



CHILD
IDENTITY
PROTECTION

Policy Brief 3

PROTECTING THE CHILD'S RIGHT TO IDENTITY

in parental child abduction cases



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We welcome any input to this publication to help improve our understanding of the situation, which is quickly changing (e.g. sharing promising practices or continuing challenges). Please also let us know if and how this publication has been used in your work.



These policy briefs are designed to explore specific issues through the protective lens of the child's right to identity as established in Articles 7 and 8 of the Convention of the Rights of the Child (i.e. birth registration, name, nationality and family relations).

In their concise format, these policy briefs seek to complement the existing work of other stakeholders and where possible, reference is made to their work, with a view of facilitating a holistic approach to protecting children's rights. As such, the policy briefs do not purport to provide a comprehensive analysis of all children's rights at stake, such as non-discrimination, right to survival and development, health, education and other rights.

Protecting the child's right to identity in parental child abduction cases

Abstract

This policy brief addresses the need of protecting the child's right to identity, including family relations, in cases of parental child abduction under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCCH 1980 Child Abduction Convention).

The first section of the policy brief provides a short overview of the nature of parental child abduction proceedings and the relevance of considering the child's identity during these proceedings. The HCCH 1980 Child Abduction Convention preserves the child's identity by maintaining that it is in the best interests of the abducted child to be promptly returned to his or her habitual residence. This ensures that the child will maintain contact with the left-behind parent, siblings and other extended family. The instrument, however, also envisages that in some, well-defined situations, it will not be in the best interests of that child to be returned to his or her habitual residence. When 'exceptions' to prompt return are raised, the court in the requested State is encouraged to take into

account a number of issues, including those related to the child's identity. To this end, Section 2 highlights the importance of maintaining personal relations with both parents, siblings and extended family, to the extent possible, regardless of whether the child is returned to his or her (previous) habitual residence, or the child remains in the requested State. Discontinued contact with either parent can cause the child to lose part of his or her identity. Given the importance of preserving the child's identity and States Parties' obligations under Articles 3, 7, 8, 9 and 12 of the Convention on the Rights of the Child (CRC), the last part of Section 2 suggests a more individual approach in parental child abduction cases when exceptions to prompt return are raised, which takes into account the importance of preserving and restoring the child's identity. Section 3 provides recommendations to this end.

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Introduction

The purpose of this policy brief is to explore the phenomenon of parental child abduction through the lens of the child's right to identity. Preserving the child's identity in these situations is an additional protective safeguard, that has received little attention. The policy brief does not intend to provide a comprehensive overview of all issues that might arise in a case of parental child abduction, which are well-covered in other publications.¹

Parental child abduction refers to a situation where one parent takes his or her child to, or wrongfully retains him or her in, another jurisdiction, in breach of custody rights of the other parent.² The most recent available statistics estimate that, in 2015, there were a total of 2,730 applications, comprising 2,335 return and 395 access applications made to Central Authorities under the HCCH 1980 Child Abduction Convention.³

In these situations, the preservation of a child's right to identity, including nationality, name and family relations, guaranteed by Article 8(1) of the CRC, is at stake. In particular, the family relations aspect of identity is at risk of being lost in situations where the child is taken across borders and loses contact with the left-behind parent and extended family⁴. This also has implications for *'the right [of the child] to know and be cared for by his or her parents'*, guaranteed by Article 7(1) of the CRC. The State has also has specific obligations when a child is separated from one of his or her parents, to ensure that he or she *'maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'* (Art. 9(3) CRC).

Parental child abduction may be problematic from the perspective of preserving the child's identity because, even in cases where the child is returned to his or her place of habitual residence, in attempting to restore the *status quo ante*, there is a risk that the child might lose contact with the taking parent and by extension, his or her extended family and culture, which again is contrary to Articles 7(1), 8(1) and 9(3) of the CRC. In all parental child abduction proceedings, the retention of meaningful contact with both parents should be, in principle, prioritised.

This policy brief addresses the importance of considering the child's right to identity, in particular in respect of family relations, in cases of parental child abduction. In doing so, Section 1 provides an overview of parental child abduction proceedings. Section 2 discusses the effect of parental child abduction on a child's identity. Section 3 provides recommendations on how to preserve and restore a child's identity in cases of parental child abduction.



1.1 PARENTAL CHILD ABDUCTION PROCEEDINGS

To address the phenomenon of parental child abduction, the Hague Conference on Private International Law (HCCH) adopted the HCCH 1980 Child Abduction Convention. There are now 101 Contracting States to the Convention globally.⁵ Although the HCCH 1980 Child Abduction Convention also covers cases where the taking-person is not the parent of the child, the present policy brief only focuses on child abduction by a parent.

The objectives of the HCCH 1980 Child Abduction Convention are *'to secure the prompt return of children wrongfully removed to or retained in any Contracting state'*⁶ and *'to ensure that rights of custody and of access [...] are [...] respected'*.⁷ In this way, the HCCH 1980 Child Abduction Convention also seeks to ensure the continuity in the child's upbringing, in particular, to preserve family relations⁸. The HCCH 1980 Child Abduction Convention in general takes the position that it is not in the interest of the child to be removed from his or her habitual residence without sufficient guarantees for his or her stability in the new environment.⁹ Such reasoning goes to the heart of the preservation of the child's identity in terms of continuity, for example, in the child's existing family relations, community, culture, language, etc. The HCCH 1980

Child Abduction Convention seeks to prevent parents from unilaterally changing the habitual residence, and arguably their child's identity, even if indirectly to gain an advantage in custody proceedings.

To implement these objectives, the Contracting Parties to the HCCH 1980 Child Abduction Convention are required to *'use the most expeditious procedures available'*.¹⁰ The requirement for prompt return seeks to ensure that the taking parent does not benefit from unilaterally altering the habitual residence of the child in breach of the custody rights of the other parent and allows the child to have contact with both parents.

The HCCH 1980 Child Abduction Convention assumes that prompt return is in the best interests of children generally and that the judge of the place of habitual residence of the child is best placed to decide on the general custody dispute. In this respect, the HCCH 1980 Child Abduction Convention with its prompt return mechanism protects abducted children from the harmful effects of parental child abduction. In particular, it arguably preserves and protects the identity rights of children, by preventing parental child abduction. Because abduction is not in the best interests of children collectively, such action must be discouraged. Discouraging such action means assuring parents that abducted children will be returned expeditiously.¹¹

It equally ensures that the child will be returned to the country of his or her habitual residence as soon as practically possible, to ensure minimum disturbance and to avoid situations where the child settles in his or her new environment. It could be argued that one of the “unexpected consequences” of the prompt return mechanism is that it indirectly preserves the child's identity, including family relations with the left-behind parent and siblings, because there is an understanding that the child's identity rights are best protected in his or her place of habitual residence.

The strong assumption in favour of prompt return and the strict interpretation of the exceptions (addressed below), serve to strengthen the deterrent effect of the prompt return mechanism. Schuz explains that by not examining the welfare of the abducted child, the HCCH 1980 Child Abduction Convention reduces the chance that she or he will be abducted.¹² This shows parents that if they unilaterally remove or retain their child in another jurisdiction, the child will be returned promptly.



1.2 EXCEPTIONS TO PROMPT RETURN

Given the best interests of children generally, the HCCH 1980 Child Abduction Convention tries to provide a uniform solution for all cases of parental child abduction, namely prompt return of the abducted child. This, however, may limit the efficacy of the instrument, because it provides only one rule to address a large spectrum of situations. Different approaches might be needed for example, in cases where the abducting parent is the sole carer of the child before abduction; where the parents were still living together before the abduction and sharing equal parental responsibilities; and where the abducting parent had only limited contact with the child before the abduction. In addition, a situation where the taking parent takes the child to a familiar place (e.g. where the child has extended family or may have strong ties to this country) may be considered differently from a situation where the taking parent goes into hiding with the child. A situation where the child was subjected to abuse or violence (or witnessed such situations) may also require a different approach.

Given such complex realities, the drafters of the HCCH 1980 Child Abduction Convention envisaged that return might not be in the best interests of all children, and therefore included some limited exceptions to the requirement of prompt return, three of particular relevance to the child's identity.¹³ The benefit of these exceptions is that the judge can focus on the individual child and determine whether a return to his or her place of habitual residence is in the best interests of that child. The policy brief discusses these exceptions in more detail than the general rule which in principle, should apply to most cases (Section 1.1). This is because it is only in this situation in principle, that the courts explore individual identity issues of the child.

1.2.1 Settlement exception

The first exception is the so-called 'settlement exception', which applies only where the return proceedings commenced more than a year after the child was wrongfully removed or retained and the child has settled in his or her new environment (Art. 12). In these circumstances, it has to be proven that the child has already integrated into the new environment, and it is not in his or her best interests to be returned to his or her previous State of habitual residence. However, in deciding whether the child is settled, domestic courts take into account whether the taking parent concealed the identity and the location of the child and had gone into hiding to circumvent the return procedure.¹⁴ In determining whether the child has settled in the new environment, the judge may consider if the child was interacting with family members; attending school; has found friends that he/she has become attached to; or that the child is part of any social group.¹⁵ These factors are relevant for the child's (new) identity, because of the (newly) formed family and social relations, which will be disturbed if the child is returned to his or her previous

habitual residence. It would be more difficult to establish this exception in cases of older children who, might have strong links and roots back in their State of habitual residence. In this case, the child's identity should be preserved by ensuring that the contact with the left-behind parent will be maintained unless it is not in his or her best interests.

1.2.2 Grave risk exception

Another exception to the requirement of prompt return that is relevant for the child's identity is the so-called 'grave risk exception', namely that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation (Art. 13b)). Recently, the HCCH published a Guide to Good Practice, focused on the proper application of this exception.¹⁶ The Guide provides examples of situations that might constitute a grave risk. Situations that are linked to a child's identity could arguably fall into two main groups – when the child is separated from the taking parent and when the child is separated from sibling(s).

Child separated from the taking parent

Because the exceptions to prompt return are to be interpreted restrictively,¹⁷ the grave risk exception is only rarely upheld in cases where the taking parent is unable or unwilling to return to the State of habitual residence with the child.¹⁸

In these cases, the court considers the effect of the separation on the child and whether there should be protective measures¹⁹ put in place to address the grave risk. Such measures could include a request to the State of habitual residence to assure that it will not pursue criminal or other proceedings, or at least not arrest the taking parent.²⁰

If the taking parent can return to the place of habitual residence with the child, the court would be inclined to order the return of the child, because it is assumed that the child will then have both parents (in the same State) and hence be able to maintain relations.²¹

Separation of the child from sibling(s)

If the child is returned to his or her place of habitual residence, separation of the child from (step)-sibling(s) may occur in cases where the taking parent has formed a new family (e.g. he or she has a child from another relationship) after the abduction, but also when, in respect of one of the siblings, the child's objection's exception (addressed below) has been established or when the HCCH 1980 Child Abduction Convention does not apply to the other sibling(s).²²

In these situations, because the emphasis is on not allowing the taking parent to benefit from the situation he or she created, the separation of siblings does not usually result in a grave risk of harm determination for the other child(ren).²³ The courts, however, could require contact between the siblings, face-to-face or by other means.²⁴

1.2.3 Child's objections to return

The final exception to prompt return that is relevant for a child's identity is the so-called "child's objections exception", where the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views (Art. 13).

The term 'objects' has been given a restrictive interpretation.²⁵ As such, expressing a mere preference to live with one or another parent is not enough to constitute an 'objection' within the meaning of the HCCH 1980 Child Abduction Convention.²⁶ The child must be objecting to going back to his or her country of habitual residence rather than to the other parent. An objection is understood as '*a feeling beyond ordinary wishes*',²⁷ which maintains the distinction between the summary return proceedings and the substantive custody hearing.²⁸

Listening to children can be relevant to addressing identity issues, for example, the value the child places on having meaningful and regular contact with either parent, siblings, extended family, practising religion, or taking part in cultural activities. In addition, the child can express a preference to continue living in the requested State because he or she is part of a community (has been accepted in a community), which may not be present in the State of his or her habitual residence. Such preference might indicate that the child feels he or she (finally) belongs somewhere, particularly important for minority groups. Failure to consider this can have implications for the child's mental health, which can likewise become relevant for the grave risk exception, discussed above.

In addition, as per Article 12 of the CRC, it follows that older children, in accordance with their evolving capacities, should be able to decide which family relations they want to preserve in cases of parental child abduction. It follows that when the child's objection to return is raised, issues of identity, including preference with which parent the child wants to live, should be a relevant factor. It should be emphasised that Article 12 of the CRC is a right of the child, not an obligation. The child should not be forced to express his or her opinion or to "choose" a side in the conflict. Good practice in this respect is to appoint a separate child representative for the return procedure and/or a family mediator for supporting all parties, regardless of the age of the child. By doing so, the child's voice and perspective would be presented to the judge from the beginning of the proceedings.

However, even if one of the exceptions has been established, the judge in the requested State still has the discretion²⁹ to order the return of the child to uphold the objectives of the HCCH 1980 Child Abduction Convention.

The HCCH 1980 Child Abduction Convention is a procedural mechanism only, meaning that the decision of the court of the requested State is not determinative of any custody issue.³⁰ As such, the proceedings are only of a summary nature. Thus, there is no full hearing of all of the circumstances in the case, as would occur in custody proceedings.

The effect of parental child abduction on the child's identity rights

Maintaining relations with both parents is part of protecting the identity of the child. If the child does not have contact with both parents and his or her extended family, the child loses part of his or her identity.

For example, the child may forget the language of the parent with whom he or she is not in contact anymore, which means that the child would also be unable to communicate with extended family members, such as grandparents, cousins, aunts and uncles. In addition, the child might be unable to practise a given religion, participate in cultural activities and customs, all of which were once part of his or her identity. Because of this, issues of the child's identity should be central to any return or non-return decision. This is despite return proceedings only being of a summary nature because Article 3(1) of the CRC is explicit that the best interests of the child are a primary consideration in *all* decisions concerning him or her. The decision of whether a child should be returned to his or her State of habitual residence is indeed a decision that concerns that child and has implications on his or her identity.

Parental child abduction, especially in cases of parental alienation and concealment, can harm the abducted child's sense of identity and belonging. Indeed, it is argued that the abduction identity may, over time, become the child's primary identity.³¹ Because of this, all efforts should be taken to preserve and restore a child's identity, particularly his or her family relations and right to know and be cared for by both parents, by focusing on the following aspects.

2.1 Preservation of identity

In cases of parental child abduction, identity issues arise both in cases when the child is returned to his or her habitual residence and in cases where the court does not order the child to return. When considering the narrow exceptions to prompt return, it is therefore important, to consider whether the child will be able to maintain meaningful contact with both parents, including extended family and community, which is crucial for preserving the identity, including the cultural and linguistic connections, of that particular child.

As mentioned earlier, continuity in the habitual residence of the child in many ways preserves the child's identity. However, although courts are very critical in situations where the taking parent has gone into hiding and tries to rely on this to establish one of the defences to prompt return³², courts might not consider whether the return order will preserve the child's identity, including family relations with the taking parent. Similarly, when an exception to prompt return has been established and the child remains in the requested State, courts might not consider the effect of this order on the child's relations with the left-behind parent. Such considerations are left to the court, which determines issues of custody and should be at the heart of preserving the child's identity by the court deciding the custody issues.



2.2 Improper modification and falsification of child's identity

Interviews with some people, who have been abducted as children, reveal that during the period of abduction, their identity was changed, as a result of which they have suffered an identity crisis.³³ Further, it is not uncommon in cases of parental child abduction for the taking parent to change the identity of the child, including his or her name, and to go into hiding.³⁴ Research has found that abducting parents sometimes change their children's names, identities and appearances.³⁵ Interviewees reported that they had to lie at school about their reasons for being unable to provide proper records, whereas sometimes such records had been falsified.³⁶

Parental alienation is a form of modifying a child's identity, which can lead to the deprivation of essential elements of it. High-conflict divorce and separation can lead to parental alienation, which has a devastating impact on the child's relations with the rejected parent. This in turn means that the child loses part of his or her identity alongside the contact with the rejected parent, extended family and culture. Parental alienation is considered a form of psychological child abuse, because children subjected to it, lose the sense of their own identity.³⁷

2.3 Restoration of identity

Following a parental child abduction, the child's right to identity, including family relations with both parents, should be restored, regardless of whether the child is returned to the State of habitual residence or remains in the requested State. This is because the child has the right to maintain personal relations and direct contact with both parents (Arts. 9(3) and 10(2) CRC). Such contact should be restricted only in cases when contact with either parent is not in the best interests of the child (Art. 9(1) CRC).

Because of this, in line with the Committee on the Rights of the Child's Concluding Observations that countries should not criminalise international parental child abduction³⁸, domestic courts should ensure that when adjudicating custody matters, the taking parent is not being punished for his or her actions. Such punishment in practice hurts the child and deprives him or her of his or her right to maintain contact with both

parents when this is in his or her best interests. Not having contact with both parents has also an adverse effect on the child's identity, even more so for children being born to parents from different countries.

In cases of parental alienation, psycho-educational and family therapy programmes may help children to rebuild the lost relationship with the alienated parent and restore their lost identity. Research shows that such programmes mitigate parental alienation in high-conflict cases.³⁹ Regardless of whether the child is returned to his or her State of habitual residence or remains in the requested State, the State has an obligation, under Article 8 of the CRC, to work with families and children to restore missing elements of the child's family relations. Cultural and linguistic identity are equally important considerations.

2.4 Importance of a (more) individual approach when there are indications that an exception could apply

Article 3(1) of the CRC requires that '[i]n all actions concerning children [...] the best interests of the child shall be a primary consideration'. The Committee on the Rights of the Child has highlighted elements to be considered when assessing and determining the child's best interests, which include, among others, the determination of the child's views,⁴⁰ identity,⁴¹ preservation of the family environment and maintaining relations,⁴² care, protection and safety of the child,⁴³ health⁴⁴ and education.⁴⁵ All of these can be relevant in parental child abduction cases and have implications for the child's identity and ability to maintain contact with both parents and extended family members, both in situations when the child is returned and when the child remains in the requested State.

Given the relevance of identity rights in parental child abduction proceedings, it is suggested that identity should be one of the primary considerations in any best interest assessment and determination in Convention-applicable abduction proceedings (to the extent possible and when it falls within the exceptions noted above) and custody proceedings.

The emphasis of focusing on the individual child, rather than on the policy of return in parental child abduction cases was most prominently expressed in the case of *Neulinger and Shuruk v Switzerland*⁴⁶, in which the European Court of Human Rights (ECtHR) suggested that domestic courts should conduct an in-depth examination of the entire family situation in return proceedings for which it attracted a lot of criticism from the academic community⁴⁷ and the HCCH.⁴⁸ This was, however, later 'corrected' in *X v Latvia*⁴⁹, where the ECtHR stated that an 'efficient examination' of the defences raised will suffice.⁵⁰ Yet, the idea of focusing on the individual child can be traced back to Judge Zupančič in his dissenting opinion in the case of *Maumousseau and Washington v. France*⁵¹ before the ECtHR. He stated that the "best interests of the child is the fundamental determinative criterion, which must be assessed *de novo* by each court."⁵² From this assessment, it follows that it cannot be in the best interests of a four-year-old girl to be torn from the hands of her mother by force and transported back to the State of New York into the hands of her father with whom she has not been in any meaningful

contact for 19 months.⁵³ This is an example of an exception to prompt return that *'there is a grave risk that [the return of the child] would expose [them] to physical or psychological harm or otherwise place the child in an intolerable situation'*.⁵⁴ This can occur whenever the child is separated from the taking parent. Judge Zupančič was of the view that to sacrifice the best interests of an individual child in order *'to vindicate abstract juridical goals [...] goes against most basic human good sense'*.⁵⁵ This argument corresponds with Schuz's observation that the objective to *'deter abduction cannot justify a violation of child's rights'*⁵⁶ especially since the deterrent effect of the HCCH 1980 Child Abduction Convention is unproven and unprovable.⁵⁷

The need for a more individual assessment of the best interest of the child in parental child abduction proceedings is also supported by several other ECtHR judges. It seems that some judges are cautious to uphold that the best interests of the individual child should be sacrificed to protect the summary nature of the Convention-applicable proceedings. This is seen in several dissenting opinions, most notably by Judge

Dedov,⁵⁸ Judge De Albuquerque⁵⁹ and Judges Nicolaou, Wojtyczek and Vehabović,⁶⁰ all of whom acknowledge that, in abductions by the primary carer, a more careful balance should be struck between protecting the best interests of the child and respecting the integrity of the HCCH 1980 Child Abduction Convention.

In addition, recent ECtHR cases, such as *Thompson v Russia*,⁶¹ and *O.C.I. v Romania*⁶² also show a trend towards a more individual assessment of the child's situation. This is a welcome development from the perspective of the child's right to identity because when domestic judges are required to consider the best interests of the particular child, judges will be able to also take identity issues into account, especially in situations where it is likely that the return or non-return decision might have severe implications on the child's ability to preserve family relations with both parents.

SECTION 3:

Recommendations

A way to preserve a child's identity is to prevent parental child abduction, although this might not be always feasible and, in a limited number of cases, desirable. Other avenues, such as international relocation for the majority of cases, should be promoted instead. Parental child abduction should be discouraged, including deterring parents from abducting their children by educating them about the harmful effects of abduction on their children.

This should include awareness-raising campaigns, access to mediation and alternative dispute resolution, as well as promoting access to international relocation. States should ensure that international relocation procedures are available and efficient. In addition, social, psychological and financial support should be offered to parents, who are at risk of abducting their children. For example, support should be available to parents, who are experiencing domestic violence, so that they have other options than to leave the habitual residence of the child.

To address issues of a child's identity in cases of parental child abduction, despite the summary nature of these proceedings, courts ought to take identity issues into account when deciding if the child should be returned, especially when there are indications that an exception could apply. Such consideration should follow the Committee on the Rights of the Child's guidance and consider, *inter alia*, the child's identity and ability to preserve family relations and his or her views on the matter.

Upon return, or non-return of the child, all efforts should be made to facilitate contact with the other parent and extended family members, including using technology. In addition, the child should be given opportunities to continue learning/ speaking the language of the other parent, to ensure they do not lose communication.

Parental child abduction should be decriminalised⁶³. This would make it easier for taking parents to return to the State of habitual residence with their child. In addition, the act of parental child abduction should not be held against the taking parent in the subsequent custody proceedings, when deciding issues relating to custody and contact. In most cases nowadays, the taking parent is also the primary or the joint-primary carer of the child;⁶⁴ thus, it is unlikely that it is in the best interests of the child not to have contact with their primary or joint-primary carer.

Appropriate support and care should be provided to those children, who have been abducted. Support is required for abducted children, who are returned, and for those, who are not returned. Such support is needed to help children re-establish family relations with both parents and other family members, and therefore restoring their identity.

Collaboration between Central Authorities and judicial authorities, including the International Hague Network of Judges should be promoted. This could encompass training on the child's rights to identity and their preservation in parental child abduction cases, as well as responding to cultural issues that can lead to discriminatory decisions.

End Notes

1 See, for example, Beaumont, P. and McEleavey, P. (1999). *The Hague Convention on International Child Abduction*. Oxford University Press; Lowe, N., Everall, M. and Nicholls, M. (2016). *International Movement of Children, Law Practice and Procedure (2nd edition)*. LexisNexis, Family Law; Schuz, R. (2013). *The Hague Child Abduction Convention*. Hart Publishing.

2 The definition derives from the objectives of the HCCH 1980 Child Abduction Convention, Article 1.

3 Prof. Lowe, N. and Stephens, V. [The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017](#). Para. 26.

4 It is important to note, that the family relations aspect of child's identity might also be lost in cases of lawful, i.e. court-sanctioned family relocation (especially if it is a long-distance relocation). Relocation is regulated domestically, with only a soft-law international instrument that was prepared under the auspices of the HCCH and the US International Centre for Missing Children, the Washington Declaration ([decl_washington2010e.pdf \(hcch.net\)](#)), being available. However, in cases of family relocation, during the court hearing, the judge will consider if the child will be able to maintain meaningful contact with their family members. In contrast, in parental child abduction, the taking parent removes the child unilaterally, without guarantees that the child will maintain meaningful contact with the left-behind family members.

5 [HCCH | #28 - Status table](#), Numbers at 15 March 2022.

6 Article 1a) of the HCCH 1980 Child Abduction Convention.

7 Article 1b) of the HCCH 1980 Child Abduction Convention.

8 It is important to note that the HCCH 1980 Child Abduction Convention does not establish the obligation to return specifically to reestablish contact with the left-behind parent. However, from the perspective of preserving the identity of the abducted child, contact with both parents should be maintained, to the extent that this is in the best interest of the child.

9 See, for example, Pérez-Vera, E. (1980). *Explanatory Report on the 1980 HCCH Child Abduction Convention*. HCCH. Para. 29, where the Report makes it clear that "the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."

10 Article 2 of the HCCH 1980 Child Abduction Convention.

11 Mol, C. and Kruger, T. (2018). 'International child abduction and the best interests of the child: an analysis of judicial reasoning in two jurisdictions'. In *Journal of Private International Law*, 14 (3), at 421, 426-427.

12 Schuz, R. (1995). 'The Hague Child Abduction Convention: Family Law and Private International Law'. In *International & Comparative Law Quarterly* 44, at 771, 775.

13 The other exceptions to prompt return are: left-behind parent was not actually exercising the custody rights at the time of removal or retention, has consented to the removal or the retention, or has subsequently acquiesced in the removal or retention (Art. 13a)) or returning the child to their habitual residence would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Art. 20).

14 See, for example, *Hamilton v Simpson* [2019] NZCA 579. In this case, the court took into account the fact that the child had been living in different addresses and attending a number of schools in a short period of time.

15 See *DW v MB* [2020] JMSC Civ 230 [77].

16 See HCCH (2020). [Guide to Good Practice Child Abduction Convention](#). Part VI - Article 13(1)(b).

17 *Supra* 9, at Para. 34.

18 *Supra* 16, at 63.

19 On the topic of protective measures, see [Protection of Abducting Mothers in Return Proceedings Project \(POAM\)](#), POAM Good Practice Guide: [Best Practice Guide - POAM Project \(abdn.ac.uk\)](#) and the following journal article: [Project Journal Article - POAM Project \(abdn.ac.uk\)](#).

20 *Supra* 16, at 67.

- 21 Thompson v Russia. Application No 36048/17. 30 March 2021, at 69.
- 22 Supra 16, at 73.
- 23 Ibid.
- 24 Ibid, at 76.
- 25 Supra 9, Para. 34.
- 26 De Ruiter, A. (2020). '40 years of the Hague Abduction Convention on child abduction: legal and societal changes in the rights of a child'. Policy Department for Citizens' Rights and Constitutional Affairs, at 14.
- 27 Fenton-Glynn, C. 'Participation and natural justice: children's rights and interests in Hague Abduction Proceedings', at 5.
- 28 Ibid.
- 29 Based on the wording of the HCCH 1980 Child Abduction Convention, the author takes the view that Article 12 does not give judges discretion to return a settled child. For a detailed discussion on this, see Schuz, R. (2013). Supra 1, at 233-244.
- 30 Article 19 of the HCCH 1980 Child Abduction Convention.
- 31 U.S. Department of Justice (2010). 'The crime of family abduction: a child's and parent's perspective', at 10. Available at: <https://www.ojp.gov/pdffiles1/ojdp/229933.pdf>.
- 32 See Hamilton v Simpson [2019] NZCA 579.
- 33 Freeman, M. (2014). 'Parental Abduction: the Long-Term Effects'. International Centre for Family Law, Policy, and Practice, at 29.
- 34 Ibid.
- 35 Ibid, at 23.
- 36 Ibid.
- 37 von Boch-Galhau, W. (2018). 'Parental Alienation (Syndrome). A serious form of psychological child abuse'. In Mental Health in Family Medicine 13, at 725-739, 728. Available at: <http://www.mhfmjournal.com/New/pdf/MHFM-117.pdf>.
- 38 See Committee on the Rights of the Child. Concluding observations on the combined fifth and sixth periodic reports of Italy. CRC/C/ITA/CO/5-6. 28 February 2019. Para. 26.
- 39 Supra 37, at 730.
- 40 Committee on the Rights of the Child. General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). CRC /C/GC/14. 29 May 2013, at 53-54.
- 41 Ibid, at 55-57.
- 42 Ibid, at 58-70.
- 43 Ibid, at 71-74.
- 44 Ibid, at 77-78.
- 45 Ibid, at 79.
- 46 Application No 41615/07. Grand Chamber, 6 July 2010.
- 47 See Silberman, L.M. (2011). 'The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – Abbott, Neulinger, Zarraga'. In Oklahoma Law Review, 63, at 733, 743-44; Walker, L. and Beaumont, P. (2011). 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice'. In Journal of Private International Law, 7, at 231, 232.
- 48 Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (1-10 June 2011). Conclusions and Recommendations. At 47-49. Available at: https://assets.hcch.net/upload/wop/concl28sc6_e.pdf.
- 49 Application No. 27853/09 Grand Chamber, 23 November 2013.

50 For a discussion on this, see Beaumont, P., Trimmings, K., Walker, L. and Holliday, J. (January 2015). 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights'. In *International & Comparative Law Quarterly* 64, at 39.

51 Application No. 39388/05, 6 December 2007, dissenting opinion, at 38-43.

52 *Ibid.*, at 39.

53 *Ibid.*

54 Article 13b) of the 1980 Child Abduction Convention.

55 *Supra* 51, at 40.

56 Schuz, R. (2002). 'The Hague Child Abduction Convention and Children's Rights'. In *Transnational Law & Contemporary Problems* 12, at 393, 424. See Keller, H. and Heri, C. (2015). 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights'. In *Nordic Journal of International Law* 84, at 270-288, arguing that the speedy nature of these proceedings justifies a departure from the usual requirement of a holistic evaluation of the child's best interests.

57 Schuz, R. (2015). 'Thirty Years of the Hague Abduction Convention: A Children's Rights' Perspective'. In A. Diduck (Eds.). *Law in Society: Reflections on Children, Family, Culture and Philosophy*. Brill, at 625.

58 *Adžić v Croatia*, Application No. 22643/14, 12 March 2015, at 27-29; *Ushakov v Russia*, Application No. 15122/17, 18 June 2019, at 28-32.

59 *X v Latvia*, Application No. 27853/09, Grand Chamber, 23 November 2013, at 36-49.

60 *R.S. v Poland*, Application No. 63777/09, 21 October 2015, at 20-25.

61 Application No 36048/17, 30 March 2021.

62 Application No. 49450/17, 21 May 2019.

63 It is important to note that this is beyond the mandate of the HCCH and the 1980 HCCH Child Abduction Convention.

64 In 2015, 73% of taking persons were the mothers of the children, and 91% of the taking mothers were primary or joint-primary carers of the children. Moreover, in 58% of applications involved, the taking parent travelled to a State of which they were a national, where they have been brought up or have family ties. See Lowe, N. (2018). 'Part I – 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 of September 2017). HCCH, at 37, 43, 45-46. Available at: <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>. It is important to note that there is no difference in the statistics between primary or joint-primary carers abductions. In practice, however, it makes a difference from the perspective of the identity of the child, if the taking parent is the primary (sole) carer of the child. In these cases, the assumption that separation from the taking parent could place the child in an intolerable situation or expose the child to physical or psychological harm is greater than in cases where the parents have equal involvement in the child's life.





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