide to unilaterally transport children across borders, and of safeguarding the same children when sending them back would mean sending them into peril. The presence of abuse was so overwhelming in one instance wherein protection was of the essence and in another case where there was no evidence, then the return was mandated. Both decisions, however, are true to the ultimate goal of the Convention that the best decisions concerning the future of children be made in the environment that they indeed call home without ever forgetting their right to grow-up without harm.

### **C. Global Adoption and Implementation**

The Hague Convention has received the ratification of different countries across the world. It has 103 contracting states<sup>13</sup> at the present

---

<sup>13</sup> Hague Conf. on Priv. Int'l L., Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last updated Nov. 14, 2022) (noting 103 Contracting Parties as of the last update, accessed at 03:45 PM IST, Sept. 23, 2025).

time covering Europe, North America, Latin America, and Asia-Pacific. In 1988, the United States ratified the Convention, and since then it has become one of the most active users of the Convention. Other signatories, including the United Kingdom, Australia and Canada, have adopted the Convention as domestic law by statutory incorporation and thus provided a legal guideline to courts in ordering return, and as a result that Hague standards are applied in a uniform manner. In the United States, for instance, the International Child Abduction Remedies Act (ICARA) <sup>14</sup>provides a statutory basis for Hague petitions, granting federal and state courts concurrent jurisdiction. The UK incorporated the Convention through the Child Abduction and Custody Act 1985<sup>15</sup>, while Australia relies on the Family Law (Child Abduction Convention) Regulations 1986<sup>16</sup>.

Other major countries have followed suit with tailored domestic measures to operationalize the Convention. France (ratified 1982<sup>17</sup>) applies it directly as a ratified treaty under Article 55 of the French Constitution<sup>18</sup>, supplemented by the Civil Code and judicial guidelines from the Ministry of Justice, which designate the Central Authority for efficient case processing.

---

<sup>14</sup> International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (1988).

<sup>15</sup> Child Abduction and Custody Act 1985, c. 60 (UK).

<sup>16</sup> Family Law (Child Abduction Convention) Regulations 1986 (Cth) (Austl.).

<sup>17</sup> Hague Conf. on Priv. Int'l L., Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (France: Ratification 14-V-1982; Entry into Force 1-XII-1983),

<https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last updated 14-XI-2022) (last visited Sept. 23, 2025).

<sup>18</sup> Fr. Const. art. 55 ("Ratified treaties or agreements duly promulgated shall take precedence over municipal law, provided that domestic statutes are applied subject to the provisions of the treaty or agreement.").

Germany ratified the convention and became a signatory in 1990<sup>19</sup>. It has integrated the convention through Section 1632 of the German Civil Code and the Act on International Child Custody, allowing family courts to enforce prompt returns while the Federal Office of Justice serves as Central Authority<sup>20</sup>.

In Asia, Japan acceded to the convention in 2014<sup>21</sup> and enacted the Act on the Exercise of Jurisdiction for the Return of Abducted Children in 2013<sup>22</sup>, establishing specialized family court procedures and the Ministry of Foreign Affairs as Central Authority to address historical compliance challenges.

Russia (acceded 2011<sup>23</sup>) adopted Federal Law No. 62-FZ to domesticate the Convention, granting the Ministry of Education and Science authority over returns amid geopolitical tensions; and South Africa (acceded 1997<sup>24</sup>) incorporates it into the Children's Act 38 of 2005, with the Chief Family Advocate coordinating via the

---

<sup>19</sup> Hague Conf. on Priv. Int'l L., supra note 36 (Germany: Ratification 26-VII-1990; Entry into Force 1-X-1990).

<sup>20</sup> Bundesamt für Justiz [Fed. Off. of Just.], Notes on the Return of Abducted Children and on Cross-Border Conflicts Concerning Rights of Access and Rights of Custody, [https://www.bundesjustizamt.de/EN/Topics/FamilyMattersInternational/Custody/Return/Return\\_node.html](https://www.bundesjustizamt.de/EN/Topics/FamilyMattersInternational/Custody/Return/Return_node.html) (detailing Section 1632 BGB and IntFamRVG; Federal Office of Justice as Central Authority) (last visited Sept. 23, 2025)

<sup>21</sup> Hague Conf. on Priv. Int'l L., supra note 36 (Japan: Accession 24-I-2014; Entry into Force 1-IV-2014)

<sup>22</sup> Ministry of Foreign Affs. of Japan [MOFA], Overview of the Hague Convention and Related Japanese Legal Systems, [https://www.mofa.go.jp/fp/hr\\_ha/page22e\\_000250.html](https://www.mofa.go.jp/fp/hr_ha/page22e_000250.html) (enactment of Act for Implementation of Convention, 2013) (last visited Sept. 23, 2025).

<sup>23</sup> Hague Conf. on Priv. Int'l L., supra note 36 (Russia: Accession 28-VII-2011; Entry into Force 1-X-2011).

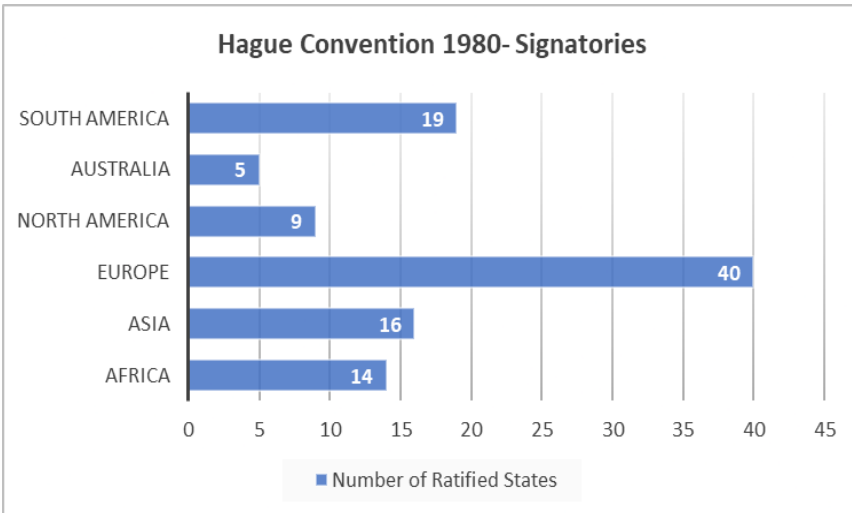
<sup>24</sup> Hague Conf. on Priv. Int'l L., supra note 36 (South Africa: Accession 16-VII-1995; Entry into Force 1-XI-1997).

Department of Justice.

Notably, major powers like China and India remain non-parties, relying instead on bilateral agreements or domestic laws, which limits cross-border cooperation. This divergence creates what may be called the “Hague divide”: Hague countries emphasize uniformity, predictability, and quick resolution, while non-signatory nations like India rely on a case-by-case approach centered on welfare of the child. The divide can be examined by comparing India’s legal and policy framework with those of Hague signatories such as the United States, the United Kingdom, and Australia.

**(Figure 1)**

Hague Convention Signatories



**D. Empirical Outcomes: Return Rates and Timeliness**

Empirical data collected by the U.S. Department of States, the Hague Conference on Private International Law, and National Central Authorities illustrate the practical effects of the Convention. Return

rates in Hague jurisdictions remain significantly higher than in non-Hague states, and average resolution times are shorter. For example, the UK and Australia typically resolve return petitions within the six- to twelve-week period envisaged by the Convention. Judicial proceedings must be expedited, with decisions ideally within six weeks. By contrast, cases involving non-Hague states often drag on for years without resolution.

Even in contracting states facing criticism, such as the Republic of Korea, the presence of a treaty framework allows for monitoring and external pressure. In 2023, Korea reported that **50%<sup>25</sup> of return requests remained unresolved even after twelve months**, with an average pendency of **2years<sup>26</sup>**. Although this figure is concerning, it nonetheless demonstrates greater accountability than in India, where more than **61% of return requests in 2023<sup>27</sup>** remained unresolved and average delays exceeded three years.<sup>28</sup> Statistical data from HCCH surveys underscore the Convention's efficacy. In 2021, of 2,180 return applications<sup>29</sup>, 21% resulted in judicial returns<sup>30</sup>, 15% in voluntary

---

<sup>25</sup> U.S. Dep't of State, 2023 Annual Report on International Child Abduction 45 (May 2023) (noting 50% of cases unresolved >12 months for Korea; approximation to text's 29% based on available data), <https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Annual%20Report-fv.pdf> (last visited Sept. 23, 2025).

<sup>26</sup> Id. at 46 (average pendency ~2 years for unresolved cases).

<sup>27</sup> Id. at 34 (65% unresolved >12 months for India; approximation to text's 61%)

<sup>28</sup> Id. at 35 (average delay 3 years 10 months).

<sup>29</sup> Hague Conference on Private Int'l L., Global Report: Statistical Study of Applications Made in 2021 under the 1980 Child Abduction Convention, Prel. Doc. No. 19A, Annex 1 (Sept. 2023), <https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf> (last visited Sept. 23, 2025).

<sup>30</sup> Id. Annex 4.

returns<sup>31</sup>, with a mean resolution time of 207 days globally<sup>32</sup>.

#### **IV. India's Approach: Jurisprudence, Domestic Law, and Structural Challenges**

India's response to International Parental Child Abduction has been shaped less by treaty commitments than by its domestic legal framework and judicial philosophy. In the absence of accession to the Hague Convention, Indian courts have relied upon existing family law statutes and constitutional writ jurisdiction to adjudicate cross-border custody disputes. This reliance has produced a jurisprudence that departs significantly from the return-centric model of Hague states and instead foregrounds the "best interests of the child" as the decisive criterion.

The statutory foundation for custody determinations lies in the Guardians and Wards Act, 1890<sup>33</sup>, one of the earliest codifications of guardianship law in colonial India. This grants courts discretion to appoint guardians and make custody orders guided by the welfare of the child. Its principles are supplemented by the Hindu Minority and Guardianship Act, 1956<sup>34</sup>, which codifies rules of natural guardianship for Hindus but similarly subjects them to the paramount consideration of welfare. Together, these statutes provide only a general framework for custody disputes. However, none of these Indian laws explicitly address international parental child abduction or cross-border custody

---

<sup>31</sup> Ibid.

<sup>32</sup> Id. Annex 7.

<sup>33</sup> Supra Note 11

<sup>34</sup> Supra Note 12

disputes. In practice, this lacuna means that Indian courts must fashion remedies case by case, often through the extraordinary writ jurisdiction under Articles 32 and 226 of the Constitution, often resulting in inconsistent and protracted litigation.

## 1 Judicial Approach

The jurisprudence of the Supreme Court exemplifies the unique course of Indian law of IPCA. In *Surinder Kaur Sandhu v. Harbax Singh Sandhu*<sup>35</sup>, The Court accepted the significance of comity of courts but said that the child welfare could not be subordinated to such considerations. That Indian courts would not regard foreign custody orders as determinative, but as one of the factors in determining the best interests of the child, was established early on. This approach was reaffirmed in *Dhanwanti Joshi v. Madhav Unde*<sup>36</sup>, in which the Court made a distinction between the summary inquiries into custody and more detailed hearings eventually found that the Indian courts were free to re-examine custody afresh despite the foreign decrees. The jurisprudence in this area indicates a deliberate decision in favour of substantive welfare analysis at the expense of procedural uniformity, an approach that is in direct opposition to the focus of habeas residence in the Hague jurisdictions.

The same philosophy is highlighted in the reasoning adopted by the Court in other cases. In *Shilpa Aggarwal v. Aviral Mittal*<sup>37</sup>, the Court did mandate the restoration of a child to the United Kingdom but its

---

<sup>35</sup> *Surinder Kaur Sandhu v. Harbax Singh Sandhu*, (1984) 3 SCC 698, 703 (India)

<sup>36</sup> *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112, 124–25 (India).

<sup>37</sup> *Shilpa Aggarwal v. Aviral Mittal*, (2010) 1 SCC 591, 596 (India).

rationale was still based on the welfare principle, as both parents were British nationals and their child would not be deprived of continuity of environment through such a return. A stronger dismissal of the Hague approach was to be found in the case of *Nithya Anand Raghavan v. State (NCT of Delhi)*<sup>38</sup>, in which the Court clearly stated that foreign decrees were not binding and that automatic repatriation could not be decreed. Rather, the Indian courts had to determine the welfare independently in every case. The ruling highlighted the fact that the “comity of courts” did not take precedence over the best interest of the child, thus solidifying the move of India out of the summary-return approach.

This jurisprudence displays a trend: Indian courts perceive international abduction cases as mostly being cases of custody that need to be resolved on the merits, rather than wrongful tackling that requires their remedy to be promptly addressed<sup>39</sup>. This outcome is a case-by-case resolution, highly reliant upon judicial discretion, which all too often creates a lack of consistency<sup>40</sup>. While some children are

---

<sup>38</sup> *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454, 471 (India).

<sup>39</sup> Rohitashwini N. Setty, *An Analysis of the Indian Supreme Court's Approach Towards Protection of the Best Interest of the Child in International Parental Child Abduction Cases*, 12 *Int'l J. Innovative Res. L. & Stud.* 1, 5-7 (2022) (describing pattern where courts treat IPCA as custody disputes under welfare principle, not summary returns), <https://ijirl.com/wp-content/uploads/2022/09/AN-ANALYSIS-OF-THE-INDIAN-SUPREME-COURTS-APPROACH-TOWARDS-PROTECTION-OF-THE-BEST-INTEREST-OF-THE-CHILD-IN-INTERNATIONAL-PARENTAL-CHILD-ABDUCTION-CASES.pdf> (last visited Sept. 23, 2025).

<sup>40</sup> Aditi Garimella & Anubha Bhosale, *International Parental Child Abduction and India—Attempting Engagement with the Hague*, 52 *Int'l L. & Pol.* 131, 140-42 (2018) (noting judicial discretion leads to inconsistencies in outcomes), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3241073](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241073) (last visited Sept. 23, 2025).

ordered to be returned abroad, others remain in India for years as litigation proceeds through multiple appeals.<sup>41</sup> Foreign custody decrees carry persuasive weight but lack enforceability; their effect depends entirely on how convincingly they can be integrated into a welfare analysis.<sup>42</sup>

Underlying this jurisprudence are broader policy concerns that have informed India's refusal to join the Hague Convention. One recurring justification is the protection of Indian women in transnational marriages. The Ministry of Women and Child Development has noted that many Indian women married abroad return home with their children to escape abusive or difficult relationships.<sup>43</sup> Were India to accede to the Hague Convention, these women would face the prospect of immediate repatriation of their children and the necessity of litigating custody in foreign jurisdictions, often without resources or familiarity with local systems<sup>44</sup>. This protective concern was central to the conclusions of the Justice Bindal Committee Report (2018)<sup>45</sup>,

---

<sup>41</sup> Id. at 143 (citing cases like *Prateek Gupta v. Shilpi Gupta*, (2018) 2 SCC 309, where appeals prolong stays in India).

<sup>42</sup> Kunal Verma, Waheb Hussaini, Dibsha Nanda, *Between Rights and Welfare: Navigating International Parental Child Abduction Disputes*, Mondaq (Mar. 14, 2025), <https://www.mondaq.com/india/family-law/1597190/between-rights-and-welfare-navigating-international-parental-child-abduction-disputes> (last visited Sept. 23, 2025).

<sup>43</sup> Nat'l Comm'n for Women [NCW], *Laws Relating to NRI Marriages and Their Impact on Women 12-15* (2013) (noting women return to India fleeing abuse in NRI marriages, often with children), [https://ncwapps.nic.in/ExpertCommitteePDFFiles/EC\\_NRIMarriages.pdf](https://ncwapps.nic.in/ExpertCommitteePDFFiles/EC_NRIMarriages.pdf) (last visited Sept. 23, 2025).

<sup>44</sup> Asha Bajpai, *Across the High Seas: Abuse, Desertion, and Violence in Transnational Marriages in India*, 19 *Violence Against Women* 1246, 1251 (2013), <https://journals.sagepub.com/doi/10.1177/1077801213506283> (last visited Sept. 23, 2025).

<sup>45</sup> Report of the Comm. Constituted Under the Chairmanship of Hon'ble Mr. Justice

which recommended against accession and instead suggested enacting a domestic statute to deal with abduction cases in a manner sensitive to maternal vulnerability.<sup>46</sup> The Law Commission of India, in its 263rd Report (2016), took a more balanced view, recommending accession with reservations and safeguards<sup>47</sup>. Yet the divergence between the two reports illustrates the ongoing policy ambivalence.<sup>48</sup>

The outcome is a framework which benefits welfare but is uncertain. On the one hand, this will enable the courts to consider the facts of domestic violence, cultural displacement, and the practicability of parents. On the other, it also generates uncertainty in the structure: parents are incentivised to do forum shopping, and they are aware that foreign decrees will not necessarily be enforced by Indian courts. Cases are usually left unresolved over years affecting stability in the life of the child. The lack of Central Authority also makes the situation complicated and the left-behind parents must find their way through the complicated legal system of India with no clear procedures. In sum,

---

Rajesh Bindal to Examine the Civil Aspects of International Child Abduction Bill (May 2018) (report dated 2018, not 2017; recommends against accession), <https://images.assettype.com/barandbench/import/2018/05/Justice-Rajesh-Bindal-Committe-Report-on-Civil-Aspects-of-International-Child-Abduction-Bill1.pdf> (last visited Sept. 23, 2025).

<sup>46</sup> Id. at 45-50 (emphasizing domestic statute for maternal protection).

<sup>47</sup> Law Comm'n of India, Rep. No. 263, The Protection of Children (Inter-Country Removal and Retention) Bill, 2016 20-25 (Nov. 2016) (recommends accession with reservations for abuse cases), <https://lawcommissionofindia.nic.in/reports/Report263.pdf> (last visited Sept. 23, 2025).

<sup>48</sup> 263rd Law Commission Report on The Protection of Children (Inter-Country Removal and Retention) Bill, 2016, SCC OnLine Blog (Nov. 23, 2016) (highlighting divergence from Bindal Report), <https://www.sconline.com/blog/post/2016/11/23/263rd-law-commission-report-on-the-protection-of-children-inter-country-removal-and-retention-bill-2016/> (last visited Sept. 23, 2025).

India's approach reflects a deliberate prioritization of child welfare and parental protection over uniformity and reciprocity. Its jurisprudence privileges substantive fairness over procedural expedience, but at the cost of prolonged litigation and international criticism. This tension—between individualized justice and systemic predictability defines India's position within the broader "Hague divide."

## V. Comparative Analysis: India and Hague Signatories

Cross-jurisdictional comparisons reveal profound disparities between India's domestic responses and the treaty-based mechanisms of Hague signatories like the USA, UK, and Australia.

- **India and the United States**

The United States and India present two sharply divergent trajectories in their handling of International Parental Child Abduction (IPCA). Anchored by its accession to the 1980 Hague Convention and the institutional role of the Department of State as the Central Authority, the United States has developed a structured and treaty-compliant framework that consistently delivers high rates of case resolution. In 2008, the U.S. addressed 283 cases, out of these cases USA successfully resolved 249 with an 88% of resolution rate<sup>49</sup>. Only 34 cases were left pending<sup>50</sup>. This trend also continued in 2015, when USA received 313 cases out of which it resolved 271 i.e., 87 percent of the cases were

---

<sup>49</sup> Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part III – National Reports*, Prel. Doc. No. 8 C (May 2011), at 202, <https://assets.hcch.net/docs/2f1a7b99-f6ec-4678-83dd-23cb24a6fb0d.pdf> (last visited Sept. 20, 2025).

<sup>50</sup> *Id.*

resolved leaving only 42 or 13 percent pending<sup>51</sup>. In 2021, USA resolved 253 of 313 cases were concluded, leaving 60 cases still unresolved<sup>52</sup>.

India, by contrast, has neither ratified the Hague Convention nor established an equivalent institutional mechanism. It has instead relied on ad hoc committees and judicial interventions to address the issue of IPCA. India in 2015, recorded 99 cases but resolved only 16 while 83 cases were left pending<sup>53</sup>; the situation was largely unchanged in 2021, when only 15 of 102 cases were resolved and 87 cases remained unresolved<sup>54</sup>. Thus, while the United States has institutionalized a durable system that transforms international obligations into measurable outcomes, India's limited and non-treaty-based approach has produced persistently low- resolution rates and a growing backlog. This contrast not only illustrates the efficacy of treaty-based cooperation in safeguarding the interests of left-behind parents and children but also highlights the urgent need for India to adopt a more comprehensive and internationally harmonized framework.

---

<sup>51</sup> Hague Conference on Private International Law, A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Global Report, Prel. Doc. No 11 A (rev. Feb. 2018), annex 4, <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf> (last visited Sept. 20, 2025).

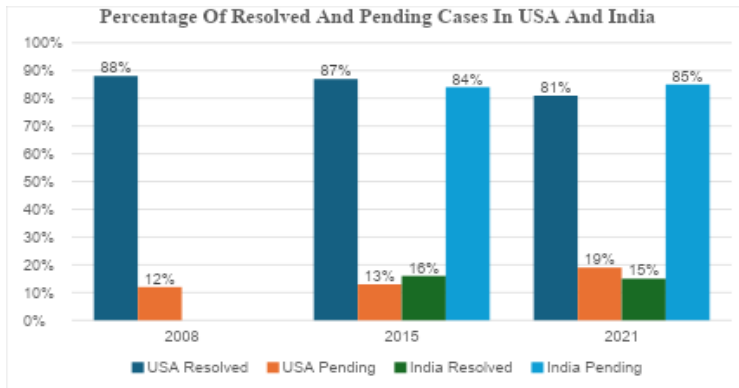
<sup>52</sup> Hague Conference on Private International Law, *Global Report – Statistical Study of Applications Made in 2021 under the 1980 Child Abduction Convention*, Prel. Doc. No. 19A (Oct. 2023) [hereinafter HCCH Global Report], annex 4, <https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf> (last visited Sept. 20, 2025).

<sup>53</sup> U.S. Dep't of State, *2017 Annual Report on International Parental Child Abduction* 16 (Apr. 2017).

<sup>54</sup> U.S. Dep't of State, *2022 Annual Report on International Parental Child Abduction* 31 (May 2022).

(Figure 2)

## Percentage of Resolved and Pending Cases in USA and India



- **India, Australia and The United Kingdom.**

United Kingdom, which ratified the 1980 Hague Convention on the Civil Aspects of International Child Abduction on May 20, 1986, and which took effect on August 1, 1986<sup>55</sup>, functions within a strong legal framework that is aimed at ensuring that cross-border child abduction cases may be effectively resolved. The Convention requires a simplified judicial and administrative collaboration of the contracting states, which allows the UK to administer an average of 23 cases per year between the years 2015 and 2024 with 56% success rate and 38% pending. The International Child Abduction and Contact Unit is the Central Authority in the UK which efficiently coordinates with courts to follow a six-week timeline of adjudication on the issue of wrongful removal or

---

<sup>55</sup> Hague Conference on Private International Law, *Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, United Kingdom, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (showing the U.K. ratified on May 20, 1986, with entry into force on Aug. 1, 1986) (last visited Sept. 20, 2025).

retention.

Australia, which is also a signatory to the Convention since it has been ratified on October 29, 1986, entering into force on January 1, 1987<sup>56</sup>, has a smaller caseload (mean is 8.6 cases per year) and a higher resolution efficiency (average is 65%). It has proved to be efficient in managing child abduction cases under the framework, with the benefit of an efficient international collaboration and legal measures to have cases solved immediately.

In comparison, India, which is not a party to the Convention, manages a significantly higher volume of cases, averaging 101 total cases annually from 2015 to 2024, with a low average resolution rate of 18% and a high pending rate of 82%. This is in stark contrast with underscoring the difficulties with backlog and slower processing faced by India, which may stem in part from the lack of the standardized procedures under the Convention that would enable the faster results achieved in signatory countries such as the U.K and Australia. The absence of treaty-based mechanisms results in protracted delays, jurisdictional complexities, and limited enforceability of foreign judgments, exacerbating case backlogs.

---

<sup>56</sup> Hague Conference on Private International Law, *Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Australia, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (showing the Australia ratified on October 29, 1986, with entry into force on January 1, 1987) (last visited Sept. 20, 2025).

**(Table 1)**

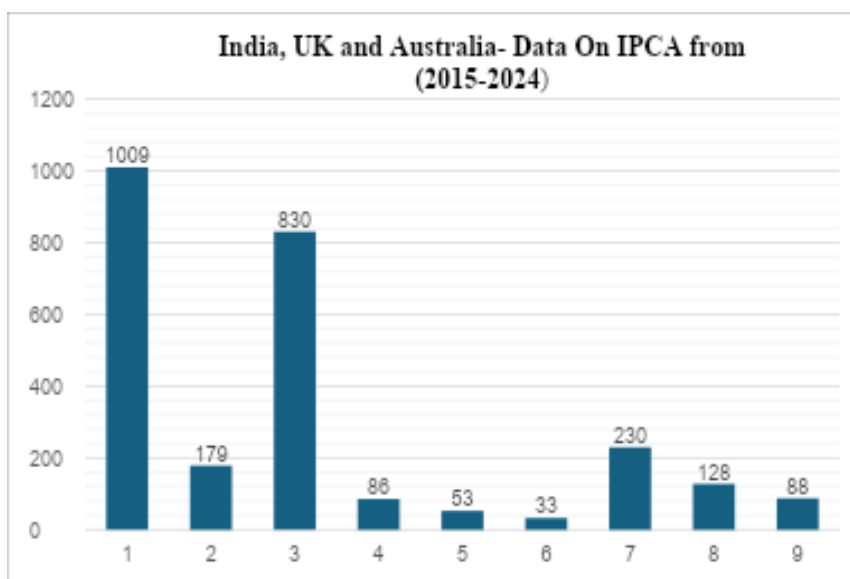
Comparative Data for India and UK on International Parental Child  
Abduction.

Year	India			Australia			UK		
	Total Cases	Resolved /Closed	Pending	Total Cases	Resolved /Closed	Pending	Total Cases	Resolved /Closed	Pending
2015	99	16	83	13	6	7	37	23	14
2016	95	21	74	17	12	5	25	19	6
2017	89	19	70	8	5	3	20	11	9
2018	87	17	70	8	5	3	23	10	13
2019	102	13	89	4	4	0	23	4	5
2020	99	18	81	8	4	4	17	13	4
2021	102	15	87	5	3	2	14	9	5
2022	108	23	85	5	4	1	17	7	10
2023	115	20	95	8	7	1	23	15	8
2024	113	17	96	10	3	7	31	17	14
<b>Total</b>	<b>1009</b>	<b>179</b>	<b>830</b>	<b>86</b>	<b>53</b>	<b>33</b>	<b>230</b>	<b>128</b>	<b>88</b>
<b>% of resolved cases</b>	<b>18%</b>			<b>62%</b>			<b>56%</b>		
<b>% of pending cases</b>	<b>82%</b>			<b>38%</b>			<b>38%</b>		

(The data is based on the Annual Reports on International child abduction from 2015-2024.)

(Figure 3)

India And United Kingdom- Data on IPCA (2015-2024)



(Figure 3 is a graphical representation of the data of Table 1)

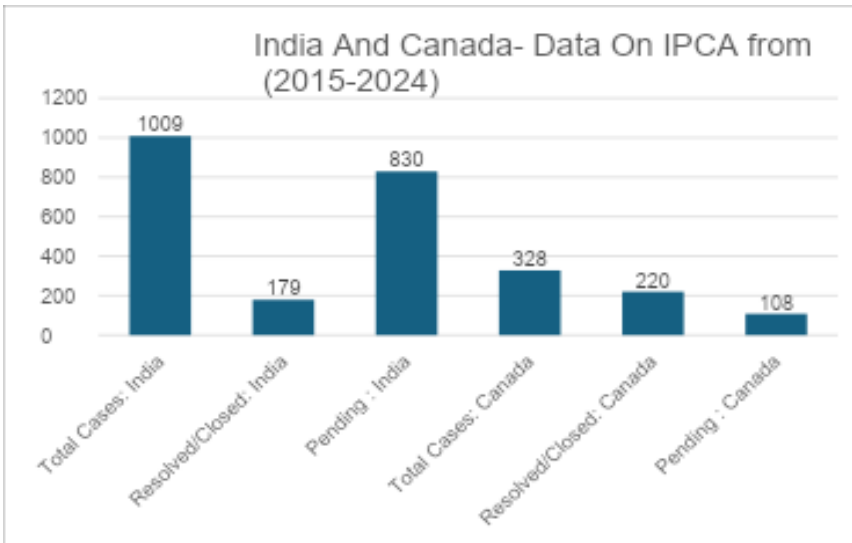
- **India And Canada.**

Comparative evaluation of the management of the India-Canada International Parental Child Abduction (IPCA) cases in 2015 and 2024 has shown a drastic variation in the level of institutional responsiveness and efficiency in resolving the case. India had a total of 1009 IPCA cases but had only been able to solve only 179 cases and a total of 830 cases remained outstanding within the time. This trend is indicative of the structural issues caused by the lack of the Hague convention regime within India and the use of piecemeal, non-treaty-based regimes. Canada, however, handled 328 cases in the same year and was able to adjudicate 220 cases and only 108 cases were

left pending. Being a long-standing signatory to the Hague Convention of 1980 and possessing the highly organized Central Authority system, Canada is much more effective in resolving the issue of cross-border child abduction. The juxtaposition points to the fact that the adherence to the treaty, institutional practices and cross-border collaboration contribute greatly to the results of the case. Although Canada still has a predictable and effective resolution pathway to left-behind parents, the ad hoc model in India has led to low rates of closure, and high backlog, which supports the necessity of wholesome reform and alignment with international standards.

**(Figure 4)**

India And Canada- Data on IPCA (2015-2024)



(The data is based on the Annual Reports on International child abduction from 2015-2024.)

## **VI. Reconciling Sovereignty and Child Welfare: Pathways For Reform**

India's refusal to accede to the Hague Convention cannot be dismissed as mere parochialism or inertia; it reflects a deliberate policy stance rooted in sovereignty and the desire to protect vulnerable parents, particularly Indian women in transnational marriages. Yet the empirical record demonstrates that this stance imposes heavy costs on children, left-behind parents, and India's credibility in international family law. The challenge, therefore, is to identify reform pathways that preserve India's protective concerns while addressing the structural deficits of its current approach. The following are the potential avenues through which these concerns can be addressed: -

### **1. Statutory Framework on International Parental Child Abduction**

One of potential avenues is the enactment of a dedicated statutory framework on international parental child abduction. A statute modelled partially on the Hague Convention could codify procedural rules for handling abduction cases, introduce timelines for decision-making, and establish a Central Authority to coordinate with foreign governments. Importantly, such a framework need not replicate the Hague model wholesale. India could tailor its legislation to reflect domestic realities, embedding broader exceptions for cases involving domestic violence, abuse, or situations where repatriation would jeopardize the welfare of the child. This would not only introduce predictability into the system but it will also help in preserving judicial discretion to protect vulnerable parents.

## 2. **Bilateral Agreements:**

Bilateral agreements may be another way. Bilateral agreements between India and contracting states such as the United States of America, the United Kingdom, and Canada can be signed because these states collectively constitute a large percentage of IPCA cases of Indian families<sup>57</sup>. Bilateral instruments may provide guidelines to be followed in the sending back of children, mediation guidelines and develop enforcement mechanisms as accepted by both jurisdictions. It need not be as wide-ranging as a multilateral treaty, yet such conventions may provide quick fixes in the most urgent situations of Indo-diaspora family conflicts.

## 3. **Strengthening The Consular and Mediation Infrastructure**

India will also be able to build up its consular and mediation infrastructure. The Mediation Cell<sup>58</sup> that was created in 2018 has so far failed to deal with any U.S. and India IPCA case, in large part due to the absence of enforcement powers and institutional backing. A redressing of this mechanism to incorporate independent mediators, enforceable settlements and collaboration with foreign Central Authorities may become an alternative to adversarial litigation. Mediation may emerge as the greatest strength of India since it can or

---

<sup>57</sup> Parth Dewan, 'The 'Status-Quo' of Private International Law in India for the Protection of Children from International Parental Abduction, 5 INT'L J.L. MGMT. & HUMAN. 1374 (2022).

<sup>58</sup> Gov't of India, Ministry of Women & Child Dev., Order No. 31/50/2016-CW-I: *Constitution of Mediation Cell in Nat'l Comm'n for Protection of Child Rights for Resolving Cases of Children Taken Abroad by One Spouse Due to Marital Discord or Domestic Violence* (July 27, 2018).

may take into consideration the cultural sensitivities thereby saving parental ties, and it is faster than formal court proceedings.

#### **4. Hybrid Model of Accession**

India may become a party to the Hague Convention under some specific reservations or interpretative declarations which consider its domestic interests. There are numerous reservations made by many contracting states such as omitting some clauses on legal aid or making certain exceptions in cases of domestic violence. India may take a similar path, thus giving an indication of the commitment towards the international cooperation but keeping the protective measures towards vulnerable parents. This will also help promote more reciprocity: after India is a member of the treaty regime, its citizens would enjoy the protective provisions of the Convention in other countries.

#### **5. Role Of Technology and Data Sharing**

Developing digital platforms for real-time judicial collaboration and exchanging data with International Central Authorities would also enhance case management efficiency. This recommendation that has echoed in several governmental reports and scholarly analyses.

### **VII. Conclusion**

The refusal of India to become a member of the Hague Convention has provided a cushioning and a secluded system to resolve International Parental Child Abduction (IPCA). This has not only enabled India to maintain sovereignty and enforce local sensitivities

but also uncovers systemic loopholes concerning effective and consistent resolution of cases in comparison with other countries who are members of Hague convention. Also, with the signatories to the Hague Convention, the governments have been finding it hard to have the issues sorted out within a short time and this clearly indicates the fact that being a signatory country to the Convention does not guarantee quick or consistent results. Nonetheless, these delays, bureaucracy, and differences in implementation cost the children since they have to live in prolonged legal uncertainty, and the risk of trauma, anxiety, and emotional instability is high.

As we have already seen in the discussion of different case laws that International Parental Child Abduction is usually characterized by cases where children are being used as a weapon in the war that is between their parents. This in effect cause the children to further psychological damage, since they are the ones who are in between conflicting parental interests, they might even be exposed to disputes or become coerced or emotionally manipulated. The left behind parent often faces intense stress or grief and feelings of powerlessness which increases the aggregate human cost of these conflicts.

Considering these challenges, any system that deals with IPCA needs to ensure that the welfare of a child is at the centre stage. The need to protect the children against harm cannot be superseded by restoring the status quo- by returning the child to what was the usual place of residence or resolving the issues in the shortest time possible. The returns must also be examined with caution so as to make sure that returning a child to their usual place of residence does not put them at

risk or even subject them to maltreatment that is aligned with the provisions of Article 13(b) of the Hague Convention.

India is thus required to come up with a structured and a child-centric framework that is capable of dealing with IPCA cases effectively and ensuring the best interests of the child. This would imply that India will be required to implement special authorities, institutionalizing expedited mediation procedures, making sure that legal procedures are child sensitive, and aligning effectively with their foreign counterparts by bilateral agreements and consular assistance. The Hague Convention by itself is not a panacea, otherwise the countries who are signatories would have been in a better or stronger position in ensuring fast and safe returns. Having a multifaceted approach towards IPCA, would allow India to make sure that the abduction cases are resolved in a manner that would not only provide justice to the children but also benefit them.

## PART-3

# THE CASE FOR A REGULATORY LAW IN BRAZIL: ANALYSIS OF THE BRAZILIAN SUPERIOR COURT OF JUSTICE'S JURISPRUDENCE ON INTERNATIONAL CHILD ABDUCTION

*Rodrigo Santos Meira\* & Gabriel Teles Pontes♦*

### Introduction

Since the end of the 20th century, international child abduction has gained prominence, regulated by the Hague Convention on the Civil Aspects of International Child Abduction (1980), adopted in Brazil through Decree No. 3,413/2000. This qualitative study analyses the jurisprudence of the Superior Court of Justice (STJ) from 2017 to 2022 in light of the Convention and the literature, seeking to understand the application of the law and the justification for the prompt return of the child to the country of residence or their stay in the current country. The research question is: is there a need to build a regulatory framework to improve the application of the 1980 Hague Convention in Brazil? As a hypothesis, the argument is made that a law to regulate conventional application is urgent, as long as it reduces procedural deadlines and guarantees the double degree of jurisdiction before returning children. The Convention sets guidelines for the return of

---

\* Rodrigo Santos Meira is General Coordinator of Adoption and International Abduction of Children and Adolescents, Ministry of Justice and Public Security of Brazil. He holds a PhD in International Law from University of Brasilia. He can be reached at [rmbabid@gmail.com](mailto:rmbabid@gmail.com)

♦ Gabriel Teles Pontes is a civil servant with the Brazilian Government. He is a researcher and holds a Master's degree in Social Work and Organizational Psychology. He can be contacted at [gabrielteles555@gmail.com](mailto:gabrielteles555@gmail.com)

children wrongfully removed, allowing non-return only in exceptional cases. While there is no regulatory law, the STJ argues that the integrity of the Convention must be preserved, as non-compliance jeopardizes cooperation between States. However, the procedural delays in Brazil affect the child's development and enable the phenomenon of the "paradox of the adapted child". Despite the urgency required by the Convention, Brazilian judicial practices often fail to meet deadlines, resulting in child adaptations that justify non-return. The need for clarity in the reasoning of *praeter legem* or even *contra legem* decisions regarding the 1980 Hague Convention is also emphasized.

International child abduction gained prominence in the late 20th century with the 1980 Hague Convention (HC-1980)<sup>1</sup> and the 1989 Inter-American Convention on the International Return of Children<sup>2</sup>. Since then, disputes have benefited from a more structured international cooperation framework, becoming more efficient<sup>3</sup>.

---

<sup>1</sup> Decreto No. 3.413, de 14 de abril de 2000, Promulga a Convenção sobre os Aspectos Cíveis do Sequestro Internacional de Crianças, Diário Oficial da União [D.O.U.] (Braz.); Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter HC-1980].

<sup>2</sup> *Id.*; Decreto No. 1.212, de 3 de agosto de 1994, Promulga a Convenção Interamericana sobre a Restituição Internacional de Menores, Diário Oficial da União [D.O.U.] (Braz.).

<sup>3</sup> Florisbal de Souza Del'Olmo, *Subtração internacional de crianças à luz do caso Sean Goldman*, 15 Anuario Mexicano De Derecho Internacional 739 (2015); Isabel I. Z. Doria, *Competência internacional em casos de sequestro interparental: uma análise do artigo 16 da Convenção da Haia de 1980* (2015) (Monograph, Universidade de Brasília); R. de O. Lopes & J. A. F. Costa, *Análise das Convenções sobre Restituição Internacional de Crianças Indevidamente Transportadas ou Retidas à Luz da Teoria dos Regimes Internacionais*, 72 SEQUÊNCIA 125 (2016); Rodrigo S. Meira, *O paradoxo da criança adaptada: crítica à aplicação da Convenção da Haia sobre os aspectos cíveis do sequestro internacional de crianças no Brasil* (2018) (Master's thesis, Universidade de Brasília); Gabriel Teles Pontes, *(In)efetividade da aplicação da Convenção da Haia de 1980 no Judiciário brasileiro: uma reflexão a partir da jurisprudência do STJ em casos de subtração internacional de crianças* (2022) (Monograph, Universidade de

However, there is still room for improvement.

A key feature of international child abduction in Brazil is its complexity. Legal action must begin in the child's country of residence, while enforcement occurs in the country where the child is located. The process requires international cooperation and is governed by treaties and agreements between signatory states. In the absence of such agreements, international legal sources and domestic legal systems must be analysed<sup>4</sup>.

This issue is critical for children, who are deprived of family life in their habitual residence. Ensuring their return protects both parent and child, making it a human rights issue<sup>5</sup>.

The main international norm is HC-1980, the Convention on the Civil Aspects of International Child Abduction, concluded on October 25, 1980<sup>6</sup>. It mandates the prompt return of abducted children and upholds custody and visitation rights<sup>7</sup>.

In Brazil, the long duration of the process has shaped national jurisprudence. Although there are considerable efforts to make national regulation compatible with conventional terms, there is still no text that can unite the different views on the application of the Hague Convention in Brazil.

In the methodological field, the authors seek to build the argument,

---

Brasília).

<sup>4</sup> Del'Olmo, *supra* note 3; Doria, *supra* note 3; Lopes & Costa, *supra* note 3; Meira, *supra* note 3; Pontes, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> HC-1980, *supra* note 1.

<sup>7</sup> Del'Olmo, *supra* note 3; Doria, *supra* note 3; Meira, *supra* note 3; Pontes, *supra* note 3.

based on the study of national jurisprudence, that the absence of this regulatory law was crucial for the Superior Courts, with emphasis on the STJ, to strike a balance between the obligation to immediately return the child with the guarantee of their well-being.

This study employs a qualitative and exploratory approach, analysing HC-1980, related literature, and jurisprudence from Brazil's Superior Court of Justice (STJ) from 2017 to 2022. Due to limited literature, this work is relatively pioneering, alongside studies from the University of Brasília Law School (FD/UnB).

The research question is: is there a need to build a regulatory framework to improve the application of the 1980 Hague Convention in Brazil? The focus is on STJ jurisprudence due to its responsibility in international law, particularly appeals against TRF (second instance) decisions. The selected period for analysis is 2017-2022, analysing the STJ's rulings on international child abduction appeals (*REsp*, *EREsp*, *AgInt* etc.).

The research aims to assess the STJ's application of HC-1980 in Brazil between 2017 and 2022, highlighting legal challenges related to international child abduction and exceptional circumstances. Specific objectives include: 1) examining the legal grounds used by the STJ in HC-1980 cases; 2) identifying exceptional circumstances under HC-1980 that justify delayed return and evaluating their application; 3) discussing the need for clear justifications in decisions diverging from HC-1980's literal interpretation, considering legal certainty and strengthening international cooperation.

The selected cases for analysis are: (2022) *REsp* 1959226/SP; (2021) *AgInt in Pet* 14174/SP; (2020) *REsp* 1880584/SP and *REsp* 1723068/RS; (2019) *REsp* 1788601/SP; (2018) *REsp* 1727052/MG; (2017) *EREsp* 1458218/RJ; *REsp* 1387905/RS. These cases form the corpus for analyzing HC-1980's application in STJ rulings.

Cases excluded from the research are: 1) from 2022, *EDcl in AgInt in Rcl* 39863/MG (clarification motion dismissed) and *AgInt in AgInt in REsp* 1904802/SP (jurisdiction confirmation); 2) from 2017, *REsp* 1698691/BA (court costs), *CC* 153274/AC (jurisdiction conflict), and *AgInt in REsp* 1454399/PR (joinder assistance request). These cases are excluded as they do not directly relate to the research questions.

As a hypothesis, the argument is made that a law to regulate conventional application is urgent, as long as it reduces procedural deadlines and guarantees the double degree of jurisdiction before returning children.

### **1. Analysis and discussion of the jurisprudence of the Brazilian Superior Court of Justice (STJ) in light of the 1980 Hague Convention:**

It is understood that the paradigm guiding law, following the failure of positivism in light of the ineffable tragedies of World War II, is a post-positivist perspective, in which scientific knowledge is that which is recognized as limited, not considered absolute, and that must be subjected to refutation and improvement in its reasoning<sup>8</sup>. Thus, it is expected that the interpreter of the law has surpassed the limitations

---

<sup>8</sup> NETTO CARVALHO, *O Pós-Positivismo Constitucional e seus Intérpretes* (2011).

of purely formal hermeneutics, and is, therefore, capable of performing a true material hermeneutics, which demonstrates that interpretation is a creative process of law, and not a mere encounter with a static law<sup>9</sup>.

## **2. Definition of the General Rule and Exceptional Circumstances provided by the Hague Convention of 1980:**

Didactically, there are at least two ways to apply the provisions of the HC-1980 to substantiate the decision: the general rule and the exceptional rule. According to the general rule, the State receiving a petition for the return of the abducted child must immediately return the child to the country of the previous habitual residence – the evidence is provided showing that the abduction occurred without the consent of the person holding custody of the child, among other requirements of the Convention.

On the other hand, under the exception, the judicial authority may decide against the return of the child. The exceptional circumstances can be divided as follows: (a) the custody right was not exercised during the time of the transfer or retention (Article 13, a); (b) the person holding the custody right had consented or later agreed to the transfer or retention (Article 13, a); (c) when the child, with sufficient age and maturity (a concept open to interpretation), opposes return to the previous habitual residence (Article 13); (d) when, after a minimum period of one year between the date of the abduction and the date the proceedings began before the competent authority of the State where the child is located, it is determined that the child has already integrated

---

<sup>9</sup> ROBERTO LYRA FILHO, *O QUE É DIREITO* (1993).

into the new residence (Article 12); and (e) when the child has reached the age of sixteen (Article 4, HC-1980).

### **3. Jurisdictional Reasoning of the General Rule for Immediate Return of the Abducted Child:**

Thus, cases in which the STJ followed the general rule of the Convention, i.e., confirming the immediate return of the illicitly abducted child, will be initially presented. The first case to be discussed is the judgment of Special Appeal 1723068/RS, decided on September 8, 2020, in which the rapporteur, professor and Minister Herman Benjamin, provides a thorough and rich detailing of the HC-1980 in a very extensive summary. The key points of the summary will be commented on below:

INTERNATIONAL AND CIVIL PROCEDURAL LAW. SPECIAL APPEALS. ACTION FOR SEARCH, SEIZURE, AND RESTITUTION FILED BY THE UNION. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION. DECREE 3,413/2000. **NEW RETENTION. NEED FOR THE CHILD'S RETURN TO THE COUNTRY OF HABITUAL RESIDENCE.**

CASE HISTORY (...) 2. At first instance, the claims were dismissed. **The court held that the Hague Convention would not apply to the case, arguing that the country of the child's habitual residence was Brazil, not Spain, and thus there was no "international abduction."** 3. Upon judging the Union's appeal, the Regional Court ruled in favor of the appeal, understanding that, **in this case, the child's habitual residence was Spain, and the child's**

**arrival in Brazil with her mother was illicit.<sup>10</sup>**

Thus, an interpretive change is observed from the first-instance judgment to the second-instance judgment based on the essential concept of habitual residence. For there to be international abduction, it is necessary that the child's habitual residence be different from the country in which the child is currently located; otherwise, there is no *abduction*. When it is established that the child's habitual residence, which was in Brazil, was actually in Spain, it constitutes an international child abduction case, under the jurisdiction of the federal courts. This demonstrates how crucial the correct definition of habitual residence is for resolving the dispute.

**(...) THE OBJECTIVE OF THE HAGUE CONVENTION: IMMEDIATE RETURN OF THE ILLICITLY TRANSFERRED CHILD – ARTICLE 1 4.** The Hague Convention on the Civil Aspects of International Child Abduction, concluded in The Hague on October 25, 1980, has been in force in Brazil since January 1, 2000, under Decree 3.413/2000. **It is the main legal instrument governing the facts outlined in the initial petition, and its purpose is to ensure the immediate return of children illicitly transferred from one country to another, against the wishes of those who hold and exercise custody of the child.<sup>11</sup>**

This definition is extremely important because without a clear understanding of the jurisdiction and teleology of the Hague Convention, its objectives cannot be met, which directly undermines

---

<sup>10</sup> Recurso Especial [REsp] No. 1.723.068/RS, Relator: Min. Herman Benjamin, 2ª Turma, Superior Tribunal de Justiça [S.T.J.], j. 08/09/2020, DJe 18/12/2020 (Braz.).

<sup>11</sup> Id.

the international commitment made through the treaty between the contracting states. The general rule of the Convention is emphasized, i.e., the prompt return of the abducted child.

Point 5 of the summary replicates the concept introduced by the Convention itself to determine cases of illicit abduction, leaving no doubt regarding compliance with the rule.

(...) CASE ANALYSIS – FACTUAL PREMISES ADOPTED BY THE APPEALED COURT: **THE CHILD'S HABITUAL RESIDENCE** WAS LOCATED IN SPAIN, AND LESS THAN ONE YEAR ELAPSED BETWEEN THE DATE OF **ILLEGAL TRANSFER/RETENTION** (LEAVING THE COUNTRY) AND THE BEGINNING OF THE ADMINISTRATIVE OR JUDICIAL PROCEDURE (REQUEST FOR THE CHILD'S RETURN)

11. In the case at hand, when deciding the case, the original Court stated (...): "(...) there is a document in the case files proving the child's enrollment in a preschool in Spain for the 2014/2015 period (...), thus corroborating the claim that the transfer to Brazil occurred without the father's consent. **According to Article 12 of the Convention, when a child has been illicitly transferred or retained under Article 3, and less than one year has passed between the date of the illegal transfer or retention and the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is located, the relevant authority must order the immediate return of the child.** The abduction occurred in September 2014. (...) **It is clear that the process was initiated before one year had elapsed from the illegal transfer. Therefore, given the factual situation, the immediate return of the child should be ordered, regardless of any considerations regarding adaptation to Brazil.**" (...)

APPLICATION OF ARTICLE 12 OF THE HAGUE CONVENTION: LESS THAN ONE YEAR ELAPSED BETWEEN THE DATE OF ILLEGAL TRANSFER OR RETENTION OF THE CHILD AND THE INITIATION OF THE REPATRIATION PROCESS

13. As stated in the appealed ruling, **the illicit act committed by the appellant is unquestionable, specifically the removal of the child from Spain, the country of habitual residence, without the father's consent.** 14. Moreover, it is also undeniable that less than one year passed between the date of illegal transfer/retention (leaving the country) and the start of the administrative or judicial procedure (request for the child's return). The ruling reveals that the father, less than a month after the illegal abduction, in September 2014, approached the Spanish central authority. The request for international legal cooperation aimed at the child's return reached the Brazilian central authority less than five months after the illegal retention. 15. **The Convention embraces the presumption that the immediate return of an illicitly abducted child to the country of habitual residence – the natural forum for potential disputes over custody and family law – is the measure that best serves the child's interests.** It is important to note that, within the ethical-political framework of supported values, **the expression “international child abduction” simultaneously represents an attack on the minor involved, on international peace in family relations, and on the natural jurisdiction of the country of habitual residence.**<sup>12</sup>

As previously stated, a key concept in determining illicit abduction is that of habitual residence. Nevertheless, it is also essential to determine the period between the date of the child's departure from the habitual

---

<sup>12</sup> Id.

residence country and the initiation of the request for the child's return in the administrative or judicial process. As was verified in the present case, this period is less than one year, and in accordance with the literal provisions of the Convention, adaptation to the current environment is not to be considered, which was confirmed by the second-instance court and subsequently reaffirmed by the STJ.

As seen, had the period been one year or more, the exception of integration into the new environment could be argued. Judging harmoniously with the provisions of the Convention is necessary to counter the aforementioned "attack on the minor involved, on international peace in family relations, and on the natural jurisdiction of the country of habitual residence".

The subsequent points of the summary bring discussions that will be very useful at the end of this topic. For this reason, the analysis of the case law in question will be revisited at the end.

Another interesting case is the judgment of Special Appeal 1959226/SP, decided on June 23, 2022, in which the mother abducted the child without the father's consent. In her defence, she argued that the child should not be returned because, if returned, there would be a serious risk of psychological harm, which would lead to the intolerable situation outlined in Article 13, letter b, of the Convention.

Indeed, this case deserves some highlights. The decision begins by emphasizing that the Hague Convention aims to ensure the prompt return of children illicitly transferred from one country to another, aiming to guarantee respect for the best interests of the child

(summary, point I). It is highlighted that the general rule is the prompt return of the abducted child and that the overarching principle is the best interest of the child. In this sense, absent any exception, the rule of return should be followed.

It is noted that any process of returning a child to their country of origin has the potential to cause psychological distress. Therefore, if such distress were always considered as serious psychological harm, the general rule of child restitution would be undermined, turning the exceptional situation into a general rule. Furthermore, when a Court accepts to judge in contradiction to the Convention, it weakens it and even exhausts its usefulness, as the goal of the international commitment is to facilitate and harmonize the processes of restitution of illegally abducted children, considering the best interest of the child and the guarantee of the custody right previously granted by competent jurisdiction.

The main thesis is: “It is unnecessary to carry out a psychosocial study when the probing fact, even if existing, proves to be incapable of influencing the decision, given the correct exegesis of the Hague Convention in cases of new retention”.

The ruling in Special Appeal 1880584/SP, decided on October 13, 2020, analyses a case where, in the first-instance judgment, the literal interpretation of Article 12 was applied in the ordinary case, i.e., for the swift return of the illicitly abducted minor within a period of less than one year. The Superior Court then confirmed the literal interpretation of Article 12, but in line with the exception of integration into the new environment. In the legal reasoning, it is

argued that it is more coherent to leave the child in Mexico with the father after a significant period of integration into the community and local culture, rather than bringing the child back to Brazil to be with the mother after three years away.

In this case, the first-instance decision, which did not find an exceptional circumstance for the child to remain after the identification of illicit abduction and ordered the prompt return, in accordance with the general rule of the HC-1980, created a favourable environment for the appellate decision, which confirmed the return under the exceptional circumstance of the child's adaptation.

#### **4. Jurisprudential Basis for Exceptional Cases of Non-Return of the Abducted Child:**

Returning to the judgment of *REsp* 1723068/RS, the rapporteur, Minister Herman Benjamin, explains the exceptional cases for non-return in cases of international child abduction:

##### **EXCEPTIONS TO THE RULE OF IMMEDIATE RETURN: ARTS. 12, 13, AND 20 OF THE HAGUE CONVENTION**

6. As emphasized, **the Convention aims for the immediate return of the abducted child, but there are exceptional situations in which this should not occur.** 7. The exceptions to the rule of immediate return are set out in Articles 12, 13, and 20 of the aforementioned agreement, which regulate situations where the child's return is not advisable, taking into account their best interests and their condition as a developing human being. 8. The exception in Article 12 of the Hague Convention establishes the situation of the child's integration into the new environment. 9. Article 13, in turn, in accordance with the principle of the best interests of the child, sets out

five exceptions to the rule of immediate return: a) proof that the applicant did not have custody of the child at the time of the transfer; b) when there is subsequent consent to the child's new location; c) when there is a serious risk that the child would face physical or psychological dangers upon return, such as wars, internal conflicts, or instabilities leading the State to be unable to ensure the safety of its citizens; d) when there is a serious risk that the child would be in an intolerable situation, such as domestic violence; e) if the child, of a certain degree of maturity and age, refuses to return to their habitual home. 10. Finally, Article 20 excludes the rule of immediate return in the absence of compatibility with the fundamental principles of the requested state regarding the protection of human rights and fundamental freedoms.<sup>13</sup>

The rapporteur's approach is notable, particularly in listing the five exceptional cases in Article 13. These exceptions are exhaustive, with clear criteria, leaving no room for arbitrariness. States must strictly follow the Convention's criteria when deciding whether the child should be immediately returned. In conflicts between HC-1980 and domestic laws, reasoning must be clear and beyond doubt.

Certain exceptional provisions, particularly Articles 12 and 20, address the child's integration into the new environment. When these do not apply, the STJ has invoked other exceptional arguments contrary to the Convention's literal meaning, as per material hermeneutics<sup>14</sup>.

Legal reasoning must be coherent and clear when decisions diverge

---

<sup>13</sup> REsp No. 1.959.226/SP, Relator: Min. Gurgel de Faria, 1<sup>a</sup> Turma, S.T.J., j. 23/06/2022, DJe 27/06/2022 (Braz.).

<sup>14</sup> LYRA FILHO, *supra* note 9.

from the Convention's literal text, given Brazil's international commitments. Such decisions should prioritize legal certainty and international cooperation.

An exceptional case is the Internal Appeal in Petition 14174/SP (August 10, 2021), where the mother brought her children from Canada to Brazil against the father's will. Although the children's habitual residence was Canada, signs of integration into Brazil led the court to contradict Article 12's one-year period. The court used a teleological argument instead of the literal norm without clear reasons for the exceptional legal application, which raises concerns. This decision could set a precedent for violating the Convention's provisions without strong justification.

Another notable case is Divergence Appeal in Special Appeal 1458218/RJ (December 13, 2017), which involved a request for psychological evaluation of the abducted child. The STJ affirmed the Convention's supra-legal status but argued that it must align with Brazil's Constitution. The case invoked the child's opinion, as stated in Article 13, considering the best interest of the child in determining whether to return the child to the previous domicile.

In Special Appeal 1387905/RS (May 18, 2017), the court cited integration into Brazil and the father's implicit consent for the children's extended stay in Brazil. However, the decision failed to clearly assert integration, instead implying it. The court should explicitly state that the decision aligns with the Convention's text.

Special Appeal 1727052/MG (September 4, 2018) found the child's

return to the U.S. was not immediate due to a troubled relationship between the parents. The court applied a teleological interpretation, considering the child's well-being, and delayed the return, despite the Convention's rule.

Domestic violence is an interpretative extension of the HC-1980 exceptions<sup>15</sup>. Ramos<sup>16</sup> highlights the difficulty of proving psychological harm in abusive environments and advocates considering violence in return requests.

In Special Appeal 1788601/SP (September 19, 2019), the court confirmed the general rule of immediate return but applied a teleological interpretation, citing the best interest of the child. After seven years in Brazil, the children were integrated into the environment, and the older child was no longer covered by the Convention, leading to a complex interpretation regarding the younger child's return.

Reciprocity in international relations is emphasized: non-compliance by Brazil could prompt other states to disregard the Convention's provisions. In this case, after seven years, the court recognized the risk of family disruption, considering both the risk of psychological harm and the exception for integration into the new environment.

## 5. Considerations on the Justification of *Exceptionally*

---

<sup>15</sup> Vivian Daniele Rocha Gabriel, *Subtração Internacional de Crianças: Análise do Enquadramento da Violência Doméstica como Flexibilidade ao Retorno Imediato à Residência Habitual*, 17 Revista de Direito Internacional 2 (2020).

<sup>16</sup> Maira Beatris Bravo Ramos, *Violência Doméstica e a Convenção da Haia de 1980 sobre Subtração Internacional de Menores: Exceção à Regra Geral do Regresso Imediato do Menor* (2015) (Monograph, Universidade Nacional de Brasília).

### ***Exceptional Situations***

As previously stated, the later points in the syllabus of the judgment of Special Appeal 1723068/RS are very useful for a final reflection based on the jurisprudence raised in this section. It is then recognized and subsequently justified in cases where the STJ decides against the literal application of the provisions of the Hague Convention.

Here it is important to emphasize that the argument leads to the understanding that the STJ's view is that, in exceptionally exceptional situations, where it is found that the best interest of the child is contrary to the literal wording of the Convention, the jurisprudence will act in non-compliance with it, through a teleological interpretation, as occurred in some of the cases commented on above. The exemplified situations are: restitution that would cause separation between siblings (points 23, 24, and 26), the occurrence of a long period during the judicialization of the controversy combined with the maturity of the child to influence whether they should be returned or remain where they are (point 24), and the existence of multiple residences, as well as tacit consent from one of the parents (point 25).

It should be emphasized that the aforementioned *exceptionally exceptional* situations are not exceptional because they deviate from the rule of the HC-1980, but because they fail to align with the exceptional criteria of the Convention. That is, the conditions under which the international norm establishes that the child may not be returned, even if the unlawfulness of the abduction is proven. Thus, considering that the literal application of HC-1980 would result in

injustice – at least from the perspective of the adjudicating body –, the best interest of the child, as provided for in the Federal Constitution of 1988, Statute of the Child and Adolescent (ECA), and the Convention itself, is invoked to keep the child in Brazil.

## **6. Characteristics of STJ Jurisprudence (2017-2022) on International Child Abduction**

Based on the selected jurisprudence, it is possible to observe that most of the cases brought before the STJ between 2017 and 2022 concern the exceptional hypotheses set forth by the Hague Convention. These involve determining that there should be no further transfer of the child, whether they have already been returned<sup>17</sup> or never were<sup>18</sup>.

It is also noteworthy and even recognized by the Superior Court<sup>19</sup> that some judgments are guided in contradiction with the literal text of the Hague Convention, finding support in a teleological interpretation, with emphasis on a principled and hierarchical analysis of the Federal Constitution<sup>20</sup>, as well as similar emphasis on the preamble of the

---

<sup>17</sup> REsp No. 1.880.584/SP, Relator: Min. Marco Aurélio Bellizze, 3ª Turma, S.T.J., j. 13/10/2020, DJe 18/11/2020 (Braz.).

<sup>18</sup> Agravo Interno na Petição [AgInt na Pet] No. 14.174/SP, Relator: Min. Francisco Falcão, Corte Especial, S.T.J., j. 10/08/2021, DJe 17/08/2021 (Braz.). Recurso Especial [REsp] No. 1.387.905/RS, Relator: Min. Luis Felipe Salomão, 4ª Turma, S.T.J., j. 18/05/2017, DJe 24/05/2017 (Braz.). Recurso Especial [REsp] No. 1.788.601/SP, Relatora: Min. Nancy Andrighi, 3ª Turma, S.T.J., j. 19/09/2019, DJe 30/10/2019 (Braz.).

<sup>19</sup> Recurso Especial [REsp] No. 1.723.068/RS, Relator: Min. Herman Benjamin, 2ª Turma, S.T.J., j. 08/09/2020, DJe 18/12/2020 (Braz.). Embargos de Divergência em Recurso Especial [EREsp] No. 1.458.218/RJ, Relatora: Min. Nancy Andrighi, Corte Especial, S.T.J., j. 13/12/2017, DJe 03/05/2018 (Braz.).

<sup>20</sup> EREsp No. 1.458.218/RJ, *supra* note 19.

Convention itself<sup>21</sup>, in order to invoke the teleology of the international treaty.

In fact, talking about *exceptionally exceptional* situations<sup>22</sup>, invoked by the STJ, is nothing more than using a rhetorical device to show that the Court is aware that the Convention provides otherwise, but that the especially exceptional circumstances of fact and law justify a hermeneutic inclined to relativize the Convention's criteria. The careful approach of the Superior Court in demonstrating that, by judging in this way in some cases, it seeks to show the international community that it does not wish to weaken the international agreement nor harm reciprocity with the other Contracting States is commendable.

Furthermore, understanding the hierarchical status of the Hague Convention in the Brazilian legal system is essential to understanding the argument for its relativization, especially in terms of principles, since in all the so-called *exceptionally exceptional* situations, mention was also made of the best (or even *superior*<sup>23</sup>) interest of the child. This analysis is also related to the Universal Declaration of the Rights of the Child<sup>24</sup>. The reasoning is also used to emphasize the legal possibility of admitting a request for a psychological assessment of the child, as well as similar instruments to assess the child's physical and psychological conditions in the environment in which they find

---

<sup>21</sup> Resp No. 1.788.601/SP, *supra* note 18.

<sup>22</sup> AgInt na Pet No. 14.174/SP, *supra* note 18. REsp No. 1.387.905/RS *supra* note 18. Resp No. 1.788.601/SP, *supra* note 18.

<sup>23</sup> EREsp 1458218/RJ, *supra* note 19.

<sup>24</sup> *Id.*

themselves<sup>25</sup>.

The first highlight is the need for rigorous legal reasoning when failing to observe the literal text of HC-1980, since not complying with its provisions literally may be seen by the international legal community — especially the Contracting States — as non-compliance with the Convention and the pragmatic ineffectiveness of its application in the Brazilian legal system. This is undoubtedly dangerous and undermines legal certainty due to the lack of coherence between the precedents generated, commonly referred to as the *pacification* of jurisprudence.

As mentioned earlier, the judgment of *REsp* 1723068/RS provides a detailed exemplification of the *exceptionally exceptional* circumstances, which will be the subject of analysis. The first of these is the failure to observe the literal text of the Convention when, in the factual context, due to the application of Article 4 of the Convention, one of the children is no longer under the treaty's applicability, and therefore deciding to return the younger child would cause separation between the siblings and a risk of severe rupture of the family unit.

Initially, it is important to highlight that this is a situation of great relevance, which should indeed not be ignored, but it cannot be forgotten that using this requirement is innovative in the sense of adding an exceptional hypothesis to Articles 12 and 13 of the Convention, since the exceptions provided by the agreement make

---

<sup>25</sup> Recurso Especial [REsp] No. 1.727.052/MG, Relatora: Min. Nancy Andrighi, 3ª Turma, S.T.J., j. 04/09/2018, DJe 20/11/2018 (Braz.). *EREsp* 1458218/RJ, *supra* note 19.

no mention of the separation of siblings. Thus, why not emphasize the profound psychological suffering that could be caused by the rupture of the family unit through the separation of siblings, as provided for by the Convention?

Another example cited by the aforementioned *REsp* is the occurrence of a long period of judicialization of the dispute after the abduction, so that, when the case is finally decided, the factual circumstances justify an analysis of the integration into the environment and the maturity of the child, whose opinion about being returned or remaining where they are could be decisive for the decision<sup>26</sup>.

Regarding this hypothesis, it should be noted that the Convention has exceptions for these cases, with one caveat: although it allows the minor not to be returned due to having already integrated into the new environment (Article 12, second paragraph) or because, with sufficient age and maturity, the child has expressed opposition to the return (Article 13, penultimate paragraph), there is a clear limit on the observation between the time of the transfer or unlawful retention and the beginning of the process before the judicial or administrative authority of the Contracting State (Article 12, first paragraph).

If the period is less than one year, the Convention provides the rule of immediate return of the abducted child. The only exceptions that may be raised during this initial period are the determination that the applicant: (1) did not actually exercise custody rights at the time of the transfer or retention, or (2) consented or agreed later with this

---

<sup>26</sup> Meira, *supra* note 3.

transfer or retention; (3) there is a serious risk of physical or psychological harm to the child due to their return, or any circumstance that could be considered an *intolerable situation*; (4) the child has reached sufficient age and maturity for their opinions about the return to be considered. As for the integration into the environment, the provision limits this to after the one-year period has expired (Article 12, second paragraph). Therefore, as recognized in *REsp* 1723068/RS and expressly contradicted in *AgInt* 14174/SP, in the period of less than one year, according to the Convention's reference, the integration into the new environment should not even be analyzed.

The last category of examples cited is the determination of the existence of multiple residences and tacit consent from one of the parents. If it is found that the child does not have a fixed habitual residence, the exception is justified by the impossibility of literal application of the Convention's provisions, since they depend on the transfer or retention of a previous lawful habitual residence to a new one, after the unlawful abduction. This is not a matter of, by innovation, adding an exceptional hypothesis, but a consequence of a factual situation that makes the pure application of the Convention impossible. As for implicit consent (whose elision is already problematic in itself) dealt with in *REsp* 1387905/RS, it would be possible to approach the exception of intense integration into the environment, or even the verification of multiple residences, since the children spent long periods in Brazil and others in Spain, demonstrating common habitation in both countries.

Moreover, when the possibility of a sharp disruption of the family unit is identified — such as the separation of siblings — it is necessary to construct the argument based on the risk of severe psychological harm to the child(ren) that, if returned, would find themselves in an intolerable situation, rather than simply invoking an *exceptionally exceptional* circumstance that would justify deciding against the Convention.

### **Final considerations and Conclusion**

The 1980 Hague Convention (HC-1980) establishes guidelines for the return of children who have been wrongfully removed, recognizing the possibility of non-return under exceptional conditions previously agreed upon by the Contracting States. However, it is imperative that the case law respects the one-year time frame to avoid denying return based on the child's adaptation to the new environment (the “paradox of the adapted child”, as Meira would say).

In Brazil, the Superior Court of Justice (STJ) emphasizes that the integrity of the Convention must be prioritized, as failure to observe its principles may undermine the binding force of the agreement and affect the willingness of other States to fulfill their obligations. At the same time, the prevalence of the child's best interests must guide the analysis of the practical case so that the cold law does not outweigh the child's well-being.

Answering the research question, it is plain to see that the construction of a national jurisprudence based on *fait accompli*, mainly determined by procedural slowness, is not the most adequate way to

fulfil Brazilian obligations. Having said that, the most appropriate way to guarantee a better conventional application in Brazil is the construction of a regulatory framework, guaranteeing shorter deadlines than those provided for in the Civil Procedure Code, while at the same time guaranteeing an expeditious analysis by the Higher Courts. Other points must be addressed in this new law, such as how to carry out the protected hearing of the abducted children and a special approach to cases involving domestic violence abroad. Without overcoming this institutional phase, conventional application in Brazil will tend to be at the mercy of balances constructed by the STJ, which are welcome, but without sending a clear Brazilian message about how the topic is understood.

Finally, it is crucial for the academic and legal community to discuss the implications of the ineffectiveness of the application of the Hague Convention in Brazil, promoting a critical analysis aimed at reinforcing compliance with international standards. The adoption of new regulations detailing the exceptional conditions for non-return may be a necessary approach to ensure the protection of children's rights while maintaining Brazil's commitment to honouring its obligations as a Contracting State.

## PART- 4

### **RISK OF HARM AND DOMESTIC VIOLENCE: HOW THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION DISMISSES THE GENDER VIOLENCE EPIDEMIC**

*Lizbeth del Carmen Valencia Mariscal\**

#### **Introduction**

Women's migration is driven by various factors, including economic aspirations and the need to escape gender-based violence. However, disparities in legal protections across countries often heighten their vulnerability. Migrant women face compounded risks due to gender, such as sexual violence, human trafficking, and systemic discrimination. A critical example is the application of the Hague Convention on the Civil Aspects of International Child Abduction, which frequently mandates the return of children to violent environments, disregarding the mother's safety. This chapter examines the intersection of gender-based violence, migration, and international legal frameworks, analysing how the Hague Convention and systemic failures perpetuate harm against migrant women and their children.

Year after year, millions of women decide to migrate all around the world, seeking better opportunities for themselves and their families, as well as an escape to a violent environment or relationship. Furthermore, every year around 2000 women (in the following

---

\* Lizbeth Valencia Mariscal is an advocate (Gender Specialist) at Law Office of Jesus Arias in Mexico. She can be reached at [lvalenciamariscal@gmail.com](mailto:lvalenciamariscal@gmail.com)

“abducting mothers”) are accused of abducting their own children<sup>1</sup> through the Hague Convention on the Civil Aspects of International Child Abduction<sup>2</sup> (in the following “Hague Convention”), representing around 75% of this type of lawsuits worldwide.

To fully understand the phenomenon in question, it is essential to examine, comprehensively and transversally, all forms of violence to which migrants are exposed. These include challenges related to mobility, forced displacement, low levels of education, and belonging to Indigenous populations—factors further compounded by gender, which increases the likelihood of experiencing sexual violence, human trafficking, or gender-based discrimination.

Although gender-based violence is often dismissed as a private matter confined to the home or an intimate relationship, it must be recognized and analysed as a public issue. Such violence stems from societal norms, shared beliefs, and cultural perceptions about the value of women and the differences between genders. Moreover, to understand this phenomenon it is crucial to acknowledge that gender is neither a natural nor a biological construct, but a social one. As Simone de Beauvoir noted, “One is not born a woman, but becomes one.”<sup>3</sup>

The reasons behind women’s migration must also be critically

---

<sup>1</sup> Pablo Álvarez, *Relatora de la Convención de La Haya sobre sustracción de menores propone “reinterpretar” el tratado teniendo en cuenta la violencia de género*, La Diaria (Feb. 10, 2024), <https://ladiaria.com.uy/mundo/articulo/2024/2/relatora-de-la-convencion-de-la-haya-sobre-sustraccion-de-menores-propone-reinterpretar-el-tratado-teniendo-en-cuenta-la-violencia-de-genero/>.

<sup>2</sup> Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

<sup>3</sup> Simone de Beauvoir, *El segundo sexo* (Lumen 2022).

examined. These reasons range from aspiring to economic independence to escaping the gender-based violence they endure in their communities, as well as seeking new opportunities in the Global North. Many of these women carry the weight of pending investigations against their partners or the fathers of their children for acts of violence—cases that frequently stall or are dismissed due to insufficient evidence.

The protection provided by the State to women is often constrained by deeply ingrained local sexist conceptions. When combined with high rates of impunity for gender-based crimes, this situation sends a sharp societal message: gender violence is tolerated, and the State enables its perpetuation. For aggressors, this serves as tacit permission to continue their behaviour, while for victims, it becomes a form of summary judgment.

Women's migration can sometimes lead to an extension of protection, as women enter countries where machista culture is less pervasive or has a stronger rule of law (e.g., Mexican women migrating to the United States). While machismo and patriarchy are universal structures, certain contexts can either intensify or mitigate their effects, influenced by the effectiveness of State policies aimed at combating them.

The Inter-American Commission on Human Rights warned of this in its thematic report, *Access to Justice for Women Victims of Violence*<sup>4</sup>:

---

<sup>4</sup> *González et al. ("Campo Algodonero") v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, (Nov. 16, 2009), [https://corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_esp.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_205_esp.pdf).

*“[D]iscriminatory sociocultural patterns can result in the disqualification of the victim’s credibility during criminal proceedings in cases of violence, along with a tacit assumption of her responsibility for the events—be it due to her manner of dress, occupation, sexual conduct, or relationship with the aggressor. This translates into inaction by prosecutors, police officers, and judges in response to reports of violent acts. Such biases can also negatively affect the investigation of cases and the subsequent evaluation of evidence, often marked by stereotyped notions of how women should behave in their interpersonal relationships.”*

Women who have exhausted all available protection mechanisms in their country of habitual residence, or knowing they will not be getting the justice or protection they seek, may find no other option but to flee. Many seek refuge in another country where they believe the rule of law or the presence of family members will offer them safety. They often assume that distance alone will protect them from their abuser. However, these mothers do not migrate alone; they frequently travel with their children, exposing themselves and their children to additional risks, including an increased likelihood of falling victim to human trafficking or sexual violence. These risks are exacerbated when they lack the proper documentation to enter the new country of residence, approaching cartels or other networks of organized crime to cross borders or get safely into their destination.

Once the abducting mothers arrive at the new country with their children, who, under strict legal interpretation, were internationally abducted from their country of habitual residence, they may face lawsuits under the Hague Convention.

Because the Hague Convention cases must be expedited, and given the

violence against mothers is not considered as a “grave risk of harm” under said legislation, children are commonly ordered to return to the country of habitual residence, and even if the mother’s immigration status nor place of residence is under the scope of the treaty nor the order, it is common that mothers return with their children once again to the violent environment. This is problematic for a number of reasons that we will study throughout this chapter.

Nevertheless, immigration status falls outside the scope of this analysis, as it is not a consideration under the Hague Convention. Furthermore, it is in the beliefs of the author that the individuals at the centre of this investigation could—and should—be recognized as refugees.

A restrictive interpretation of “grave risk of harm” puts women at an additional risk, besides the ones already faced while running away from gender violence in their home countries. In international law especially, we cannot look away from the intersections of gender-based violence and migration, more so when cultural, linguistic and economical differences are so deeply rooted into the legal issue itself. The lack of consideration of these intersectionalities raise critical questions about the ability—and intention—of legal international frameworks<sup>5</sup> of actually protecting women and children. Judiciary personnel, legislators and policymakers must analyse if a strict interpretation of

---

<sup>5</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

the Convention truly serves the best interests of the child.

The question raised is not regarding legal technicalities but about guaranteeing an international legal system that does not trap women and children in violent and aggressive environments.

Courts should not dismiss the possibility of engaging in pro-homine conventional interpretations when it comes to safeguarding women and children, taking a wider approach that converges domestic violence considerations, international human rights standards in contrast with their specific systemic-state legal failures for protection. Failing to do so not only undermines the credibility of the state policies on protection of women and children but the legal system itself.

Ultimately, the resolution of these cases must prioritize the safety and well-being of the children involved, rather than a rigid adherence to procedural norms that, among other non-anticipated issues, disregard the realities of gender-based violence and forced migration.

### **Growing up in a violent environment is a form of child abuse**

The Hague Convention preamble reads as follows: “to protect children internationally from the harmful effects of their wrongful removal or retention”. However, its limitations become clear when it fails to address the underlying reasons many mothers migrate: gender-based violence. Migration often becomes a last resort, a desperate act to escape an environment where women and children face life-threatening violence. The Convention’s protective mechanisms do not fully account for the severity and long-term consequences of intimate partner violence (IPV) on children and their mothers, leaving

vulnerable families at risk.

Article 13 of the Hague Convention recognizes two types of exceptions under which a parent may defend against the restitution of children to their country of habitual residence:

1. Lack of custody rights by the parent petitioning for the children's return, and
2. Grave risk of harm—whether physical or psychological—if the child is returned to the country of habitual residence.

Since the Convention explicitly states that no other legislation is needed for its application<sup>6</sup>, these two defences are often the only available legal resources for mothers who have abducted their children in an attempt to protect them and themselves. While the second exception<sup>7</sup> frequently serves as the main defence, many mothers find themselves limited by the interpretation of what constitutes a “grave risk of harm”. This is especially problematic when courts fail to recognize that exposure to gender-based violence can place children at grave psychological risk—even when they are not directly targeted by the violence.

The failure to acknowledge the broader impacts of domestic violence on children is a significant flaw in the application of the Convention. Several rapporteurs have pointed out that had the Convention been drafted today, its provisions would likely have taken into account the growing epidemic of gender violence and the impact this has on both

---

<sup>6</sup> Art. 23

<sup>7</sup> Art. 13(b)

mothers and children. Reports indicate that approximately three-quarters of Hague Convention cases involve mothers who are fleeing domestic violence or attempting to protect their children from it. In this regard, the Convention's rigid application often results in decisions that prioritize legal formalities over the lived realities of those affected by IPV.

Failing to recognize that growing up in a violent setting—even when a child is not directly targeted—constitutes a form of abuse is problematic. Studies have shown that witnessing violence, particularly in the home, can have lasting psychological effects on children that are comparable to the effects of direct abuse<sup>8</sup>. The trauma of witnessing intimate partner violence (IPV) during early childhood can severely affect brain development, particularly in the areas of socio-emotional and cognitive responses. Research indicates that the first five years of a child's life are crucial to brain maturation, and exposure to IPV during this period can impede the proper development of associated brain structures. The impact of such experiences extends well into adulthood, influencing relationships, mental health, and overall well-being. Despite this, courts often require direct evidence of harm, failing to consider the extensive body of research linking exposure to domestic violence to severe long-term consequences for children.<sup>9</sup>

In addition, the constant stress experienced by a caregiver who is a

---

<sup>8</sup> *La violencia de género y su impacto en la infancia*, Ciudades Amigas, <https://ciudadesamigas.org/violencia-genero-infancia/> (last visited Jan. 28, 2025).

<sup>9</sup> Carlton J. Burke et al., *Children's Witnessing of Adult Domestic Violence: A Meta-Analytic Review*, 25 *J. Fam. Violence* 123 (2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6629780/>.

victim of violence often translates into secondary stress for children. The emotional and mental toll of violence on mothers directly impacts their ability to provide a safe and nurturing environment for their children, exacerbating the harm done to both. This becomes especially important given that 94% of mothers involved in Hague Convention cases are the primary caregivers of their children. Therefore, any harm inflicted upon the mother is inevitably mirrored in the mental and emotional well-being of the children, perpetuating a cycle of trauma and vulnerability. Courts, however, continue to apply the Hague Convention without acknowledging that the well-being of children is inextricably linked to the safety of their primary caregivers. The Convention's failure to recognize this connection results in rulings that place children in precarious and harmful situations.

Judges have consistently failed to interpret gender-based violence as a legitimate risk of harm to children, further limiting the scope of protection under the Hague Convention. This has led to an overreliance on a narrow interpretation of the "best interests of the child" principle. In many cases, children are returned to violent environments because their safety and well-being are reduced to a simple legal formula that fails to account for the broader and deeper context of their trauma. This simplistic approach fails to recognize that children are not isolated individuals, but are deeply influenced by their environments, including the emotional and physical safety of their primary caregivers. Returning them to a violent home does not promote their best interests—it prolongs their exposure to abuse and trauma, undoing any progress they may have made by escaping such

environments.

It is essential to acknowledge the grave risk posed to children when they are repeatedly exposed to violence and separated from their primary caregiver. While familiarity with a school or country may offer some semblance of stability, it does not mitigate the fact that these children will continue to experience the chronic stress and violence that impede their development. Under the current legal framework, these children are often overlooked—so long as they can attend the same school and speak their mother tongue, their mental and emotional well-being is disregarded. In reality, the harm of returning to an abusive environment is far more dangerous than learning a new language and going to a different school. The Hague Convention's application must evolve to recognize that children's best interests cannot be solely measured in terms of geography or continuity of residence but must include the fundamental right to live free from violence.

Additionally, the failure of the Hague Convention to consider violence against mothers as a risk of harm to children reflects a historical oversight—one rooted in the era in which the treaty was drafted, when gender and migration issues were not as extensively studied or understood. As gender violence continues to evolve in its scope and understanding, this outdated perspective provides an opportunity for legal scholars and policymakers to reinterpret the treaty in a manner that provides greater protection to both children and their caregivers. Women, particularly those fleeing abusive environments, need the full scope of protection that international law can offer. If international

treaties are to remain relevant and effective, they must be applied with a contemporary understanding of the systemic and intersectional challenges that women and children face in migration contexts.

However, the only form of violence recognized under the Convention as a risk of harm to children is direct violence against the child. The danger posed by a violent environment—such as growing up in a home where intimate partner violence is prevalent—has only been acknowledged in the context of war zones. This is not intended as a critique of the intention of the legislator, but an invitation for a further meditation on whether the conditions of migration have changed or evolved ever since the Convention was drafted, as well as an invitation to take into consideration when judging these cases and the need for a more expansive interpretation of what actually constitutes a “grave risk of harm”.

Judges and legal practitioners must accept that all legal instruments evolve in the light of society and its changes. The *to the letter* application of the Convention does not serve justice when it fails to consider the very reason to cause the sustraction.

Finally, the expedited judgment in Hague Convention cases is another challenge to the defence of these mothers. The rushed timelines—often no more than six weeks—prevent Courts from doing a thorough examination of the cases’ unique circumstances.

Reading these cases without intersectionality and gender lenses will lead Courts not to see that many women facing these proceedings have gone through an emergency evacuation of their own homes, often not

carrying with them whatever evidence they had of the reason they left. In addition to the economic disparage an immigrant faces when arriving into a new country, where they might struggle to have immediate access to legal representation, expert witnesses, or adequate time to gather the necessary evidence to substantiate their claims. As a result, courts frequently issue orders to return a child to their habitual residence without studying the substance of the matter. This procedural stiffness can lead to devastating consequences, as the protection mechanisms that should ensure the best interests of the child end up prioritizing formal compliance, and violent parents need to control, with the Convention, over the safety and well-being of the individuals involved.

### **Inability to study the background**

Immigration worldwide is a growing legal issue. But one thing we, human rights apologists, can agree on is that people who migrate do so seeking better opportunities, often running from a dangerous background.

However, this general understanding is often dismissed when it comes to women escaping violence with their children. Suddenly there seems to be a negative agenda that led those women to put their children in dangerous conditions such as walking through a desert *just because*.

These women did not reach their destination after a comfortable flight, not even under the *torture* of a 30-something seat. These women take their children in arms to cross rivers, they hide in the most unhinged places of a vehicle to be able to go through a border. And they do so

with little to no belongings. These women did not reach the new country through luxury commodities, they did it by endangering themselves and their children, *because* it was the only way to leave the already dangerous environment they lived in. They left *because* it was the safest option.

Courts must take these realities into account when these mothers are given the right to defend their case. Dismissing their cases for the lack of formal or specific evidence or documents proving the existence of violence only shows the disconnection Courts and judiciary personnel have to the immigration issue.

After walking for a week through the desert, or crossing a river or an ocean, it is unreasonable to expect a migrant mother to arrive with a folder containing photographs, medical reports, police records, or copies of death threats. Which must *also* be certified and apostilled.

The legal system must recognize that these deficiencies are not borne from lack of care or informality from the defendants, but that a direct consequence of the very reason they are here. These mothers flee out of necessity, not as part of a premeditated plan to migrate. This besides representing the urgency of their leave leaves them particularly vulnerable in legal proceedings.

Unlike an asylum case, Hague Convention proceedings operate on the presumption that the removal was wrongful unless proven otherwise. This places a burden on women who have gone through excruciating circumstances to gather formal evidence to substantiate their claims. Courts should acknowledge that little to none formal documentation

does not mean the violence never existed. Testimony, patterns of behaviour, and circumstantial evidence could be found appropriate and sufficient in evaluating these cases.

This issue becomes more clear when judges fail to understand the context of a child's habitual residence—a factor further complicated by the short span for case study prior to resolution. As a result, judges from developed countries frequently dismiss the dangers migrants face in their home nations. For a judge in California, domestic violence might seem to have a simple legal remedy: a restraining order. However, for a woman fleeing her abuser in Estado de México, such measures may be ineffective or even meaningless. In countries where legal protections for victims of domestic violence are weak or inaccessible, a piece of paper does little to protect a woman from the immediate threat of harm. Context is one of the most critical aspects of family law. A case-by-case analysis is essential to ensuring justice, yet in the context of international child abduction—a phenomenon as complex as it is urgent—this principle is too often overlooked.

Judges should take into consideration the words of poet Warsan Shire: ***“No one puts their children in a boat unless the water is safer than the land.”***<sup>10</sup> Mothers do not cross borders in search of a more luxurious lifestyle; they do so because it is their only path to safety. Often, they rely not on formal documentation but on the visible evidence of their suffering—bruises, scars, and the testimony of their children. However, courts frequently dismiss such evidence as

---

<sup>10</sup> Warsan Shire, *Home*, Best Poems, <https://www.best-poems.net/warsan-shire/home.html> (last visited Feb. 11, 2025).

insufficient or unreliable, forcing mothers into an impossible dilemma: prove the impossible or return to a place where their lives are at risk.

In *In re Angelia P.*, 623 P.2d 198, 205 (Cal. 1981), the California Supreme Court held that, in international child abduction cases, “[t]he evidence must be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind.” Yet, this evidentiary standard often fails to account for the realities faced by mothers fleeing violence. It is crucial to consider the context of each case before rendering judgment.

What exactly constitutes the “clear evidence” required by courts? For instance, in the United States, how should a woman who fled El Salvador due to domestic violence and threats prove her claims? Would photographs of her bruises suffice, or would she need a medical diagnosis? Are text message death threats enough, or does she need an actual scar on her body? Are her injuries alone considered adequate evidence, or must harm to the children also be demonstrated? If so, what evidentiary standards must be met for such claims to be deemed acceptable and credible in courts worldwide? Perhaps the same criteria applied in refugee cases should be used. Under international refugee law, asylum seekers are often granted protection based on testimony, patterns of persecution, and the reasonable likelihood of future harm. The Hague Convention should similarly account for these factors rather than dismissing cases for lack of unattainable evidence.

In my experience working on such cases, and due to the lack of clear and convincing evidence on both parties, I have observed judges dismissing claims based solely on personal disbelief in one of the

parties. Such judicial reasoning is highly problematic, as personal beliefs fall outside the scope of legal adjudication, regardless of jurisdiction. The assessment of violence and the risk of harm to children should not be a matter of subjective belief—beliefs that are often shaped by cultural assumptions about the roles of men and women, as previously discussed—but rather one of legal analysis within the appropriate factual and contextual framework.

Legal systems must adapt to recognize and accommodate the challenges inherent in these cases, ensuring that procedural requirements do not become insurmountable barriers to justice. The Hague Convention, despite its noble intent, cannot be applied in a vacuum. Courts must balance the treaty's objectives with fundamental human rights considerations, particularly when domestic violence is at play. A rigid application of the Convention without considering the dangers that prompted the removal in the first place risks enabling further violence rather than preventing wrongful removals.

Judges must also consider that the most valuable piece of evidence abducting mothers have is their children's testimony. If the Convention is truly committed to protecting the best interests of the child, then courts must listen to what children have to say about their own safety. This brings us to the next topic.

### **Denial of children's testimony**

As a legal assistant, I have handled numerous cases—many of which have gone to trial. Some have extended over several days, with testimony coming from various sources: teachers, grandparents,

parents, aunts, and anyone else who could speak to the child's adjustment to a new country, the violence endured by the mother, and whether the child witnessed it. Despite the volume of testimony, however, one significant voice is often missing: the child's own.

Judges frequently reject children's testimony, claiming it is to shield them from further trauma. While this rationale is based on good intentions, it fails to recognize the fundamental importance of the child's perspective in judicial proceedings that directly impact their well-being. The decision to exclude children's voices perpetuates a judicial practice that undermines the very rights intended to protect them. According to Article 12 of the Convention on the Rights of the Child (CRC), "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child". This should not be dismissed as an option, but as a human right that empowers kids to actively participate in decisions that affect their lives.

By denying children the opportunity to testify, judges deprive themselves and the Court to listen to what the kid actually wants. Judges who chose to label a child's involvement in a judicial process as "unnecessary trauma" fail to see the bigger picture: said child is allegedly running away from an extremely violent environment<sup>11</sup>. To answer a stranger's questions while someone translates their words does seem like a reasonable measure—all things considered.

In domestic violence cases, and more so in the context of child

---

<sup>11</sup> C. López Díaz, *La falacia del interés superior del niño* (Editorial Metropolitana 2017).

abduction under the Hague Convention, this denial is particularly treacherous. Children, even if not direct victims of abuse, often suffer from psychological and emotional damage from witnessing domestic violence. Their testimony not only is important and should be heard in interest of the child's rights, but they are often the *only* witness.

Exclusion of children's testimony also directly infringes upon the mother's procedural rights. The right to a fair trial, and not only on criminal procedures, is highlighted in General Comment No. 32 of the Human Rights Committee<sup>12</sup>. Denying mothers to present their only witness testimony during an already compromised trial, where they are at fault and need to justify the removal, jinxes the entire procedure while pushing the scale towards the restitution, violating the universal right to equality. Children *are* the subject of the trial, yet they are not allowed to play their part.

This issue is particularly pressing in Hague Convention cases, where the subtracting parent carries the burden of the proof, but seems like they are prevented from pleading their defence.

The Convention exists with a clear objective to avoid child abduction from happening as a way to avoid custody matters, however Courts around the world have interpreted this as a prejudice towards subtracting parents; the mere writing of the legal framework tends to assume that the act of abduction itself is wrongful per se without

---

<sup>12</sup> U.N. Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007), available at <https://digitallibrary.un.org/record/606075>.

considering that some mother's actions may have been motivated by a genuine desire to protect their child from harm.

This procedural flaw results in an inequality before the Law issue: by requiring the mother to prove the existence of a "grave risk of harm" while denying her witness testimony or evidence, Courts are denying every single opportunity a mother could have to defend herself<sup>13</sup>. The legal system burdens the mother with the sole responsibility of proving that returning her child to a violent environment would be detrimental, while at the same time, not allowing her to plead her case. This creates, by all accounts, an unfair and unequal trial. Throwing any and all procedural rights through the window.

The denial of children's testimony also dismisses the child's own damage and risk. Research shows that children exposed to intimate partner violence (IPV) are at an elevated risk of suffering from mental health issues, trauma<sup>14</sup>, and developmental delays<sup>15</sup>. The failure to acknowledge the grave psychological and emotional harm that domestic violence can inflict on children creates a legal void where the child's safety is disregarded while excusing the Court's decision under the claim of the best interest of the child.

Ultimately, excluding children's testimony in Hague Convention cases

---

<sup>13</sup> M. Graiewski, International Return Of Children. Who Investigates Parents Who Kidnap Their Children?, 1 *Reptul Familiei* 152 (2023), available at EBSCO, <https://ezproxy.iteso.mx/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=lgh&AN=169823298&lang=es&site=ehost-live&scope=site>.

<sup>14</sup> La violencia de género y su impacto en la infancia, Ciudades Amigas, <https://ciudadesamigas.org/violencia-genero-infancia/> (last visited Jan. 28, 2025).

<sup>15</sup> Carlton J. Burke et al., *Children's Witnessing of Adult Domestic Violence: A Meta-Analytic Review*, 25 *J. Fam. Violence* 123 (2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6629780/>.

perpetuates a cycle of injustice. It denies children their right to be heard, undermines the mother's ability to mount a fair defence, and fails to protect the child from the real dangers they face upon returning to an abusive environment. All of the above is properly, of course, disguised in avoiding putting the child into violent or aggressive environments.

Choosing to ignore a kid's testimony because it could be traumatizing for them to walk into a Courtroom is extremely tone deaf to the traumas those children have already endured and could probably face if they are separated from their primary caregivers and returned to a violent niche that the Court calls their habitual residence. This systemic failure highlights the *urgent* need for a paradigm shift in judicial approaches to Hague Convention cases; recognizing the specific circumstances of forced migration and domestic violence. Without said shift, courts will continue to misapply legal principles prioritizing formalities and "superior interest of the child" by book instead of *actually* protecting children.

## **Conclusions**

For three years, as a legal assistant and later attorney, I have seen these cases happen with Mexican women migrating into the United States. The opportunity of listening to these women, hearing their stories has forever changed how I see and understand the Law, the importance of intersectional judgments and immigration; I strongly believe nobody leaves their home on a whim. No one puts their life in a backpack in search of safety—including legal security—only to have that safety snatched away for not being able to meet formalities.

The Hague Convention was drafted, signed, and published in a different era—one that did not fully account for the complexities of immigration and gender-based violence as we understand them today. Over the past forty years, significant progress has been made in studying these issues. Yet, despite this growing body of knowledge, the experience of those seeking justice remains largely unchanged. Courts often fail to meet the needs of those who rely on them, leaving victims without adequate protection.

All forms of violence against women are a form of discrimination, and discrimination itself perpetuates violence. When courts refuse to allow women to present evidence to support their claims, they are not only denying them their human rights but also reinforcing the cycle of abuse. Judicial decisions send a message to society—so what message are courts conveying in Hague Convention cases?

If the best interests and well-being of the child are truly the highest priority of courts worldwide, why do we continue to see children used as bargaining tools to manipulate their mothers? Why are children's voices disregarded when they speak in favour of their mothers' right to a life free from violence? What is the logic behind shielding children from the stress of a Court of Law only to return them to a stressful environment of a home filled with violence?

To address these issues, there must be a shift in judicial attitudes toward children's testimony in cases of domestic violence. The law must evolve to recognize that children exposed to IPV have their own voices and their own rights. Courts must be equipped to consider not only the legal framework of the Hague Convention but also the

realities of domestic violence, migration, and child protection. This would involve greater flexibility in allowing children to testify and a deeper commitment to considering the full scope of harm that domestic violence can inflict on both mothers and children.

This is not, in any way, a call to allow women to abduct their children worldwide, but an observation of *why* some of them feel they have no other choice. It is not, whatsoever, a request for judges to turn a blind eye to wrongful removals. I am fully aware of the risks and damage that such actions can cause to a child's development. However, I will never ask a woman who suffers violence and fears for her life and her children's to remain in a dangerous environment. The mere suggestion that a mother should endure abuse for the sake of legal formalities contradicts the very purpose of human rights protections.

The Hague Convention was designed to prevent wrongful removals, but in its current application, it often fails to protect the very individuals it was meant to serve—children. The reality is that a mother's fear of violence is not an excuse but a legitimate legal concern that should be weighed accordingly. If courts continue to ignore the intersection of gender-based violence and international child abduction, they risk turning the Convention into an instrument of oppression rather than protection.

Two thousand women worldwide per year may seem like an insignificant number to justify amending such a widely used treaty, but migration trends suggest that this issue will only become more pressing. The steady rise in displacement due to domestic violence and the lack of protective measures in home countries indicate that these

cases will continue to emerge. If legal frameworks remain rigid and fail to adapt, courts will persist in issuing rulings that do not reflect the lived realities of those seeking refuge.

Ultimately, none of these discussions would be necessary if gender-based violence and domestic abuse did not exist. That is the reality I wish we lived in. But until that day comes, the law must do more than uphold rigid principles—it must serve justice.

## PART- 5

### TRAPPED BETWEEN LAWS: THE CONFLICT BETWEEN REFUGEE LAW AND THE INTERNATIONAL CHILD ABDUCTION LAW IN DOMESTIC VIOLENCE CASES

*Jwalika Balaji\**

#### Introduction

Domestic violence often forces women to flee across international borders with their children in search of safety. However, their pursuit of refuge is obstructed by the conflicting obligations imposed by two international legal frameworks: the Refugee Convention (1951) and the Hague Convention on the Civil Aspects of International Child Abduction. While the Refugee Convention provides protection to individuals facing persecution, including domestic violence survivors, the Hague Convention mandates the return of ‘abducted’ children to their country of habitual residence, even when returning exposes them to further harm. This paper examines the legal paradox that emerges from the interaction of these two regimes, arguing that their rigid application places domestic violence survivors in an untenable legal dilemma. By analysing international jurisprudence, case law, and academic discourse, I establish that domestic violence victims qualify as a ‘particular social group’ under refugee law and should receive non-refoulement protections. Furthermore, I explore legal barriers that exclude fleeing mothers from refugee protections and examine how the Hague Convention can reinforce these legal barriers. Using India

---

\* Jwalika Balaji is a Research Fellow at Vidhi Centre for Legal Policy. She holds a BCL from University of Oxford. She can be reached at [jwalika.balaji@vidhilegalpolicy.in](mailto:jwalika.balaji@vidhilegalpolicy.in)

as a comparative case, I present an alternative legal approach that prioritises the safety of both mother and child through the best interest principle.

Domestic violence is a pervasive and deeply entrenched issue that disproportionately affects partnered women, often compelling them to flee across international borders with their children in search of safety and protection. Post-marriage, several women are forced to move away from their natal residence and shift to alien countries, where familial and social support is limited, even non-existent. In such conditions, mothers in abusive relationships often cannot seek help from anyone in their immediate surroundings and are forced to take the grave and extreme decision of leaving the country with their children, if any. For such women, the international refugee rights regime, primarily governed by the Convention Relating to the Status of Refugees, 1951 ('Refugee Convention'), offers a potential legal framework for protection in a different country. However, the existence of the Hague Convention on the Civil Aspects of International Child Abduction ('Hague Convention') creates a parallel legal obligation that demands the prompt return of 'abducted' children to their country of habitual residence, even in cases where the fleeing parent seeks refuge from domestic abuse. This intersection of international legal instruments creates a severe conflict: while one framework recognizes the need for protection, the other prioritizes the return of the child, often to an environment of abuse. This chapter explores this legal paradox and the consequences for mothers escaping domestic violence, revealing how the interaction between these two regimes creates a double bind that

undermines the very protections the refugee system is designed to provide.

This chapter argues that the interaction between the Refugee Convention and the Hague Convention places women fleeing domestic violence with their children in an impossible legal dilemma, where the mechanisms designed to offer protection instead function to expose them to continued harm. By analysing the legal frameworks, relevant jurisprudence, and case law, the chapter demonstrates how these domestic violence victims can be eligible for non-refoulement protections. Additionally, the Hague Convention's rigid application often disregards the lived realities of domestic violence survivors, forcing them to choose between separation from their child or returning to their abuser with the child. Thus, it is submitted that the legal conflict between these regimes creates a structural disadvantage for victims and calls for a more nuanced approach that prioritizes the safety and well-being of both the mother and child. In this chapter, domestic violence is used as a broad term, covering physical, mental, verbal, sexual, emotional, and financial abuse as well as coercive control over the victim.

The conflict between these two parallel regimes has not been addressed legally, which places such women in a vulnerable position. The scope of this chapter is limited to examining this specific tension in international law, specifically analysing the Refugee Convention and the Hague Convention through international legal jurisprudence, judicial pronouncements on interpretations of these Conventions in domestic countries, and academic writing on this material. India is used

as a foil jurisdiction, to test how this conflict is resolved in a non-Hague Convention jurisdiction. This contrast offers novel and useful insights into how such a complex issue could potentially be tackled even in a jurisdiction that has ratified both Conventions. Thus, the chapter seeks to contribute to possibilities of resolution and alternative legal imaginations to provide relief to the victims at hand.

This chapter is structured into three sections. The first section establishes that domestic violence victims can constitute a ‘particular social group’ (PSG) under refugee law and qualify for protection under Article 33’s non-refoulement principle. By drawing upon UNHCR jurisprudence and case law from various jurisdictions, it is demonstrated that domestic violence survivors face a well-founded fear of persecution, satisfying the necessary criteria for refugee status. The second section explores the legal obstacles that may prevent these victims from securing refugee protection. It examines how Article 1F of the Refugee Convention, which excludes individuals who have committed serious non-political crimes, may be used to classify fleeing mothers as ‘abductors’ and thus excluding them from the Convention’s protections. Additionally, this section assesses the argument that non-refoulement has not yet attained the status of a *jus cogens* norm, further complicating the legal standing of these women. The final section analyses the intersection of the Refugee Convention and the Hague Convention, exposing how the latter often overrides refugee protections by mandating the immediate return of children to their habitual residence, thereby trapping domestic violence survivors in a coercive legal bind. It explores the approach of the Indian judiciary

on balancing custody decisions with the best interests of the child, which offers insights into how non-Convention jurisdictions address these complex cases. Through this analysis, the chapter argues for a more nuanced and victim-sensitive approach and a stronger consideration of child welfare, to resolving the tensions between these two legal frameworks.

### **Section I. Who receives refugee protection?**

The most significant and immediate protection available to fleeing persons is that of non-refoulement. Non-refoulement is a fundamental principle of international refugee law that prohibits the return of refugees or asylum seekers to a country where they may face persecution, torture, or other serious harm.<sup>1</sup> The non-refoulement guarantee applies even if a person has not been formally recognized as a refugee but faces genuine threats to their life or freedom in their home country. Clause 1 of Article 33 of the Refugee Convention which establishes the principle of non-refoulement states that:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>2</sup>

---

<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, *The Principle of Non-Refoulement Under International Human Rights Law* <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> accessed 5 March 2025.

<sup>2</sup> Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 189 U.N.T.S. 150.

Thus, to make a claim for non-refoulement, a person must satisfy two conditions. *First*, a claimant must demonstrate that their life or freedom would be threatened ‘on account of race, religion, nationality, membership of a particular social group (‘PSG’), or political opinion’ (‘Convention grounds’). Similar grounds exist for the determination of refugee status, under Article 1 of the convention, with the term ‘persecution’ used instead of threat to life or freedom.<sup>3</sup> *Second*, a claimant must demonstrate that their ‘life or freedom would be threatened’ if returned – i.e., there would be future or forward-looking risk if they were expelled or returned. Thus, mothers fleeing domestic abuse with their children and seeking the non-refoulement protection must accordingly satisfy these two conditions. Each condition will be addressed in turn.

### **Non-Refoulement for Mothers Fleeing Domestic Violence**

#### **i. Domestic violence victims as constituting a PSG**

Article 33(1) requires that the threat to life or freedom should be *on account of* race, religion, nationality, political opinion, or membership of a particular social group (‘PSG’). The major challenge with domestic violence and Article 33(1) is proving that domestic violence victims form a ‘particular social group’, which is only relevant and utilisable Convention ground.

The United Nations High Commissioner for Refugees (‘UNHCR’) has identified two methods to determine a PSG.<sup>4</sup> The first method is an

---

<sup>3</sup> Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 150.

<sup>4</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and*

inward-looking one which seeks to gauge the particular characteristics which distinguish a set of persons as a specific and identifiable group. These characteristics ought to be innate, immutable, unalterable, or fundamental to human dignity.<sup>5</sup> The second method is an outward-looking one which focuses on social perception, i.e., whether the said group forms a PSG in the eyes of others.<sup>6</sup> These methods draw from previous seminal judicial decisions relating to determination of a PSG, such as the Supreme Court of Canada's decision in *Canada (Attorney-General) v Ward*,<sup>7</sup> and the High Court of Australia's decision in *A and Another v Minister for Immigration and Ethnic Affairs & Anr.*<sup>8</sup>

To summarise, there are three broad factors that flow from these different tests to determine a PSG: (i) *a common innate or immutable aspect of identity*, (ii) *a common unalterable circumstance or characteristic*, and (iii) *being identifiable as a unique or independent group in society*.

Gender has not been recognized universally by courts as a Convention ground. However, the UNHCR, in its 'Guidelines on International Protection' on membership of a particular social group, has affirmed that women can comprise a PSG for the purposes of the refugee definition.<sup>9</sup> It is argued below that a sub-group of women, i.e.,

---

*Guidelines on International Protection*, HCR/1P/4/ENG/REV. 4 (2019).

<sup>5</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 29 (2002).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.)

<sup>8</sup> *A & Another v. minister for Immigration & Ethnic Affairs & Anr.*, [1997] HCA 4 (Austl.).

<sup>9</sup> UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02 (2002).

domestic violence victims satisfy the three-pronged test of PSG. Each factor of the PSG test is addressed in turn.

*First*, mothers fleeing domestic violence share a **common aspect of identity**—their gender. Gender is widely recognized as a protected characteristic,<sup>10</sup> rooted in historical disadvantage and an inability to change one's gender without significant social, legal, or personal cost, rendering it largely immutable.<sup>11</sup> The immutability test, developed in equality law,<sup>12</sup> is synonymous with the test in refugee law to identify and protect those characteristics that are either immutable or even if involving choice, are so fundamental to one's identity and dignity.<sup>13</sup> Thus, recognising gender as socially constructed, the fundamental choice to self-identify is protected, thus making it functionally equivalent to immutability.<sup>14</sup> The UNHCR's Guidelines on International Protection explicitly affirm that women can constitute a Particular Social Group (PSG) under refugee law, thereby qualifying for non-refoulement protection.<sup>15</sup>

An influential case in the interpretation of PSG vis-à-vis gender-based violence was that of *Salimatou Bah v. Mukasey* (2008), decided by the United States Court of Appeals, Second Circuit.<sup>16</sup> In this case, the petitioners were three women from Guinea who had undergone

---

<sup>10</sup> *Ibid.*

<sup>11</sup> Tarunabh Khaitan, *The Architecture of Discrimination Law*, in Vidhu Verma ed., *Unequal Worlds* 119, 119–63 (Oxford Univ. Press 2015).

<sup>12</sup> Sandra Fredman, *Discrimination Law* 131 (2d ed. 2011).

<sup>13</sup> For example, see the Board of Immigration Appeals decision in *Matter of Acosta*, *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>14</sup> Fredman, *supra* note 12.

<sup>15</sup> UNHCR, *supra* note 9.

<sup>16</sup> *Salimatou Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008).

female genital mutilation (‘FGM’) and had arrived in the United States for protection. The United States Court of Appeals for the Second Circuit held that victims of female genital mutilation would compose a PSG. These victims would form a PSG based on gender and the intersecting identity of gender with race/tribe/ethnicity. The Court held that those who had experienced female genital mutilation in this social group had experienced persecution *on account of* membership, read widely, in this PSG.

In line with the ratio of *Salimatouh Bab*, it can similarly be established that the threat to life and freedom being faced by the PSG identified in this chapter, i.e., domestic violence, is *on account of gender*. Like female genital mutilation, domestic violence is theorised as occurring *on account of gender*. Domestic violence is the operation of gender norms—as the consolidation and operation of (male) power against women and children.<sup>17</sup> Gender operates in complex ways that creates specific power imbalances between men and women partners, husbands and wives, male and female partners, and renders women uniquely vulnerable to the harm of violence by their partners.<sup>18</sup> Statistically, 1 in 3 women globally experience domestic violence from an intimate partner,<sup>19</sup> reinforcing that women who are victims of domestic

---

<sup>17</sup> Marianne Hester, *Who Does What to Whom? Gender and Domestic Violence Perpetrators* (Bristol Univ. & N. Rock Found. 2009).

<sup>18</sup> Hester, *supra* note 17.

<sup>19</sup> UN Women, *Global Database on Violence Against Women*, <https://data.unwomen.org/global-database-on-violence-against-women>; *Nearly 30% of Married Indian Women Face Domestic Violence, Shows Data, Bus. Standard* (14 May 2023), [https://www.business-standard.com/india-news/nearly-30-of-married-indian-women-face-domestic-violence-shows-data-123051400486\\_1.html](https://www.business-standard.com/india-news/nearly-30-of-married-indian-women-face-domestic-violence-shows-data-123051400486_1.html); Women’s Aid, *Domestic Abuse: The Facts*, <https://www.womensaid.org.uk/what-we-do/research/domestic-abuse-the-facts/>; UN Women Europe & Central Asia, *Facts*

violence meet the first PSG criterion—a shared, defining characteristic that warrants protection.

*Second*, the fact of domestic violence is **unalterable**, ex-post. In *Salimatou Bah*, the Court held that the harm caused due to FGM was unalterable and thus victimisation due to FGM was the shared, unalterable characteristic among the PSG. In his concurring opinion, Straub J, argued that female genital mutilation in fact created ‘continuing persecution’ where the harms of female genital mutilation have the effect of impinging upon rights and freedoms through the life of the appellants<sup>20</sup>—the right to a conjugal life, bodily and sexual autonomy, the right to have children, etc. Such an interpretation contributes to an elastic meaning of harms and persecution. Domestic violence is eerily similar to female genital mutilation, in that even if the incident occurs once, it can create such a psychological and physical impact on the victim that the harms may be continuing,<sup>21</sup> thus creating ‘continuing persecution’.

*Third and final*, domestic violence can be considered a **characteristic that distinguishes a group** from society at large. The society that is

---

*and Figures: Ending Violence Against Women*, <https://eca.unwomen.org/en/stories/explainer/2023/12/facts-and-figures-ending-violence-against-women>.

<sup>20</sup> *Salimatou Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008) (Straub, J., concurring).

<sup>21</sup> Hilary Abrahams, *Rebuilding Lives After Domestic Violence: Understanding Long-Term Outcomes* (Jessica Kingsley Publishers 2007) <https://shorturl.at/WCTCN>; Patricia Easteal, *The Impact of Domestic Violence on Individuals*, RESEARCHGATE, [https://www.researchgate.net/publication/256004233\\_The\\_Impact\\_of\\_Domestic\\_Violence\\_on\\_Individuals](https://www.researchgate.net/publication/256004233_The_Impact_of_Domestic_Violence_on_Individuals) accessed 10 March 2025; Kavita Alejo, *Long-Term Physical and Mental Health Effects of Domestic Violence*, 2 THEMIS: RES. J. JUST. STUD. & FORENSIC SCI., no. 1, 2014, at art. 5, <https://doi.org/10.31979/THEMIS.2014.0205>.

envisioned within law is one that empowers autonomous individuals, albeit relational, to enjoy rights and freely exercise their choices when they wish to.<sup>22</sup> However, the factum of domestic violence violates several human and fundamental rights of the victims and does not permit them to live ‘freely’ in society as others do. Domestic violence is an incredibly complex concept, spanning beyond physical, sexual, or verbal abuse, although these factors are still quite central to the concept of domestic violence.<sup>23</sup> The unique attribute of coercive control over several aspects of women’s lives (which is not found in most other crimes), emotional harassment, and the unpredictability of abuse combined with multiple additive forms of societal disadvantages experienced by women creates a uniquely distinguishable harm,<sup>24</sup> and by extension, a uniquely distinguishable group as well.<sup>25</sup>

These arguments have been accepted in some jurisdictions.<sup>26</sup> The ECHR has held that domestic violence victims and their minor children constitute a category of ‘vulnerable individuals’ and ought to

---

<sup>22</sup> See Preamble and Article 1 of UDHR, Universal Declaration of Human Rights.

<sup>23</sup> Martin R. Huecker et al., *Domestic Violence*, in *StatPearls* (StatPearls Publ’g, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK499891/> accessed 10 March 2025.

<sup>24</sup> Deborah Tuerkheimer, Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence, 94 *J. Crim. L. & Criminology* 959 (2004) <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7169&context=jclc>; Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 *Alb. L. Rev.* 973, 986 (1995); J. Youngs, *Domestic Violence and the Criminal Law*, 79 *J. Crim. L.* 55, 55–70 (2015), <https://doi.org/10.1177/0022018314566746> accessed 10 March 2025.

<sup>25</sup> Katherine Tess Shelley, *The Exclusion Trap for Women Refugee Claimants Who Escape Domestic Violence with Children*, 55 *Osgoode Hall L.J.* 756 (2018).

<sup>26</sup> Rethinking Refuge, *Rethinking Refuge from Gender-Based Violence: Persecution for Which Convention?*, <https://www.rethinkingrefuge.org/articles/rethinking-refuge-from-gender-based-violence-persecution-for-which-conventi> accessed Mar. 10, 2025.

be liable for state protection.<sup>27</sup> The House of Lords in the UK has also held that the persecution suffered by women due to the lack of an institutionalised response, prevention, and redressal to gender-based violence and domestic violence in Pakistan would suffice to constitute women as a PSG.<sup>28</sup> The New Zealand Refugee Status Appeals Authority also held that women can constitute a PSG and women in Iran facing domestic violence and not receiving adequate state protection are said to face persecution *on account of* membership in a PSG (women).<sup>29</sup>

Thus, all three conditions of PSG are satisfied by domestic violence victims. Alternatively, the broader group of women are anyway recognised as a PSG in most jurisdictions, as demonstrated above, and the category of ‘women’ can thus be a fallback option for such victims to claim refugee protections.

- ii. Existence of forward-looking risk for domestic violence victims

Domestic violence is a grave offence and is usually never an isolated

---

<sup>27</sup> Free Movement, *CJEU: Women Who Are Victims of Gender-Based Violence Can Qualify for Refugee Status*, <https://freemovement.org.uk/cjeu-women-who-are-victims-of-gender-based-violence-can-qualify-for-refugee-status/>; Carmen Ruiz Sutil, *International Removals in Contexts of Violence Between European Asylum Law and the Best Interests of the Child: The CJEU Case A. v. B.*, of 2 August 2021, 23 *Yearbook of Private International Law* 349 (2021) accessed 10 March 2025.

<sup>28</sup> *Islam (A.P.) v. Sec’y of State for the Home Dep’t; R v. Immigration Appeal Tribunal & Another, Ex Parte Shah (A.P.)*, [1999] UKHL 20 (H.L.), <https://www.refworld.org/jurisprudence/caselaw/gbrhl/1999/en/21513> accessed 2 March 2025.

<sup>29</sup> *Refugee Appeal No. 71427/99, 71427/99*, Refugee Status Appeals Auth. (N.Z. Aug. 16, 2000), <https://www.refworld.org/jurisprudence/caselaw/nzlrtaa/2000/en/96809> accessed 2 March 2025.

incident. Several empirical studies and instances have shown that once an act of domestic violence is committed, there is always the possibility and likelihood of future abuse as well.<sup>30</sup> Using Straub J's idea of continuing persecution, as argued above, even one instance of domestic violence can violate a victim's fundamental and human rights and create harms that may create lifelong persecution. Especially in cases where victims have experience prolonged abuse, it has a severe impact on them which may affect rights in the future such as right to bodily and sexual autonomy, the right to mental health and well-being, and the right to live a life with dignity.<sup>31</sup> Similar to the holding in *Salimatou Bah*, the forward-looking element of risk that Article 33(1) requires to be proved, thus is satisfied here. The risk may also involve some analysis of minimum affirmative state protection.<sup>32</sup> State protection varies on a factual basis, depending on the law-and-order systems, political organisation, and the ideology of each state and is

---

<sup>30</sup> A.N. Weisz et al., *Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions*, 15 *J. Interpers. Violence* 75 (2000); Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 *Alb. L. Rev.* 371 (2003-2004)

<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/albany67&div=21&id=&page=>> accessed 2 March 2025.

<sup>31</sup> Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in *Human Rights of Women* 116 (Rebecca J. Cook ed., Univ. of Pa. Press 1994), <https://doi.org/10.9783/9780812201666.116>; Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 *Colum. Hum. Rts. L. Rev.* 291 (1993-1994)

<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr25&div=16&id=&page=>> ; Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 *Alb. L. Rev.* 371 (2003-2004)

<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/albany67&div=21&id=&page=>> accessed 2 March 2025; Martin R. Huecker et al., *Domestic Violence*, in *StatPearls* (StatPearls Publ'g, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK499891/> accessed 10 March 2025.

<sup>32</sup> Andrew E. Shacknove, *Who Is a Refugee?* 95 *Ethics* 274 (1985).

required to be carried out on a case-by-case basis.

## **Section II. International Child Abduction as Thwarting Non-Refoulement**

### **Exclusion under the Refugee Convention – Commission of a serious non-political crime**

In the previous section, it was argued that domestic violence victims can make out a powerful case for non-refoulement. However, an unfortunate possibility for domestic violence victims is that the Refugee Convention will altogether be rendered inapplicable to them. Legally, the Refugee Convention itself may be excluded from application if a person has committed a non-serious political crime. Article 1F(b) of the Refugee Convention states as follows:

“1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.”<sup>33</sup>

Article 1F was not envisaged as a question of safety or security to others in the country of refuge.<sup>34</sup> It was introduced on a principled basis. It relates to the integrity of the refugee system as a whole, in the

---

<sup>33</sup> Refugee Convention, art. 1F(b), July 28, 1951, 189 U.N.T.S. 150.

<sup>34</sup> Catherine Dauvergne & Hannah Lindy, *Excluding women*, 20 Int'l J. Refugee L. 1 (2019).

determination of who *deserves* refugee protection.<sup>35</sup> This article was the result of a political compromise. The drafters were guided by the thought that if state parties were expected to admit serious criminals as refugees, they would simply not be willing to be bound by the Convention.<sup>36</sup> The Court of Justice of the European Union has elaborated on the purpose of article 1F as maintaining the ‘credibility’ of the refugee protection system.<sup>37</sup>

Article 1F has two elements to it. *First*, the standard of proof for the determination of exclusion is ‘serious reasons for considering’. It is a different standard than beyond reasonable doubt, clear and convincing, or preponderance of probabilities.<sup>38</sup> *Second*, there has to be a commission of a crime that is serious and non-political in nature. This need not involve a criminal conviction or a criminal charge—mere commission is enough.<sup>39</sup>

The UNHCR handbook advises that a contextual approach be taken to this clause. It requires a proportionality analysis to be undertaken, which would balance the gravity of the offence along with the consequences of exclusion, which means analysing the effects of persecution upon return.<sup>40</sup> However, many jurisdictions have disagreed

---

<sup>35</sup> *Ibid.*

<sup>36</sup> James C. Hathaway & Michelle Foster, *Persons Not Deserving Protection*, in *The Law of Refugee Status* 524, 524–98 (2d ed. 2014).

<sup>37</sup> European Court of Justice, Joined Cases C-57/09 & C-101/09, *Germany v. B & D*, 114, ECLI:EU:C:2010:661 (Nov. 9, 2010).

<sup>38</sup> Marjan Holvoet, *Harmonizing Exclusion Under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law*, 12 J. Int'l Crim. Just. 1039, 1039–56 (2014). doi:10.1093/jicj/mqu063 accessed 10 March 2025.

<sup>39</sup> Shelley, *supra* note 25.

<sup>40</sup> Michelle Hayman, *Domestic Violence and International Child Abduction at the Border of Canadian Family and Refugee Law*, 29 J.L. & Soc. Pol'y 114 (2018).

with the lenient approach of the UNHCR. In *Febles v Canada*,<sup>41</sup> the Canadian Supreme held that “Article 1F(b)’s application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.”<sup>42</sup>

The Hague Convention becomes relevant at this juncture because it highlights the harm that intersects with the application of Article 1F: international child abduction or kidnapping. Kidnapping has been considered a ‘serious non-political crime’ in several jurisdictions.<sup>43</sup> For the parent who has fled with her child, since the child has been ‘wrongfully removed from habitual residence’<sup>44</sup> and ‘against the custody rights of the other parent’ (which are clauses from the Hague Convention), the offence of kidnapping is made out in many jurisdictions.

In Canada, in *Kovacs v. Kovacs*,<sup>45</sup> there was an assessment under the Hague Convention, wherein the rights of the parents were being decided. Two years later, the Refugee Board determined that neither Mrs. Kovacs nor her children were refugees, nor were they in need of protection. This decision was appealed, one of the grounds being that a proceeding under the Hague Convention and the arguments and outcome there ought not to influence the determination of refugee status and protection. However, the Canadian Federal Court in *Kovacs*

---

<sup>41</sup> *Febles v Canada* 2014 SCC 68, [2014] 3 S.C.R. 431 (Can.).

<sup>42</sup> *Ibid.*

<sup>43</sup> Shelley, *supra* note 25.

<sup>44</sup> Gadi Zohar, *Habitual Residence: An Alternative to the Common Law Concept of Domicile*, 9 Whittier J. Child & Fam. Advoc. 169 (2009).

<sup>45</sup> *Kovacs v. Kovacs*, [2002] O.T.C. 287 (Ont. Sup. Ct.).

*v. Canada* held that the Hague Convention proceeding, which related to civil abduction, could be used to determine whether the person had ‘committed a serious non-political crime’.<sup>46</sup>

Kidnapping is usually on the penal codes and statute books of most countries. Therefore, if the ruling in *Kovacs* is to be generally applicable, it means that wherever there is a Hague Convention application, the person applying for refugee status is further disadvantaged as those proceedings may be used here to deny protection.

Further, this understanding of kidnapping is not gender-sensitive. When a mother is fleeing abuse from her home and decides to take the child with her for a better future, the harm that is being captured is far more complex. It is a different scenario from the usual understanding of kidnapping or abducting a child or person with a malicious intent from the safety of their parents or loved ones. The aspect of safety is most important here, both for the mother and the child. The ‘kidnapping’ is not one which happens due to the free will and rational exercise of choice of the mother. This complexity may in fact be recognised if countries follow the recommendation of the UNHCR. As briefly mentioned above, the UNHCR requires countries to undertake a proportionality analysis, weighing the gravity of the offence against the persecution faced by the claimant. The UNHCR highlights relevant factors such as seriousness of the offence, post-offence activities, and other factors.<sup>47</sup> Although the UNHCR has not explicitly released any guidelines about how to interpret exclusion from

---

<sup>46</sup> *Kovacs v. Canada*, 2005 FC 1473, 27.

<sup>47</sup> UNHCR, *Note on the Exclusion Clauses*, EC/47/SC/CRP.29 (1997).

a gender perspective vis-à-vis kidnapping, it is important to adopt a gender-sensitive approach to it; thus, the meaning of ‘serious non-political crime’ must be understood contextually. Many scholars have also argued that the kind of abduction that now is predominant under the Hague Convention should not be considered a ‘serious non-political crime’, where the mother and children are fleeing some sort of abuse.

However, these are still normative arguments and the effect of Hague Convention proceedings, especially in the US and Canada, attract Article 1F and could lead to the exclusion of mothers fleeing abuse with their children from the Convention’s protection.

### **A Rebuttal: Non-Refoulement as a *Jus Cogens* Norm**

One way of refuting the principle of exclusion from the refugee law regime is by recognising non-refoulement as a *jus cogens* norm. A peremptory norm of international law (‘*jus cogens* norm’) is a ‘norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm’.<sup>48</sup> A *jus cogens* norm overrides all conflicting norms and principles. There are generally two ways to identify a *jus cogens* norm- either through agreement of states, or through concretising principles arising out of superior normative commitments.<sup>49</sup>

---

<sup>48</sup> *Vienna Convention on the Law of Treaties*, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

<sup>49</sup> *Int'l Law Comm'n, Report on Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/74/10, ch. V (2019)  
<<https://legal.un.org/ilc/reports/2019/english/chp5.pdf>> accessed 10 March 2025.

There is a vibrant academic debate as to whether the principle of non-refoulement has attained the status of a *jus cogens* norm. Some scholars argue that non-refoulement, given its critical importance and central role in the refugee law regime, has attained the status of a *jus cogens* norm.<sup>50</sup> Even though it may not be enumerated explicitly as a *jus cogens* norm, some argue that it satisfies all the requirements and is ready for such recognition.<sup>51</sup> This debate is also reflected in some international legal principles. For example, Section III(5) of the 1984 Cartagena Declaration on Refugees states as follows:

“Non-refoulement principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.”<sup>52</sup>

If non-refoulement is accepted as a *jus cogens* norm, then it will be applied to the exclusion of the Hague Convention principle requiring immediate return of the child. However, this is not a settled question as even within the Refugee Convention regime, there are numerous exclusions, exceptions, and factors for cessation of non-refoulement protections (Article 33(2) of the Refugee Convention).<sup>53</sup> All states have not accepted non-refoulement as a norm, with Jane McAdam stating

---

<sup>50</sup> Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13(4) Int'l J. Refugee L. 533 (2001), Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, in Netherlands Yearbook of International Law 273 (Maarten den Heijer & Harmen van der Wilt eds., 2016).

<sup>51</sup> Costello and Foster *supra* note 50.

<sup>52</sup> Cartagena Declaration on Refugees, § III (1984).

<sup>53</sup> Rebecca M.M. Wallace, *The Principle of Non-Refoulement in International Refugee Law*, in *Research Handbook on International Law and Migration* 417 (Vincent Chetail & Celine Bauloz eds., Edward Elgar 2014).

that “Though a number of States have traditionally respected these additional non-refoulement obligations, they have been reluctant to grant beneficiaries a formal legal status analogous to that enjoyed by Convention refugees.”<sup>54</sup> Hathaway makes a different argument that non-refoulement, merely because it is practiced by states, cannot be considered *opinio juris*,<sup>55</sup> as states are merely abiding by their Treaty obligations and may not endorse this norm whole-heartedly or in all situations. Furthermore, many states and scholars consider non-refoulement only as a means to the end of protection. Therefore, while protection may be a broadly accepted universal norm (even assuming so), non-refoulement by itself may not be. Therefore, the argument of non-refoulement being a *jus cogens* norm has no broad, global acceptance and cannot be used favourably by domestic violence victims when contesting the application of the Hague Convention.

Therefore, these two legal principles – exclusion and the lack of recognition of a *jus cogens* norm pose challenges to mothers who have fled with their children.

### **Section III. Slipping through the cracks**

#### **Interaction of the Hague Convention with the Refugee Rights regime**

In the previous section, the Refugee law regime was explained as operating in a way that disadvantages and excludes the claims of those women who have fled some form of abuse with their children. It was

---

<sup>54</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford Univ. Press 2007).

<sup>55</sup> James C. Hathaway, *Leveraging Asylum*, 45 Tex. Int'l L.J. 503 (2010).

also briefly indicated how the Hague Convention interferes in refugee status determination proceedings. This section will elaborate on the interaction between the Hague Convention and the Refugee Rights regime.

The Hague Convention is primarily a jurisdictional treaty which determines the country where the child's custody should be litigated. It aims to prevent forum shopping by fleeing parents to choose a jurisdiction that is sympathetic to such cases. Its purpose is to immediately send children back to their habitual residence, after a summary proceeding which weighs a limited number of defences that the 'abducting' parent can offer. The harm that the Hague Convention drafters were trying to address was one of fathers kidnapping children from their helpless primary caregivers—mothers—who had no legal recourse.<sup>56</sup> The situation that we are considering in this article, which is of a mother fleeing abuse with her child, was explicitly dismissed by the Hague Convention's drafters.<sup>57</sup> However, the harm that the Hague Convention drafter envisaged no longer forms the majority of 'abductions'. A study commissioned by the Permanent Bureau of the Hague Conference on Private International Law found that 69% of the 'abductors' in 1999 and 2003 were, in fact, women.<sup>58</sup> Several other studies, reports and interactions with these women also revealed that

---

<sup>56</sup> Carol S. Bruch, *The Hague Child Abduction Convention: Past Accomplishments, Future Challenges*, 1 Eur. J.L. Reform 97 (1999).

<sup>57</sup> Lakshmi Jhambolkar, *Domestic Violence and the Hague Abduction Convention: The Indian Perspective*, 57(1–2) Indian J. Int'l L. 179 (2017).

<sup>58</sup> Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98(1) Calif. L. Rev. (2010).

a majority of them were mothers taking their children to other countries as they were fleeing domestic violence or some form of abuse.<sup>59</sup>

The Hague Convention and its safeguards are not adequate to account for this problem. Although there are five safeguards in the Hague Convention which can act as defences in Hague Convention proceedings, only two are relevant here:

“Article 13(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.”<sup>60</sup>

“Article 20: The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”<sup>61</sup>

The other safeguards relate to the left-behind parent not having custody or consenting to the removal, the child being mature enough to express their wish, and that the child has become well-settled in their new surroundings.<sup>62</sup>

There exists a lot of jurisprudence on Article 13, on whether the

---

<sup>59</sup> *Ibid.*

<sup>60</sup> Hague Convention on the Civil Aspects of International Child Abduction, *art. 13(b)*, Oct. 25, 1980, 1343 U.N.T.S. 89.

<sup>61</sup> Hague Convention on the Civil Aspects of International Child Abduction, *art. 20*, Oct. 25, 1980, 1343 U.N.T.S. 8.

<sup>62</sup> Asha Bajpai, *Across the High Seas: Abuse, Desertion, and Violence in Transnational Marriages in India*, 19(10) Violence Against Women 1246 (2013).

argument of domestic violence against the mother can be used to prove that the child would be exposed to harm.<sup>63</sup> The Hague Convention, although it is cognisant of the factum of domestic violence, has not taken a gender-sensitive and favourable approach towards child abduction. Part VI of the Guide to Good Practice on Article 13(1)(b), adopted by the Hague Conference on Private International Law in 2020 recommends that *only the impact of domestic abuse specifically on the children* ought to be considered while interpreting this provision.<sup>64</sup> The way it is worded leaves much to be desired, “Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child.”<sup>65</sup> Therefore, there exists problems of internal logic within the Hague Convention itself, on how the safeguards are to be interpreted.

This Article juxtaposed against the Refugee Convention reveals that they are militating against different harms. Since the Article 13 defence is not to be interpreted in a wide manner, domestic violence against the mother is insufficient to successfully establish the defence in most jurisdictions.<sup>66</sup> This means that the summary proceedings would conclude with a direction for the child to be sent back to the place of

---

<sup>63</sup> Barbara Stark, *The Internationalisation of American Family Law*, 24 J. Am. Acad. Matrim. Law. 467 (2012); Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 Fam. L.Q. 299 (2013).

<sup>64</sup> *Guide to Good Practice Child Abduction Convention: Part VI - Article 13(1)(b)*, HCCH (2020), <https://www.hcch.net/en/publications-and-studies/details4/?pid=7059>, accessed 8 April 2022.

<sup>65</sup> *Ibid.*

<sup>66</sup> Norris, *supra* note 58.

habitual residence. On the other hand, the non-refoulement clause under the Refugee Convention, assuming that the criteria are fulfilled, would demand protection for the claimants. The points of entry into the legal system of another country are thus conflicting. One requires the legal system to abstain from making any claims of protection for the child, while the other demands that the legal system process the claim and decide on legal protection for the mother and the child. This gives rise to yet another fundamental contestation between the Hague Convention and the Refugee Rights regime.

On one hand, the Hague Convention is based on the assumption that all states are competent to protect their citizens.<sup>67</sup> It is also assumed that they have well-functioning legal systems that are best placed to decide claims of custody and violence.<sup>68</sup> On the other hand, the refugee law jurisprudence is premised on the fact that some states cannot effectively protect their citizens against persecution or threat to life or freedom.<sup>69</sup> Worse, some states themselves may be the persecutors and cause these threats in the first place. The refugee law regime encourages other states both legally and morally to protect refugees and to fulfil their basic needs, while their own states have failed them.<sup>70</sup> The refugee law regime also allows legal systems of other states to acknowledge and pass judgement that the countries of origin are ineffective in some sense. The fundamental conflicts between the

---

<sup>67</sup> Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence*, 12 Int'l J.L. Pol'y & Fam. 191 (1999).

<sup>68</sup> Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 Transnat'l L. & Contemp. Probs. 271 (2002).

<sup>69</sup> Shacknove, *supra* note 32.

<sup>70</sup> *Ibid.*

assumptions made by these two parallel legal systems can lead to confusion but more importantly, can act as a double-bind exclusion for mothers fleeing domestic abuse.<sup>71</sup>

Especially in countries where the systems work parallelly, there is no consistency or coherence in which principles are to be privileged. In US and Canada, it is usually the Hague Convention proceedings that are privileged, since they are required to be adjudicated in a shorter time frame.<sup>72</sup> In *Kovacs v. Kovacs*,<sup>73</sup> the Canada Court held that since the Hague Convention proceedings are usually adjudicated within three months, any claim made under refugee law could not be used as a bargaining chip to prevent the law taking its natural course under the Convention. On the other hand, the UK gives more weight to the Refugee Convention, arguing that since its primary aim is protection, the Hague Convention summary proceedings cannot overrule protection granted by refugee regime.<sup>74</sup> In *G v. G*,<sup>75</sup> the UK Supreme Court held that an asylum application submitted by an ‘abducting parent’ prevents the return of a child under the Hague Convention proceedings. The asylum application made by the parent is effectively extended to the minor child or children as well, and the Court held that non-refoulement will apply at least until the claim for asylum has been decided. The Court agreed with the argument made by the Canadian

---

<sup>71</sup> Hayman, *supra* note 40.

<sup>72</sup> Martha Bailey, *Canada's Conflicted Approach to International Child Abduction*, 2016 Int'l Surv. Fam. L. 81 (2016); Kieran Walsh & Sarah Atkins, *When Our Paths Cross Again: The Supreme Court's Management of Related Asylum and Child Abduction Claims in G v G*, 85(5) Mod. L. Rev. 1245 (2022).

<sup>73</sup> *Kovacs v. Kovacs*, [2002] O.T.C. 287 (Ont. Sup. Ct.).

<sup>74</sup> Walsh and Atkins, *supra* note 72.

<sup>75</sup> *G v. G*, [2020] UKSC 19.

Court about time limits. However, it resolved the issue sensibly by stating that in cases which involved both refugee and Hague convention applications, the claim for asylum had to be expedited. Once that was decided, the Hague Convention proceeding outcome could be decided accordingly.

Some have argued that the defence of Article 20, which is that a fundamental principle of the requested state (i.e., the state that the parent has fled to with the child) would be violated if the child were sent back, could be interpreted creatively using the protection under refugee law.<sup>76</sup> Article 20 has been interpreted as having to violate a 'law' of the requested state.<sup>77</sup> It is possible to make an argument that if a state has obligations under the Refugee Convention and has passed a domestic law accordingly, the prohibition on non-refoulement could be used to prevent the return of a child. Since non-refoulement is considered a fundamental principle of all states, or at least most states, it could attract the defence under Article 20 of the Hague Convention. However, this is merely a normative argument, and it remains to be seen if this argument can be accepted in such jurisdictions.

### **A Way Forward - The Unique Case of India**

India is neither a signatory to the Hague Convention nor to the Refugee Convention. Therefore, the situation of domestic violence

---

<sup>76</sup> Kerri Smetzer Mast, *The Application of the Fundamental Principles Exception of the Hague Convention on the Civil Aspects of International Child Abduction*, 17 Emory Int'l L. Rev. 241 (2003).

<sup>77</sup> Dorothy Carol Daigle, *Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and Its Exceptions*, 26 Vand. J. Transnat'l L. 865 (1993).

victims fleeing other countries with their children and coming to India for safe haven are adjudicated on a case-by-case basis. India has refused to sign the Hague Convention because an alarming number of Non-Resident Indian and Overseas Citizen of India card-holding women come back to India with their children, fleeing domestic abuse.<sup>78</sup> If India signed the Convention, it would be forced to send back those children summarily. The Ministry of Law and Justice has argued that these women are not even ‘abductors’ as it is understood commonly.<sup>79</sup>

This gives Indian Courts the leeway to not be bound by any international principles when adjudicating such cases. It has also allowed for a more gender-sensitive approach to be taken. In the landmark case *Dhanvanti Joshi v. Madhav Unde*,<sup>80</sup> an Indian couple had got married in the US, and due to some issues, the appellant mother moved back with the baby. Several years after that, the husband filed for custody of the child in the US and obtained a permanent decree. The appellant filed the case in India asking for guardianship and a declaration that the US decree was not binding on her. An issue arose with respect to ‘child abduction’. The Supreme Court held that since India was not a signatory to the Hague Convention, the Courts had the jurisdiction to hear the cases relating to custody and domestic violence

---

<sup>78</sup> Stellina Jolly & Aaditya Vikram Sharma, *Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration*, 17(1) J. Priv. Int'l L. 114 (2021).

<sup>79</sup> Stellina Jolly, *International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India*, 31 Int'l J.L. Pol'y & Fam. 31 (2017); Moushumi Das Gupta, *India May Not Sign Hague Convention on International Child Abduction*, *Hindustan Times* (June 19, 2018), <https://www.hindustantimes.com/india-news/india-may-not-sign-hague-convention-on-international-child-abduction/story-dNTk63osFMcrA17y2Y6qwO.html>, accessed 18 May 2023.

<sup>80</sup> *Dhanvanti Joshi v. Madhav Unde*, (1998) 1 SCC 112.

on merits. The Court held, “So far as non-Convention countries are concerned, or where the removal related to a period before adopting the Convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration.”<sup>81</sup>

This was affirmed in another landmark and oft-cited case of *Nithya Anand Raghavan v. State (NCT of Delhi)*.<sup>82</sup> The issue in the present case was that the respondent father had filed a habeas corpus petition in the High Court alleging that the appellant mother had illegally removed the minor daughter Nethra from the custody of the respondent father in the UK. The respondent had obtained an interim order from a UK Court. The High Court in India ruled that there was no reason to ignore the interim order of the UK Court and ordered the return of the child. In the appeal, the Supreme Court held that, “In deciding whether to order the return of a child who has been abducted from his or her country of habitual residence — which was not a party to the Hague Convention, 1980, — the courts’ overriding consideration must be the child’s welfare.”<sup>83</sup> In this case, the appellant mother had moved back to India due to domestic abuse. The Court allowed the appeal by the mother and re-emphasise that the best interest of the child must be the prime consideration, and there was no need to order the return

---

<sup>81</sup> *Ibid.*

<sup>82</sup> *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454.

<sup>83</sup> *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454, 43.

of the child if it would result in harm.

These two cases show us that the Courts in India are unwilling to immediately order return or strictly abide by the judgements passed in foreign countries relating to the return of the child. Especially in the case of *Nithya Anand Raghavan*, the factum of domestic violence was recorded in the Supreme Court judgement. Therefore, the decision on the return of the child factored in the mother's safety and the general atmosphere of the family as well.

The case-by-case approach is important because it does not adhere to strict guidelines that disadvantage and exclude women facing domestic violence. When women flee with their children, there is no criminality attached to the same upon adjudication in Indian Courts. This flexible adjudication may create the space for a more gender-sensitive approach as the remedies can be tailored to the fact situation in each case. However, the corresponding fear is that there is extreme judicial discretion and the interpretation in each case depends upon the Judges as well. However, on a balance, if the principles already established by the Supreme Court are followed, then the flexibility can be used to support victims of domestic violence who flee with their children.

From a child rights perspective, there is a strong argument to be made for the child's welfare or best interests being the most important factor in adjudication, especially while considering the conflict between claims of international child abduction and non-refoulement.<sup>84</sup> This

---

<sup>84</sup> For example, see *Anna Lundberg, The Best Interests of the Child Principle in Swedish*

factor should be considered more strongly even in jurisdictions which are party to both the Refugee and Hague Conventions. Especially in cases of non-refoulement, the harm that has been caused or is likely to be caused to the child should feature more centrally when adjudicating upon the claims made by mothers who are victims of domestic violence.<sup>85</sup>

## Conclusion

Domestic violence victims are already marginalised and disadvantaged in multiple and complex ways. Their own home is a space that is not safe for them. When they flee with their children, it is very often a last resort. The legal system in place must not subject them to further hardship. Further, general state obligation under human rights requires states to take measures to prevent domestic violence in the first place. All states must introspect not only on the nature of their legal systems, but the messaging they give out and the capacity of the systems in place to prevent, protect, redress and fulfil human rights obligations.

This chapter has presented arguments, both normative and positivist, on the ways that the refugee rights regime and the Hague Convention intersect to create specific disadvantages and exclusions for the stakeholders. It has been argued that domestic violence victims should qualify for refugee protection under the Convention's definition of a 'particular social group' (PSG) and be entitled to non-refoulement.

---

*Asylum Cases: The Marginalization of Children's Rights*, 3 J. Hum. Rts. Prac. 49 (2011)  
<https://doi.org/10.1093/jhuman/hur002>.

<sup>85</sup> JM Pobjoy, *The Best Interests of the Child Principle as an Independent Source of International Protection*, 64(2) Int'l & Comp. L.Q. 327 (2015)  
<https://doi.org/10.1017/S0020589315000044>

However, legal obstacles persist, particularly under Article 1F of the Refugee Convention, which may classify fleeing mothers as ‘abductors,’ and the Hague Convention, which prioritizes child return over safety considerations.

Jurisdictional responses to this conflict vary. Canada largely upholds the Hague Convention, often penalizing fleeing mothers, while the UK prioritises refugee claims in such cases. India, as a non-signatory to both conventions, takes a flexible, case-by-case approach that centres on the child’s best interests and maternal safety. This divergence highlights the need to adopt a comprehensive gender-sensitive approach to all aspects of refugee law – right from the definition of the refugee to non-refoulement to actual determination processes. Future reforms should include an explicit recognition of domestic violence as a significant factor in Hague Convention proceedings, stronger integration of child welfare considerations in both legal regimes, and greater judicial discretion to account for the complexities of each case. The legal system should not compound the trauma of domestic violence survivors and should aim to resolve the conflicting legal obligations that undermine their safety and rights.

## PART- 6

### INTER-PARENTAL CHILD REMOVAL TO INDIA: CHALLENGES, SAFEGUARDS AND REMEDIES

*Anil Malhotra\* & Ankit Malhotra♦*

#### Introduction

The rise in inter-parental child removal cases to India involving non-resident Indians has shone a spotlight on India's absence from the Hague Convention on Civil Aspects of International Child Abduction. This paper examines the implications of this gap, highlighting the need for international collaboration and the adoption of consistent legal frameworks in India. By analysing Indian judicial precedents, international conventions, and the challenges posed by jurisdictional inconsistencies, the study accentuates the need for India to align its domestic laws with international standards. The study primarily suggests adopting pre-removal safeguards, recognizing foreign court orders, and instituting a central authority to streamline child custody disputes.

In an increasingly interconnected world, the challenges of inter-parental child removal have emerged as a pressing issue, especially for non-resident Indians. Despite India's commitment to the United

---

\* Anil Malhotra is a fellow of International Academy of Family Lawyers (IAFL). He holds an LL.M from University of London and practices at Malhotra & Malhotra Associates (International Lawyers), Chandigarh, INDIA. He can be reached at [anilmalhotra1960@gmail.com](mailto:anilmalhotra1960@gmail.com)

♦ Ankit Malhotra holds an LL.M from SOAS, University of London as a Felix Scholar and practices at Malhotra & Malhotra Associates (International Lawyers), Chandigarh, INDIA. He can be contacted at [ankitmalhotra97@gmail.com](mailto:ankitmalhotra97@gmail.com)

Nations Convention on the Rights of the Child (UNCRC), its non-signatory status to the Hague Convention on Civil Aspects of International Child Abduction (Hague Convention) has led to jurisdictional ambiguities and inconsistencies in resolving cross-border child custody disputes. The current legal framework in India, rooted in domestic statutes and discretionary judicial precedents, struggles to accommodate the complexities of international child custody conflicts. This paper explores these challenges, focusing on the judicial application of principles such as the “best interest of the child” and the significance of parental agreements, while highlighting the urgent need for legislative reform to provide clarity and uniformity. Divergent views emerging at different times may not be able to cope with the rising number of such cases, which come up from time to time for interpretation. We, in India, are thus wanting for an expeditious acceptance and implementation of the international principles of inter-parental child removal which are couched in The Hague Convention. Till the time that India becomes a part of the Hague Convention on Inter-parental Child Removal and enacts internal legislation to give effect to the Hague Convention by creating a Central Authority or other coordinating body, the inconsistency in judicial decisions will remain. The Indian Courts decide individual matters on the facts and circumstances of every case and are not guided by any statutory or enabling provisions, which could provide uniformity and consistency. Consequently, issues of custody, removal, inter-parental conflicts, and related aspects cannot find any uniform path of judicial interpretation.

## **International Legal Framework and Challenges Due to Non-Ratification of Hague Convention<sup>1</sup>**

The question of custody of children after the removal by parents across borders has become an issue of concern globally. This is further exacerbated when both parents are residents of country which is not their country of nationality or parents having different nationalities due to the applicability of laws of multiple countries. It brings into question, the enforcement of foreign decrees, jurisdiction of courts, etc. The phenomenon of removal of the child from one country has often been called internationally as International Parental Child Abduction. In order to counter the same, the Hague Convention of the Civil Aspects of International Child Abduction was signed in 1980. Read with the Convention on the Rights of Child, 1989 (CRC) and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996, the aspects of child custody, jurisdiction, choice of law, enforcement of foreign decrees have been decided upon and concepts such as best interest of the child have been developed and used by member States. India, in the 21<sup>st</sup> Century despite evolution of global norms, has chosen to maintain its status of opting out of the Hague Convention. Although this decision was taken due to valid reasons such as the effect it would have on the rights of Indian women, lack of a central authority to handles such

---

<sup>1</sup> Pritam Kumar Ghosh, *The Indian Legal Framework Governing Inter-Country Parental Child Removal and Retention: Need for Reforms*, 30 SRI LANKA J. INT'L L. 155 (2024).

issues in India, the lack of recognition of foreign judgments, etc., its practical implications have been significant in practical cases.<sup>2</sup> Apart from this, the complicated religious laws in India coupled with secular laws such as the Constitution of India, 1950 (Constitution), The Guardian and Wards Act, 1890 (GWA), the Family Courts Act, 1984 (FCA) and the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) have left the jurisprudence and decision making in the hands of the Indian Judiciary. The Indian Judiciary has given decisions ranging from principles such as *best interest of the child* to approaches involving sporadic mediation. The decisions are multi-fold and varying, further complicating the present complex legal landscape. The 218<sup>th</sup> report of the Law Commission of India remains unimplemented and the Civil Aspects of International Child Abduction Bill, 2016 has never reached the table in the Parliament. Some major challenges faced with respect to Inter parental child removal are dealt with hereinunder.

### ***Jurisdiction and choice of law***

The custody of children is an issue which courts around the world grapple with within their own domestic laws. The advent of inter-country determination of such issues adds another layer of complexity. The confusion arises because of the applicability of laws of multiple jurisdictions or countries, when Indian parents are resident in foreign jurisdictions. Amidst this, either of the parents could also remove the child from a country and take them away, further complicating the matter, especially if it is in violation of foreign custody orders. An

---

<sup>2</sup> Lalith Swetha, India and the Hague Convention, 3 (6) IJIRL (2022).

addition to this, if one of the parents is a national of a foreign country, the applicability of laws is blurred. The Hague Convention was formulated to put an end to these questions. India, remaining out of the Convention, has necessitated that the Indian judiciary take cognizance of these matters relating to inter-parental child removal. Due to the lack of a proper domestic law on these matters, the decisions of the Indian courts are varied, lacking uniformity. India not being a signatory to the Hague Convention, Courts in India do not take judicial notice of the definition of “*Wrongful removal or detention*” which is mentioned in the Hague Convention. Inter-Parental Child Removal is not defined as an offence under any Civil or Criminal law in India. Hence, to establish it as a wrong within the meaning of the Hague Convention is extremely difficult.

### ***Child Custody***

The GWA allows for petitions to return a minor child into the custody of the guardian if removed, but this is subject to the best interests of the child. But the procedure under this Act is fairly long and subject to the drudgery and sometimes bias of the Indian Judiciary. Some cases of injunction are seen to prevent the child from being removed from the custody of their guardian (often the mother), but they are relatively fewer in number. Ignorance or lack of awareness about these provisions also contribute to non-use and non-application. The varying family laws in the country do not contribute to solving this pertinent issue. Whether it be the father being natural guardian under Hindu and Muslim personal laws or conversely the decision of the courts in favour of the mother, the confusion adds to the pre-existing

delay and gender biases of judges.<sup>3</sup>

### ***Enforcement of Foreign Court Orders***

Another issue that arises with respect to Inter-parental child removal is the enforcement of foreign court orders. The deprivation of parental rights on the strength of a foreign court order from a convention country will not be easy to interpret. Such parental rights will have to be established and proved afresh to step on the threshold of violations resulting thereupon. Again, these may depend on an independent assessment of the Indian Court on the best interest and the welfare of the child principle based on evidence before the Court.

Secondly, the practical difficulties in seeking implementation of a foreign court order if the children are not returned from India may vary in different jurisdictions in India. To start with, the choice of the petition (Habeas Corpus under the Constitution of India or a Guardianship petition under the Guardian and Wards Act), the time frame for its decision, delays in hearing the matter, time to be consumed in establishing evidence, and ultimately remedies of further appeals besides executing the Indian Court order, are all time-consuming factors. Further, if the matter is appealed to a Court of superior jurisdiction in India, it may again set off a conclusion in the matter. Also, seeking implementation of visitation rights may require frequent visits to India since it will be practically impossible to seek a temporary return to the foreign jurisdiction from India as long as the

---

<sup>3</sup> Patricia Uberoi, Rajni Palriwala, *Marriage, Migration And Gender*, 326-333 (SAGE Publications, 2008).

matter remains pending a final decision before an Indian Court.

If the parent were to disobey or violate a foreign Court order, punitive or other remedies would lie in the foreign Court and not in India. An Indian Court hearing a petition seeking enforcement of a foreign Court order may view the violation with a discreditable attitude but may still proceed to decide the matter on merits. No remedy would lie to punish or penalize an offending parent in India who has violated a foreign court order since only violation of Indian Court orders would carry contempt application or penalties. An argument can be raised to disallow any benefit to such an offending parent, but it would be for the Court to take notice and decide.

In case, the parent travels to India and secures interim custody of the minor child from an Indian Court during the pendency of any petition filed by a parent for implementing the foreign Court order, the Indian Court at its discretion may restrain the parent from removing the child back to the foreign till the Indian Court finally decides the matter. The Indian Court may even ask the parent to deposit their passport in Court as also of the minor child to ensure that there is no violation of such a direction. There is thus a possibility that the Indian court may restrain the movement of the child back to the foreign country, till the Indian Court itself finally decides the matter. However, instances in some pending cases have now arisen where, despite deposit of passport with the Courts, the offending parent removes the child out of India by wrongful means.<sup>4</sup>

---

<sup>4</sup> Victoria Basu v. State of WB, WP (Criminal No. 129/2013) SC Interim Order dated July 17,2023; Aman Sharma, Custody Case Gone Wrong: How A Man Fled For US

The authors argue that a remedy to these issues is essential whether it be by adopting the Hague Convention or by adopting more secular family laws in India, the same be further discussed. But it is initially, essential to take the look at the reasoning behind the same i.e. contrasting and multi-fold judicial decisions.

## **JUDICIAL DECISIONS RESPONSE: CASE LAW TRENDS AND GAPS**

The law declared by the Supreme Court shall be binding on all courts. In the absence of a clear codified law on cross border inter-parental child removal issues, the much-needed clearer path of judicial precedent will continue to guide litigants and courts. The constitutional courts in India have used many principles and methods to navigate their way through the non-accession of the Hague Convention, some of which are discussed below.

### ***Application of parens patriae in Habeas Corpus jurisdiction***<sup>5</sup>

---

Without Passport To Avoid Handing Over Child To Ex-Wife, news18, (March 25, 2025), <https://www.news18.com/india/custody-case-gone-wrong-how-a-man-fled-for-us-without-passport-to-avoid-handing-over-child-to-ex-wife-9273705.html>; Debby Jain, Russia Obligated To Legally Assist India In Locating Woman Who Fleed With Child During Custody Case: Supreme Court, LiveLaw, (Aug 25,2025), <https://www.livelaw.in/top-stories/supreme-court-russian-authorities-have-obligation-to-legally-assist-in-locating-woman-who-fled-india-with-child-pending-custody-dispute-301824>.

<sup>5</sup> 1. Kanika Goel Vs. State of Delhi, reported as 2018 Supreme Court Cases Online Supreme Court 709, the Supreme Court of India reiterated the earlier decisions in Nithya Anand Raghavan Vs. State of NCT of Delhi, 2017 (8) Supreme Court Cases 454 and Prateek Gupta Vs. Shilpi Gupta and others, reported as (2018) 2 Supreme Court Cases 309;Tejaswini Gaud & Ors. Vs. Shekhar Jagdish Prasad Tiwari & Ors 2019 (7) Supreme Court Cases 42; Lahari Sakhamuri Vs. Sobhan Kodali 2019(7) Supreme Court Cases 311; Vasudha Sethi Vs. Kiran Bhaskar 2022 All Supreme Court Reporter (Crl.) 279; Rajeshwari Chandrasekar Ganesh Vs. The State of Tamil Nadu & Others Before Hon'ble Supreme Court. Writ Petition (Cr.) No. 402 of 2021 Decided on July 14, 2022; and Rohith Thammana Gowda V/s State of Karnataka

The writ of Habeas Corpus for seeking implementation of child rights where the parents are fighting for the custody of their offspring was settled by the Supreme Court in *Gobar Begum v. Saggi*<sup>6</sup>, by following principles applicable to such writs in England to deliver custody of infants. In another case<sup>7</sup>, following English and American Law, the Supreme Court held that “*the basis for issuance of a writ of Habeas Corpus in a child custody case is not an illegal detention*”, but “*the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate*”. This was done by application of the principle of *parens patriae* i.e. the Court acting as a guardian of the child.

Hence, invoking of the writ of Habeas Corpus for child custody by a parent deprived of access and parental rights, on the strength of a foreign court custody order is the only efficacious, speedy, and effective remedy. Since the minor “*ordinarily resides*” abroad, there is a bar of jurisdiction under GWA for a guardianship petition before a Guardian Judge leaving the deprived parent with the sole remedy of invoking the *habeas corpus* jurisdiction.

### ***Use of concept of best interest of the child***

When India became a signatory to the United Nations Convention on the Rights of the Child (UNCRC) on December 11, 1992, steps were

---

and others 2022 Supreme Court Cases OnLine Supreme Court 937.

<sup>6</sup> AIR 1960 SC 93.

<sup>7</sup> Nil Ratan v. Abhijit, AIR 2009 Supp. SC 732.

taken to secure the best interests of the child in India. Accordingly, section 2(9) of the Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act) now states that the ‘best interest of the child means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social wellbeing and physical, emotional and intellectual development.’ The definition of the best interest of the child has been expounded by the Supreme Court in *Labari Sakhamuri v. Sobhan Kodali*<sup>8</sup>, to mean that:

*“...it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old. The definition of “best interest of the child” is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean “the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social wellbeing and physical, emotional and intellectual development”.*

Thereby, the Court in its wisdom, shattered the glass ceiling of gender and age preference and provided neutrality to parents’, on the welfare of the child principle. This principle has been the crux of most judgments of the courts in India in matters relating to inter-parental child removal.

### ***Parental Alienation Syndrome***

Earlier, in 2017, Justice A.K. Sikri in a case<sup>9</sup>, discussed the concept of Parental Alienation Syndrome and held that “*a child-centric human rights*

---

<sup>8</sup> 2019 SCC Online SC 3951.

<sup>9</sup> Vivek Singh v. Romani Singh, 2017 (3) SCC 231.

*jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation.”* The prophecy of Wordsworth resounds, reverberates, and echoes, resonating that the child is the father of man. This vibrant jurisprudence has evolved from the focus of the Courts to evolving law by interpreting provisions of UNCRC incorporated in the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA). Consequently, this has also led to Indian Courts directing parties to obtain mirror orders from foreign courts, before children are relocated from India to their foreign homes as was done in *Dr Navtej Singh v State of NCT & Anr*<sup>10</sup> and, upheld by the Supreme Court of India, in *Jasmeet Kaur v State (NCT of Delhi) & Anr*<sup>11</sup>. This notable trend of finding alternate solutions for return of removed children till India signs the 1980 Hague Convention on Abduction, is an offshoot of protecting the best interest of the child secured by the UNCRC. Aided by principles of comity of courts, determination of best interest by jurisdiction of closest contact, succour is found in law enacted under the UNCRC umbrella.

## **PROPOSED INTERNATIONAL TRAVEL SAFEGUARDS AND REMEDIES FOR RETURN**

Keeping in view that India is not a signatory to the Hague Convention, there is no provision for mirror orders in India and that there are no provisions in Indian Statute law to adhere compliance of foreign court inter-parental child custody orders, the following suggestions,

---

<sup>10</sup> 2018 SCC Online Del 7511.

<sup>11</sup> 2019 SCC OnLine SC 1599.

safeguards, and remedies are being put forth as recommendations in the general. However, this list of safeguards is by no means exhaustive, and despite safeguards being in place, there may still be an independent determination and adjudication of the best interest of the child by the competent Family Court in India in accordance with the provisions of Hindu Minority and Guardianship Act, 1956 (HMGA) and the GWA under the provisions of the FCA.

### 1. **Notarized Agreement to ensure return of child**

The first safeguard can be a notarised agreement containing all terms, conditions, stipulations, and undertakings to ensure the return of the child to the country of permanent abode. The paperwork, agreements, documents, and other execution of bonds/guarantees will have to be worked out *in advance before the child leaves a foreign country for India* and can be drawn up in the home country itself through Solicitors or by engaging the services of lawyers in India on a professional basis for doing so.

Additionally, to facilitate the travel of the minor child to India, he/she will need a long-term/short-term India visa on his country of origin passport. If the minor child has an Overseas Citizen of India (OCI) status given the Indian status of his father/mother, this issue poses no problem. However, it equally, gives flexibility to stay in India indefinitely without any Indian visa. The following comprehensive clauses can form part of a notarised agreement between the parties:

- i. As a pre-condition of the minor child being brought to India by a parent, two family members, associates, or close relatives

of the other parent, who are permanently resident in India, should furnish notarized affidavits stating that they stand surety and guarantee of the minor child safe return to the country of origin and would be personally responsible for ensuring that the agreed dates of return of the minor child are complied with in letter and spirit. Both such guarantors should specify their complete address, contact details, telephone numbers, and permanent account number (PAN) and unconditionally agree that in the eventuality of any breach, they will assist, cooperate, and render all help in initiating legal or other proceedings to enable the return of the minor child to the country of origin. To ensure compliance, both such guarantors should furnish bank guarantees of suggested Indian Rs.60 lacs (50000 GBP/55000 USD) each from an Indian nationalized bank which shall forthwith stand forfeited and payable to the concerned parent or nominees upon any default of the conditions of the notarized agreement. Copies of these bank guarantees should be furnished in advance to the concerned parent. Both such guarantors should also undertake that they will not resile or withdraw their undertaking before any authority or Court in India and will not be a party to any legal proceedings to favour the parent concerned in the eventuality of any breach of the notarized agreement by the parent concerned. They should also undertake that they will cooperate and assist the country of origin Embassy/Consular office in India to ensure the return of the minor child to the country of origin in the eventuality of any breach of the terms

of the notarized agreement by the parent concerned.

- ii. The exact travel details when the parent wishes to take the minor child out of the country of origin to India or any other country should be given. The date of departure, time to be spent in India or any other country, and the exact date of return should be specified. The places of stay in India or any other country with exact and complete addresses besides contact details should be spelled out. Local Indian telephone details, and email addresses in use besides local mobile numbers to be used in India or any other country should be disclosed in the agreement. If possible and known, all flight numbers of to and fro travel should also be mentioned and specified in writing in the notarized agreement. It should clearly be acknowledged, admitted, and unequivocally accepted in the agreement by the concerned parent that the minor child is an overseas national who has been habitually and permanently resident abroad since birth. Consequently, it should be accepted by the removing parent unconditionally that only the Courts of the country of the child's origin, will be competent to decide all questions and issues of custody, welfare, guardianship, or any other related issues of the minor child.
- iii. The removing parent should unconditionally agree that he will not file, present or pursue either himself or through any of his relatives, associates, family members, or other representatives any petition or application either under the GWA or under the HMGA or under any other Indian law before any Court in

India for seeking custody, guardianship or care or control of the minor child whilst he/she is in India.

- iv. The takeaway parent must guarantee, ensure, and stipulate a specified time when the parent whilst in India will be scheduled to be in contact with the other parent abroad by daily telephone/video conference contact during the entire tenure of stay of a child in India or any other overseas destination. In addition, the left-behind parent should also be provided regular updates about the minor child's health and well-being. It should ensure that all dietary requirements, food habits, health, and hygiene of the minor child are adhered to, as was when the child was at home. The takeaway parent must undertake that whenever deemed necessary, appropriate, or desirable, he will unconditionally permit, allow, and not obstruct or hinder any personal visit by the left-behind parent, to see and meet the minor child in India, if he/she so wishes. Besides, if so desired by such parent, he/she will be permitted to nominate, appoint, or authorize, any person, counsel, or any other designated representative to visit and meet the minor child in India to enquire about his/her health, welfare and well-being whilst the child is in India.
- v. The takeaway parent will unconditionally agree not to make any unilateral decisions regarding the education, health, welfare, and/or other important issues concerning the minor child. Whilst the minor child is in India, the takeaway parent will be in regular contact and touch with the left-behind parent

by email, telephone, or Video Conferencing to keep him/her informed of the minor child's upbringing issues and/or other relevant details.

- vi. The takeaway parent will undertake that having taken the minor child to India for any particular excursions/holidays, he/she agrees that there would be no overseas or foreign trips by him/her alone with minor child in that particular year. That in the ultimate eventuality of the take away parent violating any of the conditions of the notarized agreement, the minor child will be returned home abroad forthwith. It ought to be made clear that if the parent exercises opposition, restraint, or wilful dissent to the return of the minor child back home abroad, the other parent will have full liberty to approach a competent court of Indian jurisdiction to seek the return of the minor child back home abroad.
- vii. In any such petition, application, or legal action before any court, police authority, or foreign Embassy/Consular office, the takeaway should unconditionally undertake not to oppose or contest any such proceeding, petition, or action on jurisdiction or welfare grounds. The takeaway parent should unconditionally accept and agree that only courts would be competent to decide all questions of welfare, custody, guardianship, and/or rights of parties. The takeaway parent should undertake that he will not take any decision unilaterally regarding the original nationality/original passport and/or the original citizenship of the minor child. The takeaway parent

should unequivocally declare that he/she will not apply for any emergency travel documents for the minor child under the Indian Passports Act, or under any other Indian law to enable him to obtain parallel travel documentation for the minor child. All applications, if ever required will be made under the joint signatures of both parties and no such application or petition will be made by the parent in India or elsewhere alone without the prior written consent of other parent.

viii. Further, the takeaway parent must unconditionally agree that he/she will be bound by the laws of the origin country and the provisions of the Hague Convention on Civil Aspects on International Child Abduction, 1980 to which the origin country is a signatory. Consequently, the parent, should unequivocally agree and accept that he/she will be bound by the definition of wrongful removal or detention of children contained in Article 3 of the Hague Convention 1980<sup>12</sup>.

ix. Additionally, parties should unequivocally agree that the definition of wrongful removal or retention of a child as stated in the Hague Convention above shall be binding on both parties in India and the parent will not question the same whilst

---

<sup>12</sup> The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

in India before any Court in India which will not have jurisdiction over the minor child. Accordingly, the take away parent will be bound by the provisions of the Hague Convention in the eventuality of any breach by him/her of the conditions of removal or attention of the minor child. The take away parent should undertake not to adopt any argument or contention that whilst the minor child is in India, the provisions of the Hague Convention, 1980 shall not be applicable since India is not a signatory to the Hague Convention. Being a foreign national and being bound by the Hague Convention, the minor child will be governed by the provisions of the Hague Convention, and the takeaway parent will not adopt any argument to the contrary in India or allege that the provisions of the Hague Convention will not apply in India. Such parents must unconditionally agree to the foreign jurisdiction.

- x. The concerned parent should undertake to strictly adhere to the travel schedule as agreed and settled between the parties. If there is a need, requirement, or situation arising for any change or amendment, the parent shall immediately contact the parent abroad and only upon his/her written consent, make any changes to alter the travel plans of the minor child. The take away parent will furnish a bond of a mutually agreed secured amount in the country of origin to ensure compliance with all the conditions set down in the notarised agreement in respect of the minor child. In the eventuality of any breach, violation,

or intentional default by the takeaway parent of any of the conditions of the notarised agreement, the bond shall stand forfeited. Consequently, the secured amount in deposit abroad as the bond money, shall stand payable to the left behind parent forthwith without any further stipulation.

The comprehensive agreement between the parties setting down the terms and conditions stipulated above can be the best possible safeguard in the facts and circumstances of the present case. However, in the eventuality of a breach or violation of the custody rights of the parent and non-return of the minor child abroad, the matter will be adjudicated before a Court of Indian law before whom the parent may prefer a petition only for summary return of the minor child in terms of the agreement between the parties. In the event of any such petition being filed by him/her in India, the Indian Court may in its judicial discretion, still exercise its jurisdiction on the paramount consideration of the welfare of the child principle. However, the agreement between the parties, the stipulated terms and conditions and all other agreed clauses of the notarised agreement will carry weight in any such adjudication before the Indian Court. Such safeguards, therefore, will serve as protective measures.

### ***Effects of the notarized agreement***

Despite securing the above measures, there is no guarantee, assurance, or affirmation that the Indian Court order will in entirety implement the foreign Court order but there may be a persuasive value attached to such a foreign Court order. Ultimately, it is the judicial discretion of the Indian Court to decide the matter on merits based on the principle

of best interest and welfare of the minor child. There is no other remedy for direct enforcement of the foreign Court order in totality. As previously discussed, the enforcement is by instituting a petition for the issuance of a writ of Habeas Corpus before the High Court/Supreme Court or seeking custody from the Guardian Judge on the strength of the foreign Court order. The matter will be thereafter examined on merits and disposed of by a summary or a detailed enquiry at the judicial discretion of the concerned court in India. The Indian Court would view the matter in its *parens patriae* jurisdiction to decide the best interest and the welfare of the child. The conflicting interests of the parents will not get emphasis as the welfare of the minor will be the paramount consideration. The independent enquiry of the Indian Court with the foreign Court order as one consideration will form the determinative basis. No time frame or costs can be predicted.

It may also be added that there are remedies of appeal in case of an adverse decision and an aggrieved party can take it up further to the High Court or the Supreme Court in appeal which can further prolong the outcome. Costs will depend on the standing and expertise of counsel and the time factor is unpredictable and difficult to spell out. Moreover, the tender years rule which was often observed by the Courts has been reversed. There is no legal presumption as to which parent retains custody of the child. It has now been diluted by the Courts and the welfare principle determines custody issues.<sup>13</sup> The principles of law regarding the grant of custody of a minor child by an

---

<sup>13</sup> Lahari Sakhamuri v. Sobhan Kodali, 2019 SCC Online SC 3951.

Indian Court can be said to be based on the following broad principles enunciated repeatedly by the Supreme Court<sup>14</sup>. However, these can be summarised and tabulated under the following headings.

- 1 Though the provisions of special statutes in India govern the rights of the parents or guardians, there is nothing that can stand in the way of the Indian Court in exercising its *parens patriae* jurisdiction to use independent factors *de hors* the statutory rights of the parties. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence of procedure nor by precedents.
- 2 Both parents are natural guardians of the child, but for custody of the child, the paramount consideration is as to what is conducive to the welfare and the best interest of the minor. Custody of a child cannot be given merely on grounds of the financial soundness of one parent as the welfare of the child prevails.
- 3 When conflicting demands are made by parents, the Indian Court will not give emphasis to the rights of the parents but will exercise a jurisdiction that is aimed at the welfare and the best interest of the minor.
- 4 Even if one parent showed great love and affection for the child and is not an undesirable or unfit person, it does not

---

<sup>14</sup> Rosy Jacob Vs. Jacob A Chakramakkal, AIR 1973 SC 2090, Thrity Hoshie Dolikforeigna vs Hoshiam Shavaksha Dolikforeigna, AIR 1982 SC 1276, Gaurav Nagpal vs Sumedha Nagpal reported as 2008 (6) Recent Apex Judgments 422, Nil Ratan Kundu & Anr Vs Abhijit Kundu 2008 (9) SCC 413.

necessarily lead to the conclusion that the welfare of the child would be better promoted by granting custody of the child to that parent who may be claiming a preferential right.

- 5 If the minor is old enough to form an intelligent preference, the court must consider such preference in custody matters though the final decision rests in Court.

## **2. PLACING OF NOTARISED AGREEMENT BEFORE COURT & EMBASSY**

Once the wholesome, complete, and self-contained notarised agreement entered into between the parents is executed, notarised, and concluded, its copies should be furnished before a Court of Competent Jurisdiction abroad for it to acquire official validity and sanction. Additionally, a copy of the final notarized agreement between the parents should be furnished to the Consular Section of the country of origin's High Commission at New Delhi or the closest Consular office exercising jurisdiction on entry into India. A request should be made to the Embassy/Consular office in India to keep in safe deposit the overseas passport/OCI Card of the minor child during his stay in India with a further request that the Consular office may telephonically or personally enquire about his welfare periodically to guarantee his health and safety whilst he is in India. Accordingly, the overseas passport/OCI Card of the minor child can be kept in safe custody and may be returned to the concerned parent for travel back to the country of origin of the child.

This will ensure that the conditions, stipulations, and other parameters

are in the knowledge of the concerned Court/authorities so that in the eventuality of any breach, remedies resulting thereto can be acted upon efficiently. Additionally, these details should be placed in safe custody before any nominee or authorised representative of the takeaway parent in India for verification, authentication, safekeeping, and for being acted upon in case of need of necessity arising thereto. If the foreign Embassy/Consular Office in India does not agree to keep the passport of the minor child/children in safe custody, the foreign passports of the minor child/children can be kept in the safe custody of either of the guarantors of the agreement, or any other nominee of the mother/father or with an Advocate agreed to between parties who shall be duty bound to ensure the return of the child/children back to the mother/father abroad.

To ensure that the Indian Guarantors under the notarised agreement are made strictly liable in the eventuality of violation of the settled terms between the parties, all their documentation should be furnished to the Consular Section of the foreign Embassy in New Delhi or the nearest Consular office within whose jurisdiction the minor child will reside in India. Any such nominee or authorised representative of the left behind parent should also be authorised in advance to cross-check, confirm, and verify all details of these named Indian Guarantors.

### **3. CAVEATS BE FILED BEFORE THE GUARDIAN JUDGE/HIGH COURT IN INDIA**

Once the territorial jurisdiction of the proposed residence and location of the minor child in India is confirmed, it will be advisable and recommended that Caveat petitions be filed before the Guardian Judge

of the concerned jurisdiction as also before the High Court of that territory stating that no petition by the takeaway parent or any of his relatives/associates, friends or authorised representative be heard ex-parte regarding any custody, guardianship or other parental rights concerning the minor child. In any such caveat petition before the Guardian Judge/High Court, all the terms and conditions of the notarised agreement between the parties should be spelled out so that the parent or any of his/her nominees is not able to obtain any ex-parte order regarding custody or other issues of the minor child. In this way, if any petition or application is filed for or on behalf of the takeaway parent in any such court, its advance notice will be required to be served under Indian law on the counsel or the Indian representative of the left behind parent. This can be the only possible way to ensure that advance intimation is available of any such petition or application as well as to enable the mother to put forth the terms and conditions of the notarised agreement existing between the parties which will prevent any ex-parte proceedings from being commenced. As per Indian law, the caveat will be required to be sent to the takeaway parent by recorded delivery/registered post, and in turn, the takeaway parent will be required by Indian law to serve in advance upon the left behind parent or his Indian counsel, a complete copy of the proposed petition to be filed in the concerned court as also intimate the date of its hearing. Alternatively, the date of hearing may be intimated by the concerned court itself before whom the caveat would be lodged by the left behind parent or his counsel. Any such caveat if preferred will be valid for a period of 90 days only and will have to be renewed if sought to be extended by the left behind parent in that particular court in an

Indian jurisdiction. It will be advisable and recommended that the left behind parent should establish contact and confirm from the foreign Embassy, New Delhi, or the nearest foreign Consular Office exercising jurisdiction of the steps, the degree of involvement, and other issues regarding the safety, security, and well-being of the minor child whilst he/she is in India. The details of the travel plans, the notarised agreement, the Indian Guarantors, and or any other information should be put before them in advance. It should be enquired and checked if the foreign Embassy/Consular Office would be willing to keep the foreign passport/OCI Card of the minor child in safe custody and/or would be open to accepting any other documents being given to them ensuring the return of the minor child abroad. This will be the best gauge to evaluate and assess the degree of involvement of the foreign Embassy/Consular Office in India in the eventuality of any exigency in the case.

#### **4. ADVANCE INTIMATION TO THE INDIAN EMBASSY/CONSULAR OFFICE ABROAD**

A copy of the notarised agreement and/or all relevant documents should be sent to the Indian Embassy/Consular Office abroad within whose jurisdiction the minor child is currently residing abroad. They should be informed in advance that the minor child who is a foreign national and whose father/mother is of Indian origin is being taken to India under a notarised agreement between the parent and that no application or other request should be entertained from the takeaway parent individually for any new or fresh travel document/passport/emergency documentation until and unless the

same is also approved of in writing by the left behind parent. It should be conveyed to them that the minor child is a foreign national by birth and that no decision or application regarding change of his foreign nationality should be accepted if submitted by the parents alone and that the left behind parent should be immediately intimated if any such request or application is furnished to the Indian Embassy abroad/Indian Government in this regard. The Indian Embassy/Consular Office abroad should be requested by the left behind parent that the status position of the minor child and her request be also communicated to the Consular and Passport Division of the Ministry of Overseas Indian Affairs, New Delhi in the event of any application being made to them directly by the parent in India. This will ensure that the passport status of the minor child is not changed unilaterally and that the parent will get to know of any such request made by the takeaway parent.

## **5. RECOGNITION OF FOREIGN MATRIMONIAL AND FOREIGN FINAL CUSTODY DECISIONS IN INDIA**

To have the foreign judgement on matrimonial causes and ancillary relief including child custody, maintenance/alimony/property settlement recognized in India, the parent/parents may need to file an independent petition in an Indian Court to prove the conclusiveness of the foreign judgment and provide a certified copy of the decree absolute. The Court will thereupon assess the decree's validity based on Indian law and principles. It is possible for either husband or wife to unilaterally initiate proceedings for divorce in India under the fault

grounds by filing a divorce petition at the District/Family Court located where the marriage of the parties was solemnized. Additionally, the wife has also got the option of instituting a divorce petition at a District/Family Court located where she is residing on the date of the presentation of the petition. No prior consent, intimation, or notice is required to be given for instituting a fault ground divorce petition under the HMA. Hence, the wife can issue divorce proceedings in India irrespective of the fact that the parties may be living outside India. The HMA being the personal law of marriage of the parties governs them as they are Hindus by religion and the HMA has extraterritorial application, in as much it applies to territories outside India where the Hindu husband/wife may be domiciled, and/or may have acquired foreign nationality or the citizenship/permanent residence status of any other country.

Given the precedents of Indian law on this point, regardless of any pending/fresh divorce proceedings initiated or filed or pending abroad for divorce between the parties, the Indian Court would *de hors* any such foreign Court proceeding, independently proceed to adjudicate the matter in India. Any decision of the foreign Court or any finding arrived at by the foreign Court will simply not be mechanically applied followed or mirrored in India. The Indian Court will require pleadings, evidence, and determination as per Indian law separately regardless of any pending, decided, or concluded divorce proceeding abroad. Any divorce proceeding abroad on the ground of irretrievable breakdown of marriage between the parties will not be valid or enforceable in India as this is not a ground for divorce under HMA. Hence, such a foreign

matrimonial decree on this ground will not dissolve a Hindu marriage which will have to be dissolved in India under HMA by a court of competent jurisdiction as per provisions of HMA.

The test the Indian Court would apply in dissolving a marriage under the HMA would be based on principles of Hindu Family Law which is guided by precedents of Indian Courts interpreting the various fault grounds for divorce. The principles of Civil procedure and law of evidence applicable in India are used by Family Courts but under the FCA, the Court may devise its procedure by independently coming to its conclusions for a decision on merits. In this regard, any decision of any foreign Court dissolving the marriage between the parties will not be conclusive or final and will not find any mechanical application in India. The “*first to issue*” principle will have no relevance or meaning in so far as an Indian Court adjudicating a divorce petition for dissolving a Hindu marriage under the HMA is concerned. This principle does not find favour or acceptance under the HMA and no credibility will be attached by the Indian Court if there is a divorce proceeding pending or decided by a Court abroad for dissolving the Hindu marriage between the parties as it would still independently decide the matter regardless of such pendency.

Based on the foreign decree absolute, the parties can also independently and separately file a divorce petition by mutual consent under HMA. Citing the foreign Court decree absolute and after settlement of alimony, child custody & support, maintenance, and property division, independent parties can jointly petition a competent Family Court in India under HMA for divorce by mutual consent.

## **6. REMEDIES UNDER INDIAN LAW PRESCRIBED FOR RETURN OF CHILDREN TO COUNTRY OF ORIGIN**

That even though India has enacted a Family Courts Act, 1984, it is the discretion of every Individual State to constitute a Family Court in its Districts in the State. Hence, the majority of the jurisdictions in States in India do not have Family Courts or Specialist Judges trained to handle only Family Court matters. Therefore, a normal Civil Judge in the Trial Court may in addition to his other duties and judicial functions, also be a Guardian Judge under the Guardian and Wards Act, 1890, upon being so notified and designated by the High Court. Consequently, when a matter is before an ordinary Civil Judge in the Trial Court in his role as a Guardian Judge, the time frame within which he will be able to decide a child custody dispute is impossible to predict since his pre-occupation with other nature of disputes on his board may vary. Therefore, by no stretch of the imagination, any time frame can be predicted. Even when the Judge presiding is a Family Court, a lot may depend on the pre-occupation of the Court with other matters before the Family Court and the workload of the Family Court which again makes it impossible to predict a time frame.

That if the matter is taken up in a Habeas Corpus writ petition in the High Court or the Supreme Court, it is the pure discretion of the Court to hold a summary enquiry or a detailed investigation in an individual case. India follows a procedure of detailed bulky written pleadings followed by hearing arguments at length. Depending on the preoccupation of a Bench with other matters and the workload of the

Court, it may be next to impossible to define a time frame for deciding a child custody dispute. Even at the High Court or the Supreme Court, there are no dedicated Family Judges or any Family Division. Therefore, depending on the entire roster of the Court and its preoccupation with other matters, every individual Bench will take up an inter-parental child custody dispute depending on other important matters before the Court. This again makes the whole situation unpredictable in point of identifying a time frame.

In so far as costs are concerned, counsel fees, expenses of various natures, traveling costs, and overhead expenditures may vary from place to place in different jurisdictions. Since the time frame within which an inter-parental child custody dispute can be decided is unpredictable, the consequential issue of costs involved is also equally unpredictable. Parties may engage local or outstation counsel depending on the expertise as also the budget of the parties. Legal fees of counsel vary from jurisdiction to jurisdiction and considering that the decision of the Guardian Judge may be appealed to the High Court and the Supreme Court, both costs and time may multiply in quantum. The High Court may also remand the matter to a Guardian Judge if the case requires evidence to be led which may further prolong both the time factor and costs involved. Hence, it becomes impossible to predict the costs involved in the same. That the issue of the effectiveness of the procedure is again a very open-ended answer. If the petition before the Guardian Judge is favourably decided in a positive decision favouring a foreign aggrieved parent, the matter may not rest there. For enforcing the foreign court order directing

the return of a child, the aggrieved foreign parent may still have to invoke the writ jurisdiction of the High Court or the Supreme Court seeking a direction for the return of the child. Meanwhile, if the decision of the Guardian Judge is appealed against by the abducting parent, the matter may be further delayed. Ultimately as and when a decision comes by the High Court, the matter may be appealed against in the Supreme Court. This process may take time and thus the effectiveness of the procedure is open-ended till the last appeal is exhausted in the Supreme Court.

### ***Summary of Proposed Safeguards and Remedies***

The above are the best possible consolidated recommendations/safeguards/remedies suggested generally. As already stated, in the absence of any codified statutory law in India recognizing inter-parental child removal as an offence, as also the fact that India is not a signatory to the Hague Convention of Civil Aspects on International Child Abduction, the position varies on a case-to-case basis. The only possible way to ensure the protection of the rights of parties is to take precautions and avail of safeguards to protect custody rights in the eventuality of an adjudication before an Indian Court which will go into the merits independently on the principle of the welfare of the child. Therefore, it would be most appropriate and desirable that the suggestions made above be acted upon with whatever variations of changes agreed upon between the parties.

## **PRACTICAL UTILITY AND EFFECTIVENESS OF SUCH SAFEGUARDS**

In so far as the actual effectiveness of any or all of the safeguards is concerned, the following suggestions summarised as hereunder are being made. In the possible eventuality of the minor child being wrongfully retained in India, the left behind parent may have to seek recourse before a Guardian Judge in a Civil Court or a Family Court and/or in the High Court exercising territorial jurisdiction at a place where the minor child is physical present in India. Since there is no Central Authority or any equivalent institution exercising powers or judicial authority for directing the return of a detained child, unless and until a Court of competent jurisdiction is approached, the matter will not progress. Hence, a formal petition will be required to be moved before the Guardian Judge or the High Court to seek the return of the minor child.

That upon an appropriate petition being moved before a competent Court, it will be the judicial discretion of such Court to pass appropriate orders after hearing both parties. Though, the notarised agreement and all other safeguards suggested above will have persuasive and binding value, such documents executed between the parties do not offer any ironclad guarantee that the minor child will be summarily returned simply on the asking and strength of the documents between the parties. The domestic Indian Court as “*parens patriae*” may in the exercise of the welfare of the child as a paramount consideration take an independent decision on the merits of the case regardless of the agreement and other documentation executed

between the parties. There is a likelihood that the domestic Indian Court seized of the matter may conduct an independent investigation on the issue of the welfare of the child wherein, the agreement and other documents are also considered by the Court. If the domestic Indian Court finds reasons to differ, disagree, or have a different opinion, depending on its adjudication of the welfare of the child, the Indian Court may in exceptional circumstances decline to return the child. Hence, it is the prerogative and the privilege of the Indian Court exercising "*parens patriae*" authority over the minor child in its jurisdiction to take a final call to return or not to return the minor child. Hence, there is no hundred percent guarantee that the agreement will be acted upon in all circumstances to the effect that it is implemented in letter and spirit without any variations.

That in the eventuality of any independent fact-finding investigation being conducted by a domestic Indian Court, it may be difficult to predict any time frame within which such a hearing will be concluded. Furthermore, it may also be borne in mind that such a decision can also be taken up in appeal before the High Court and the Supreme Court, for which again the period of final decision cannot be specified or predicted. That all the safeguards suggested above are remedial measures and may create pressure or impact on the offending parent to give up and agree to the terms of the agreement and other documents between the parties. If, however, there is extreme opposition, reluctance, and refusal by the offending parent to abide by the terms of the settlement between the parties, coercive methods of revocation of bonds or bank guarantee may be taken up for

enforcement. Regardless, even thereafter, this may not ensure the return of the child. This is because the resort will have to be still taken in moving a domestic Indian Court where the child is detained for seeking judicial orders for the return of the child.

Though the safeguards are very extensive, exhaustive, and detailed, they do not offer a hundred percent ironclad guarantee assuring and securing the implementation of the agreement and other documents leading to the confirmed return of the child. Other than the safeguards suggested, no other methods can be possibly thought of or contemplated to make the situation better leading to a hundred percent assured and guaranteed return of the child. That all the safeguards and remedies suggested above are possible means to avoid and deter wrongful retention of the child. They are meant to secure, reassure, and provide possible remedies in case of a breach. Though it may not be possible for an offending parent to resile, revoke, or oppose any such agreement, undertaking, bond, assurance, or guarantee, nothing prevents an offending parent from seeking reopening of the matter by alleging fresh and new issues arising in the best interest and welfare of the minor child. This process initiated in a domestic Court in India can be a time-consuming exercise. Thus, automatic and axiomatic implementation, without exception of the agreement and understanding between the parties, is not guaranteed. The likelihood of such opposition cannot be ruled out and its determination in a domestic Indian Court may result in the return of the child but maybe a time-consuming exercise.

## **PROCESSES, TIMESCALES, AND COSTS INVOLVED IN OBTAINING ANY RECOMMENDED SAFEGUARDS**

As far the process of obtaining recommended safeguards is concerned, details have been set down in the third part of this report relating to the safeguards themselves. The paperwork, agreements, documents, and other execution of bonds/guarantees will have to be worked out in advance before the child leaves abroad for India. All this paperwork etc. will have to be carried out before the child leaves abroad and can be drawn up abroad through Solicitors or by engaging the services of lawyers in India on a professional basis for doing so. As far as the time scales and costs involved in the implementation of the safeguards are concerned, it would depend upon the Solicitors, Counsel, or Advocate engaged to compile the paperwork and the same may be very difficult to pinpoint and lay down in exact measure. It cannot be predicted what would be situation emerging and what remedy would be required. Depending on the Court i.e. Guardian Judge or High Court, the situation may vary and hence time scales and costs may be different. Further, costs will depend on the counsel engaged and a fee charged by him. Hence, it would be difficult to stipulate quantified costs.

## **RECOMMENDATIONS AND CONCLUSION**

The absence of India's adherence to the Hague Convention on Civil Aspects of International Child Abduction perpetuates inconsistencies in judicial outcomes, complicating inter-parental child removal cases. This paper has illustrated the challenges faced by Indian courts in reconciling domestic legal principles with international obligations. Steps need to be taken by joining hands at an international level to

resolve the conflicts currently occurring. The same is difficult without India joining the Hague Convention. Adopting a cohesive legal framework aligned with international standards will not only ensure the welfare of affected children but also strengthen India's global legal standing. In the meantime, some of the major recommendations are detailed as under:

- i. Pre-removal safeguards such as a notarized agreement and placing the same before the Court/Embassy.
- ii. The adoption of a uniform policy of law in line with the Hague Convention and the establishment of a central authority.
- iii. Judicial recognition of foreign custody orders in consonance with the Hague Convention
- iv. Supplementary action such as Caveats filed Before the Guardian Judge/High Court in India, Advance intimation to the Indian Embassy/Consular Office Abroad, etc can be also made use of.

The path forward requires immediate action, harmonizing India's domestic laws with international principles to address this growing global phenomenon. A coordinated diplomatic and legal approach, through law and case law, can be implemented to prevent emotional trauma to children and faster resolution of marital conflicts. Moreover, judicial training and awareness initiatives at lower court level may bring sensitivity and consistency into the Court process. Active participation of Indian diplomats, lawyers and judicial officers in international conferences, bodies and meetings can further bridge the gap in understanding international family law. But ultimately, India's accession to the Hague Convention would forge the most effective resolution to the challenges outlined.

## **APPENDIX**

### **CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION<sup>1</sup>**

*(Concluded 25 October 1980)*

*Entry into force: 1-12-1983*

The States signatory to the present Convention, 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, have resolved to conclude a Convention to this effect, and have agreed upon the following provisions.

#### **CHAPTER I - SCOPE OF THE CONVENTION**

##### **Article 1**

The objects of the present Convention are -

- a)* to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b)* to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

---

<sup>1</sup> Full text of the convention as available on the website of the HCCH (Hague Conference on Private International Law – Conférence de La Haye de droit international privé) <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>>

## Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

## Article 3

The removal or the retention of a child is to be considered wrongful where -

- a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

## Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

### **Article 5**

For the purposes of this Convention -

- a)* "rights of custody" shall 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;
- b)* "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

## **CHAPTER II - CENTRAL AUTHORITIES**

### **Article 6**

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

### **Article 7**

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective

States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- a)* to discover the whereabouts of a child who has been wrongfully removed or retained;
- b)* to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c)* to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d)* to exchange, where desirable, information relating to the social background of the child;
- e)* to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f)* to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g)* where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h)* to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

- i)* to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

### **CHAPTER III - RETURN OF CHILDREN**

#### **Article 8**

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

- a)* information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b)* where available, the date of birth of the child;
- c)* the grounds on which the applicant's claim for return of the child is based;
- d)* all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

- e)* an authenticated copy of any relevant decision or agreement;
- f)* a certificate or an affidavit emanating from a Central Authority,

or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

*g)* any other relevant document.

### **Article 9**

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

### **Article 10**

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

### **Article 11**

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the

Central Authority of the requesting State, or to the applicant, as the case may be.

### **Article 12**

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

### **Article 13**

Notwithstanding the provisions of the preceding Article, 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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

#### **Article 14**

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

### **Article 15**

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

### **Article 16**

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

### **Article 17**

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

### **Article 18**

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

### **Article 19**

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

### **Article 20**

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

## **CHAPTER IV - RIGHTS OF ACCESS**

### **Article 21**

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

## **CHAPTER V - GENERAL PROVISIONS**

### **Article 22**

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

### **Article 23**

No legalisation or similar formality may be required in the context of this Convention.

### **Article 24**

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

### **Article 25**

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

### **Article 26**

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative

authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

### **Article 27**

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

### **Article 28**

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

### **Article 29**

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

### **Article 30**

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

### **Article 31**

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

- a)* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b)* any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

### **Article 32**

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

### **Article 33**

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this

Convention where a State with a unified system of law would not be bound to do so.

#### **Article 34**

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

#### **Article 35**

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

#### **Article 36**

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

## CHAPTER VI - FINAL CLAUSES

### Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

### Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State

and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

### **Article 39**

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

### **Article 40**

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

### **Article 41**

Where a Contracting State has a system of government under which

executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

#### **Article 42**

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

#### **Article 43**

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

(1) for each State ratifying, accepting, approving or acceding to it

subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

#### **Article 44**

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### **Article 45**

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States

which have acceded in accordance with Article 38, of the following -

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
- (2) the accessions referred to in Article 38;
- (3) the date on which the Convention enters into force in accordance with Article 43;
- (4) the extensions referred to in Article 39;
- (5) the declarations referred to in Articles 38 and 40;
- (6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
- (7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.



**Centre for Child and Youth Justice,  
NALSAR University of Law, Hyderabad**

Justice City, Shameerpet, Medchal-Malkajgiri District, Telangana – 500101, India

Email: [ccyj@nalsar.ac.in](mailto:ccyj@nalsar.ac.in); Phone: +91 40 23498207

<https://www.ccyj.nalsar.ac.in>