AN OVERVIEW OF THE INTERNATIONAL PARENTAL CHILD ABDUCTION PROVISIONS OF THE HAGUE CONVENTION

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ABSTRACT

The 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction is an international convention that is central to ensuring the families remain as intact as possible and that countries respect each others’ decisions with regards to minor children. Not only should countries be a party to the Convention, but should also have national legislation to give effect to the Convention. Still, there are wide disparities in the adherence of countries in conforming to the treaty, so a culture to commit to its provisions is necessary. Because the treaty applies in the same manner in signator countries, these partner countries can learn from each other’s Hague Convention application through statutory and case law.

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I. INTRODUCTION

This article provides an overview of the 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction ("Hague Convention"). Turkey entered into the Hague Convention with other signator countries by signing the Convention on August 1, 2000. The U.S. became a party to the Convention in 1988. Because the treaty applies in the same manner in signator countries, these partner countries can learn from each other’s Hague Convention application through statute and case law, no matter the difference in application of local, state or national law in each country. Turkey and the U.S. are partners with sixty-seven other countries that have signed the Hague Convention.

In the U.S., the implementing legislation for the provisions of the Hague Convention is the International Child Abduction Remedies Act, otherwise known as "ICARA." In Turkey, the Turkish Parliament enacted legislation criminalizing parental abduction of children, codified at Law 4461.

This article discusses when the Hague Convention applies, the methods of compliance, the outcome of applying the Hague Convention, the effect of child abductions on children and parents, and recommendations for Turkey to consider in contemplating a sustainable and effective implementation of Hague Convention provisions.

1 The signator countries to the Hague Convention other than Turkey and the U.S. include Argentina, Australia, Austria, Bahamas, Belgium, Belize, Bosnia-Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Hong Kong SAR, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Macau SAR, Macedonia, Malta, Mauritius, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, St. Kitts & Nevis, San Marino, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Ukraine, United Kingdom, Uruguay, Venezuela, and Zimbabwe.


II. UNDERSTANDING THE HAGUE CONVENTION ON THE
CIVIL ASPECTS OF INTERNATIONAL PARENTAL
CHILD ABDUCTION

A. When does the Hague Convention apply?

When a parent wrongfully retains or wrongfully removes a child from the
other parent without that other parent's consent, then a parental abduction has
occurred. An abduction by one of the parents can occur whether or not the
parents are married. If the abduction is from one country to another over
international boundaries, then the Hague Convention applies if the involved
countries are members of the Convention. If one country is a member of the
Convention and the other country is not, then the laws of the country where the
child has been abducted determine whether the Hague Convention applies or
not. If the child has been abducted to a country that is not a partner to the
Hague Convention, then the Convention may not apply, and the parent seeking
a return of the child would need to look to local, state, or federal law in that
country to see if any relief is possible in that country's laws. If, however, the
child has been abducted to a country that is a partner to the Hague Convention,
then the provisions of the Hague Convention govern the case, along with
whatever Hague Convention-implementing legislation has been enacted by that
particular country within that country's body of laws.

A threshold issue to be determined under the Hague Convention is whether
the country from which the child is abducted is in fact the child's country of
habitual residence. Further, a court deciding a case pursuant to the Hague
Convention must determine whether the left-behind parent has rights of access
or custody and was exercising those rights at the time of the abduction. The
Hague Convention directs courts to act "expeditiously" in resolving Hague
cases. The Convention does not apply for cases of abductions involving a child
over the age of sixteen.

B. How does the Hague Convention apply?

Pursuant to the terms of the Hague Convention, each signatory country must
have a Central Authority, a place that acts as a headquarters for all Hague-
related matters and fulfills the duties imposed on the Convention country by the

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4 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction arts. 1,
3. 
5 See id.
6 Id. at art. 4.
7 Id. at arts. 3(a), (b).
8 Id. at arts. 2, 11.
9 Id. at art. 4.
Convention. In the U.S., the Central Authority is the Department of State’s Office of Children’s Issues. In Turkey, the Central Authority is the Turkish Ministry of Justice.

The Hague Convention not only provides for the return of a child to his or her country of habitual residence, it also provides for access for the left-behind parent to the child if the child is to remain in the country where he or she is removed.

The Central Authority should be contacted as soon as possible by the parent seeking to have the child returned to the child’s country of habitual residence or seeking to have access to the child. Even if a parent believes he or she may not have the financial means to prosecute a Hague application for the return of the child, that parent should make every effort to seek assistance from the appropriate Central Authority. The U.S. Department of State, through its Office of Children’s Issues, maintains a list of attorneys who may handle Hague cases for free, or pro bono, if certain qualifications are met. The Central Authority in the country of the parent who wants the child returned would contact the Central Authority of the country where the child was taken, assuming both countries are signatories to the Hague Convention and, therefore, each have a Central Authority. The Central Authority of either or both countries would use certain resources to locate the child using every piece of information the left-behind parent can provide.

The time for when a Hague application should be filed matters in relation to when the child was abducted, or, more specifically, when the prosecuting parent (also sometimes known as the left-behind parent) can prove he or she first learned that the child was in fact abducted. If the Hague application is filed more than one year after the prosecuting parent knows the child was abducted, then the application might be dismissed as a threshold matter because it was not timely filed. At the least, the timing of the application would serve to show that the child has been in a certain environment for more than one year and the child’s status quo in that environment would likely weigh in favor of the child remaining in the defending parent’s country. If the Hague application is filed on a date which is less than one year after the prosecuting parent knows the child was abducted, then the application is timely filed, and the case can be

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10 Id. at art. 6.
13 Hague Convention, arts. 8, 21.
14 Id. at art. 7.
argued on the merits, so long as the other threshold provisions of the Hague Convention are met.\(^\text{15}\)

\textbf{C. What is the effect of the Hague Convention?}

The Convention provides that if an application is filed pursuant to the Hague Convention within one year from the child’s abduction, or, more specifically, within one year of the left-behind parent’s first knowledge of the child’s abduction, then if all requirements under the Hague Convention are met, the court shall order the child to be returned. If, however, the application is filed \textit{more than one year from the child’s abduction, then the court shall order the child returned to the country of habitual residence unless the abducting parent can demonstrate that the child has settled into his or her environment.}\(^\text{16}\) The court determining the Hague application may hear proof related to whether the child will be harmed by a return to the country of habitual residence.\(^\text{17}\) The court may also take into account a child’s preference if the child is determined to be of a sufficient maturity to express such preference.\(^\text{18}\)

U.S. law directs the U.S. Central Authority to file a report each year with the U.S. Congress.\(^\text{19}\) This annual report discusses compliance and non-compliance with the Convention by partner signator countries and non-signator countries. According to the April 2010 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, there are a few countries that are considered by the Report to be either non-compliant or showing patterns of non-compliance.\(^\text{20}\) The April 2010 Report identifies Bulgaria, a neighbor country to Turkey, as a “country showing patterns of non-compliance” with the Hague Convention.\(^\text{21}\) Specifically, the Report points to Bulgaria’s non-compliance in the area of judicial performance such that Hague cases are generally taking an excessively long time and are not being heard expeditiously as required by the Convention.\(^\text{22}\)

The April 2010 Report specifically cites to a Turkish Hague Convention case.\(^\text{23}\) In May 2007, the child was abducted from the U.S. to Turkey.\(^\text{24}\) The parent left behind in the U.S. filed a Hague application, and Turkish authorities

\(^{15}\text{See id. at art. 12.}\)

\(^{16}\text{id. at art. 12.}\)

\(^{17}\text{Id. at art. 13(b).}\)

\(^{18}\text{Id. at art. 13.}\)

\(^{19}\text{42 U.S.C. § 11611(a) (2010).}\)

\(^{20}\text{Jacobs, supra note 11.}\)

\(^{21}\text{Id. at 17 et seq.}\)

\(^{22}\text{Id. at 24.}\)

\(^{23}\text{Id. at 30.}\)

\(^{24}\text{Id.}\)
immediately processed the application. The abducting parent, however, went into hiding. The abducting parent was located in time for the initial hearing in the Hague case, and the Turkish court ordered the child to be returned to the U.S. Before the order could be enforced, however, the abducting parent again took the child into hiding. The abducting parent had filed for divorce in Turkey, and those proceedings went forward until the abducting parent did not appear for a scheduled court hearing. Turkish authorities continue to search for the child and abducting parent, and a travel ban has been issued to prevent the parent and child from leaving the country. The lower court’s order was upheld by the Turkish High Court of Appeals (Yargıtay) in February 2009. As of the publication of the April 2010 Report, the child and abducting parent had still not complied with the court’s order requiring the child be returned to the U.S., and the left-behind parent continues to utilize resources available for enforcing the court’s order.

Other cases involving abductions to Turkey from the U.S. are highlighted within the April 2010 Report. Further, the Report provides statistics relating to abductions from the U.S. to Turkey and from Turkey to the U.S.; specifically, in the fiscal year 2009, there were four new cases involving six children who were abducted to Turkey from the U.S., and there were two new cases involving two children who were abducted to the U.S. from Turkey.

D. Effects of Parental Abductions on Children and Parents

Children bear costs associated with being abducted by one of the parents without the consent of the other parent. In some cases, lawyers find it necessary and helpful to provide expert testimony with regard to the impact of abduction on a child’s psychological and emotional condition and development. Especially in cases where a child is abducted to a country where the child experiences a very different culture or a language with which the child is unfamiliar, then there is significant risk of harm to the child.

Much research has been conducted to determine the effect “attachment” has on a child’s development and parental relationships; this body of research

25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id. at 31.
31 Id.
32 Id.
33 Id. at 58-59.
34 Id. at 68.
relates to “attachment theory.” Reactive attachment disorder can occur when a child does not attach well to others. While this type of disorder is most commonly associated with infants who are raised in orphanages or homes where they do not receive consistent or frequent comfort, nurturing, or security, this disorder can also be found in children who have experienced the loss of a parent through abduction by the other parent.

Additionally, the parents of an abducted child experience certain effects. The parent who is left behind without the child finds himself or herself in the necessary position of having to litigate the issue of whether the child will be returned to the country from which the child was abducted. The litigation of such issues is often a very costly endeavor. The left-behind parent often experiences the frustration of being hundreds of miles, thousands of miles, or even continents away from the child and abducting parent. In the U.S., some governmental and non-governmental organizations (“NGOs”) provide resources for left-behind parents in order to lessen the burden of cost, travel, and access to the courts and translators.

Likewise, the abducting parent faces litigation costs if the left-behind parent elects to litigate pursuant to the Hague Convention. The abducting parent might have to prove the harm that would have come to the child or the parent had the parent remained in the home of or the country of the left-behind parent.

E. Hague cases are not child custody cases

The Hague Convention does not provide for the litigation of custody matters as part of the Hague application. The Convention anticipates the issues of abduction and custody will be litigated separately, and particularly, it is anticipated that the courts of the child’s habitual residence country will litigate custody-related issues. Consequently, a home study should not necessarily be ordered as part of a Hague case due to the fact that the Hague case is not a custody case.

It is advisable for family law courts to hear Hague cases. Additionally, in a federalized system, it would be possible to file a Hague case in a federal court when the federal courts have jurisdiction over matters involving the

35 See Marc J. Ackerman and Colleen M. Drosdeck, Should Your Infant Spend the Night?: What the Experts Say about Overnight Visits for Young Children, FAMILY ADVOCATE, Summer 2010.
36 Id. at 13.
37 See id.
38 See Jacobs, supra note 11, at 11.
39 Id. at 13.
40 See id. at 11.
41 Hague Convention at art. 19.
42 See id. at art. 16.
interpretation and application of international treaties and federal laws. Within the federal system or within a particular jurisdiction for which there are multiple family law judges, a certain judge might be assigned to hear all Hague cases. This practical procedure permits a particular judge to develop an expertise in the area of law surrounding Hague cases, much like a U.S. Bankruptcy Court judge only hears issues related to bankruptcy matters and, presumably, develops an expertise in and authority over bankruptcy cases. As a practical matter, this procedure should result in Hague cases moving more quickly through the judicial process, as reasonably allowed by the law.

Hague Convention cases usually play out against the backdrop of the lower federal courts or state courts. The U.S. Supreme Court, the highest court in the U.S., considered for the first time a Hague Convention case during oral argument on January 12, 2010. The ruling from this case reaffirms key provisions of the Hague Convention.

III. RECOMMENDATIONS

A. Implement Internet resources for Turkey-specific child abductions.

The U.S. Department of State maintains a user-friendly website with information for parents who have had a child abducted to another country. Specifically, the website maintains country-specific information for parents who are seeking resources related to a child who has been abducted to a particular country. Despite the fact that Turkey is a party to the Hague Convention, as of the date of publication of this article there is no link on the U.S. Department of State’s website for country-specific information for parents who are seeking information related to a child who has been abducted to Turkey; the author anticipates this link will soon be available. The links for country-specific information include fifty-six countries, but Turkey is unrepresented in this resource tool, as of the date of publication of this article. This article urges there to be a link for Turkey-specific Hague Convention information accessible by parents who have had a child abducted to Turkey.

B. Enforce Hague Convention case-related court orders

The Turkish judiciary should make every effort to ensure enforcement of Hague Convention case court orders. Having the laws that implement the Hague Convention is a step in the right direction, but further actions toward enforcing court orders made pursuant to Hague Convention applications are

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44 G.M. Filisko, When Global Families Fail, ABA JOURNAL, July 2010, at 56.
46 See id.
necessary in order to fully realize the scope and potential of the Hague Convention and protections it offers.\textsuperscript{47}

C. Encourage efficacy of judicial performance by promoting Hague Convention tutorials and seminars for lawyers and judges

Judges before whom Hague Convention cases are litigated should be vigilant about maintaining an educated understanding of the Hague Convention law and related case law. Bar associations and universities should offer appropriate and helpful training and maintenance courses related to the Hague Convention body of law so that judges and attorneys have resources for staying abreast of the Hague Convention law. These training sessions could be sponsored by local bar associations or universities, national or state bar associations or universities, or the European Union-affiliated agencies or association.

IV. CONCLUSION

The Hague Convention has received a lot of attention recently and the issue of international parental abduction is viewed with increasing importance by the international community. It is not enough just to be a party to the Convention and have national implementing legislation; a commitment to reuniting families is required.

BIBLIOGRAPHY

Ackerman, Marc J. and Colleen M. Drosdeck, \textit{Should Your Infant Spend the Night?: What the Experts Say about Overnight Visits for Young Children}, \textit{FAMILY ADVOCATE}, Summer 2010.


\textsuperscript{47} See Sylvester v. Austria, 37 E.H.R.R. 17 (E. Crt. H.R., April 24, 2003) (holding that Austria failed to take the necessary further steps to enforce the court order related to the Hague Convention application).