

## Editorial Introduction

This paper examines the experiences of women who have been ‘Hagued’: forced, through a court-facilitated process enabled by the Hague Convention on the Civil Aspects of International Child Abduction, to return children taken unlawfully across international borders. It considers how the convention, which lacks specific mechanisms to account for family and domestic violence, is weaponised against women fleeing such violence. It identifies three types of harm: further intimidation and abuse by an ex-partner through contact necessitated by court proceedings; punishment through a court system that positions the woman as a ‘child abductor’ and may engender adverse custody arrangements; and homelessness caused by lack of support structures, income and financial independence. Finally, it suggests improvements to reduce or avoid this harm.

## Acknowledgements

The authors are deeply grateful to the women who participated in the study for sharing and discussing their private and personal experiences of post-Hague abuse.

## Being ‘Hagued’: How weaponising the Hague Convention harms women, family and domestic violence survivors

Gina Masterton, Zoe Rathus, John Flood and Kieran Tranter

### Background

The Hague Convention on the Civil Aspects of International Child Abduction provides legal machinery to require the expeditious return of children who are wrongfully taken from their country of habitual residence (*Hague Convention*, 1980). Its drafters intended it to address the situation where a non-custodial father took their child across international borders without permission from the child’s mother (Quillen, 2014, p. 625; Silberman, 2011, p. 736). However, it did not consider the circumstance where a custodial mother must cross international borders with her child to flee family and domestic violence (Quillen, 2014, p. 625), or that under the convention she would be termed an abductor (Keyes, 2019, p. 109; Bozin, 2016, pp. 22–42; Quillen, 2014, p. 625).

Because the Hague Convention is a jurisdictional law—not a child custody or child welfare law—the return of a child to their habitual residence is primarily ordered so that the courts in that jurisdiction can settle the custody dispute (Schuz, 2013, p. 12). However, family and domestic violence perpetrators have weaponised the convention against women trying to escape.

### What is known

Beyond United States–Israeli anthropologist Smadar Lavie’s detailed account of fleeing to Israel with her child, and eventually defeating a Hague order to return to the United States (Lavie, 2018, pp. 15–16), there has been little research into the experiences of women survivors of family and domestic violence who have been Hagued. However, a United States Department of Justice study interviewed 22 such women, their lawyers and central authority lawyers (Edleson et al., 2010, p. 5). It found that United States courts usually granted Hague applications, ordering children’s return with minimal regard to evidence of family and domestic violence. It also found that in most cases, women and children faced great hardships upon their return, including new abuse by ex-partners. This was because being Hagued put the mother in the father’s country, frequently without familial, social, financial or legal support, providing a perfect context for continued violence.

Today, there is still very little information about survivors' experiences, as Weiner (2021) comments:

*There is no comprehensive data detailing the outcomes in cases involving domestic violence after children are returned. Nor do judges who return children despite a history of domestic violence receive feedback about what actually happens after the children depart. The lack of feedback perpetuates the myth for those adjudicating Hague Convention cases that return will not cause anyone harm. The reality, however, is that things frequently end poorly for the domestic violence survivor and the child after the child is returned. Media outlets, including the internet, produce a sample of anecdotal (and admittedly unconfirmed) hardship stories. Sometimes the mother and/or child are killed. (pp. 237–238).*

## Methodology

This paper seeks to address the gap in Australian research by focusing on 10 women whose children were returned to Australia and other countries. It used semi-structured interviews as the data collection method. Conducting such interviews using open-ended questions leads to a discussion-like forum where the participant has agency and becomes equal with the interviewer during the sharing of her story (Wambui, 2013, p. 5). For this research, some interviews were conducted face to face, and others by telephone or Skype. All interviews were recorded and transcribed. The transcripts were then analysed using an iterative coding approach to identify themes, commonalities and differences.

The 10 women were initially invited to participate in the research via their lawyers. (This gave them a trusted contact and a protective intermediary.) Six women had their children returned to Australia, one woman had her child returned to New Zealand, one had her child returned to the USA, one returned her child returned to the U.K. and one returned her children to South America. A total of 13 children were returned by Hague courts. Nine mothers chose to return with their children upon receiving the Hague order. One remained behind because she was terrified that her ex-partner would try to kill her if she returned to New Zealand with her child. All of those who returned eventually secured access to their children, either by court order or informal agreement, and six of the mothers did so in their chosen country of residence. Despite the enormous challenges they faced, none returned to their abusive ex-partners.

## Findings

### *Intimidation and controlling behaviour*

By complying with Hague orders to return to their ex-partners' countries, the women became extremely vulnerable and exposed. Their accounts demonstrate two forms of 'paper abuse', that is, abuse through legal means such as vexatious lawsuits and court orders. First, the ex-partner would use the Hague processes and other legal levers to force the child, and therefore the woman, to return to his territory. Then, emboldened by his Hague Convention 'win', he would exploit family law orders and child support systems to further

intimidate, harass and isolate the woman. (In Australia, shared parenting orders requires parents to 'consult' with one another about major decisions and make a 'genuine effort' to reach a 'joint' agreement (*Family Law Act, 1975*). This rule forces family and domestic violence survivors to interact with abusive ex-partners.) The abuse suffered would often be exacerbated by local authorities not taking action against the abuser.

### *Adverse custody arrangements*

The interviewees also experienced traumatic separations from their children post-Hague. They perceived court-imposed reductions to their parenting rights and contact times as punishments for fleeing with their children. Some of them commented that they felt family courts prioritised abusive parents' contact rights over children's safety.

### *Homelessness*

Returning to the country they had fled put these women in a vulnerable accommodation situation. This might be expected for women who cannot access social services because they lack citizenship or residency rights. However, homelessness occurred even for women possessing these rights. This was due to lack of income, and often inability to work, due to caring responsibilities, and bureaucratic processes and wait times encountered when trying to get help with accommodation.

## Recommendations

The current Hague Convention and its implementation can be hostile to women, family and domestic violence survivors. However, the international machinery for addressing child abduction could be made less indifferent to family and domestic violence and less susceptible to paper abuse. Three reform options are clearly available. The first is modifying the convention. The second is changing the domestic laws that facilitate the convention in its contracting states. The third is facilitating more nuanced, sensitive judicial interpretations of the convention.

### *Amend the convention*

An appropriate reform would be to amend the convention to better protect abused women and their children. This would include inserting stronger defences against return where there is a context of family and domestic violence and incorporating an understanding that a child's return order may compel an abuse survivor to return to violence and harm. However, amending an international convention is a lengthy and difficult task.

### *Amend the domestic Hague regulations*

For women Haged in Australia, a simpler, more achievable reform would be to amend Article 13(1)(b) of the *Family Law (Child Abduction Convention) Regulations* (1986) to explicitly connect 'grave risk of harm' with family and domestic violence or to deem such violence an 'intolerable situation'. Both are grounds for denying Hague applications. This recommendation is not new. It was first suggested in 1994 (Australian Law Reform Commission, 1994, Recommendation 9.5). However, it has not been enacted.

### *Alter central authorities' and courts' approaches*

An alternative reform approach would involve requiring Hague judges to consider more thoroughly what post-Hague life will be like for women by investigating the context from which a woman fled and the circumstances she is likely to face on return. They would need to address the unfounded assumption that jurisdictions to which children are returned adequately protect against domestic violence. The data shows this to be untrue. One woman is killed every nine days in Australia by domestic homicide alone (Australian Institute of Health & Welfare, 2019, p. x). The World Health Organization has declared that 'violence against women—particularly intimate partner violence and sexual violence—is a major public health problem and a violation of women's human rights' (World Health Organization, 2021). Given authorities', social services' and courts' apparent inability to prevent or address such crimes, the attendant risks involved need to be considered when granting Hague orders.

A final possible change would be to encourage courts with Hague jurisdiction to consider family and domestic violence when interpreting and applying the convention. Although during the past 20 years some United States courts have allowed such violence to inform their assessments of the Hague Convention's grave risk exception (*Gomez v Fuenmayor*, 2016), a recent New Zealand Court of Appeal decision represented a significant breakthrough in this area (*RR v COL*, 2020).

In 'the case of Jane', the New Zealand court held that both the mother's history as a family and domestic violence survivor and her potential post-Hague future were pertinent to interpreting the grave risk exception. It subsequently declined to order the child's return (*RR v COL*, 2020). Significantly, the judges asked wide-ranging questions about the mother's access to support if she returned to Australia and how that would affect her child. They also probed the central authority about the ex-partner's criminal history, outstanding charges and previous family court orders.

Hague proceedings are intended to be swift. Nevertheless, the New Zealand court's approach, and to a lesser extent some decisions by United States courts, indicate that Hague courts do have the time to interpret and apply the convention in a manner cognisant of family and domestic violence.

## Conclusion

The Hague Convention, drafted to address the issue of non-custodial fathers removing children, can precipitate significant harm to women who have crossed international borders with their children while fleeing family and domestic violence. This is because abusive ex-partners can weaponise the convention by filing return applications that position mothers as abductors of their own children. Haged women are then subjected to further harm: first, they are newly exposed to their emboldened former partners' intimidatory and controlling behaviours; second, they are often separated from their children by adverse custody orders; third, they frequently experience homelessness because of low income and poor access to support services.

This weaponisation could be largely avoided by updating the convention to account for family and domestic violence or by having local courts interpret the convention's exemptions in a manner cognisant of family and domestic violence and its survivors' experiences.

## References

- Australian Institute of Health and Welfare. (2019, 5 June). *Family, domestic and sexual violence in Australia: Continuing the national story* (Cat. no. FDV 3). <https://doi.org/10.25816/5ebcc837fa7ea>
- Australian Law Reform Commission. (1994, July 25) *Equality before the law: Justice for women* (ALRC Report 69 Part 1). <https://www.alrc.gov.au/publication/equality-before-the-law-justice-for-women-alrc-report-69-part-1>
- Bozin, D. (2016). The Hague Child Abduction Convention's grave risk of harm exception: Traversing the tightrope and maintaining balance between comity and the best interests of the child. *University of Tasmania Law Review*, 35(1), 24–42.
- Edleson, J. L., Lindhorst, T., Mehrotra, G., Vesneski, W., Lopez, L. & Shetty, S. (2010). *Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases* (NCJ No. 232624). US Department of Justice, Office of Justice Programs. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/multiple-perspectives-battered-mothers-and-their-children-fleeing>
- Family Law Act 1975 (Cth), s. 65DAC (Austl.). [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/s65dac.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s65dac.html)
- Gomez v Fuenmayor* 812 F.3d 1005 (11th Cir. 2016). <https://cite.case.law/f3d/812/1005/>
- Hague Convention on the Civil Aspects of International Child Abduction*, October 25, 1980. <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>
- Keyes, M. (2019). Women in private international law. In S. Harris Rimmer and K. Ogg (Eds.), *Research handbook on feminist engagement with international law* (pp. 103–117). Edward Elgar Publishing.
- Lavie, S. (2018). *Wrapped in the flag of Israel: Mizrahi single mothers and bureaucratic torture* (rev. ed.). University of Nebraska Press.
- Quillen, B. (2014). The new face of international child abduction: Domestic violence victims and their treatment under the Hague Convention on the Civil Aspects of International Child Abduction. *Texas International Law Journal*, 49(3), 621–643.
- RR v COL* [2020] NZCA 209. <https://www.incadat.com/en/case/1451>
- Schuz, R. (2013). *The Hague Child Abduction Convention: A critical analysis*. Hart Publishing.
- Silberman, L. (2011). The Hague Convention on Child Abduction and unilateral relocations by custodial parents: A perspective from the United States and Europe—Abbott, Neulinger, Zarraga. *Oklahoma Law Review*, 63(4), 733.
- Wambui, J. (2013). *An introduction to feminist research*. University of Nairobi.
- Weiner, M. H. (2002). Navigating the road between uniformity and progress: The need for purposive analysis of the Hague Convention on the Civil Aspects of International Child Abduction. *Columbia Human Rights Law Review*, 33, 275–362.
- Weiner, M. H. (2021). You can and you should: How judges can apply the Hague Abduction Convention to protect victims of domestic violence. *UCLA Journal of Gender and Law*, 28(1), 223–332. <https://doi.org/10.5070/L328155744>
- World Health Organization. (2021, 9 March). *Violence against women*. <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>

## About the Authors

Gina Masterton, Indigenous Australian Postdoctoral Research Fellow, QUT Centre for Justice

Zoe Rathus, AM, Senior Lecturer, Griffith University Law School

John Flood, Professor of Law and Society, Griffith University School of Humanities, Languages and Social Science

Professor Kieran Tranter, Chair of Law, Technology and Future, QUT School of Law