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Dislocated Lives: The experience of women survivors of family and domestic violence after being 'Hagued'

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Abstract:

This article reports on interviews with ten women who had experienced the legal process of the 1980 Convention on the Civil Aspects of International Child Abduction (the 'Hague Convention' or the 'Convention'). We refer to that experience as being 'Hagued'. All the women were subjected to a Hague return order after fleeing family and domestic violence perpetrated by their previous partner, because they fled with their children across international borders. Subsequently, all women were ordered to return their children to the country where their abusive previous partner lived. Nine out of the ten women also returned with their children. On return the women experienced further harms: they were vulnerable to, further intimidation and controlling behaviour from previous partners; they became homeless; and they felt punished in ordered from returning country's courts through reduced contact and custody arrangements. The article concludes by suggesting if the Convention, the domestic implementation laws and ultimately the courts assessing return applications, placed greater emphasis and understanding on family and domestic violence, then the women interviewed probably would not have been ordered to return their children and they would not have experienced further post-Hague harm.

Keywords:

The Hague Child Abduction Convention, international child abduction, family and domestic violence, post-separation violence, post-separation homelessness, women's stories

Introduction

This article examines the experiences of ten women who have been exposed to the legal process of the 1980 Convention on the Civil Aspects of International Child Abduction (the

'Hague Convention'), and consequently found themselves alone and adrift in alien countries trying to make sense of their new post-Hague situations. Through the stories of these women who fled with their children from family and domestic violence to a country where they had hoped to be safe, the article reveals that in their post-Hague lives they experience further harm. They are harmed through further exposure to the controlling behaviours of their abusive previous partner, who is now emboldened by their Hague victory in having the child and mother returned to his country. They experienced homelessness and they were often 'penalised' by the courts in having contact with their child reduced. These findings emphasise the need for courts making Hague return orders to be more appropriately informed of family and domestic violence.

The article is in five parts. The first part introduces the Hague Convention and discusses its limitations and gaps in relation to women who have traversed and challenged the legal process of the Convention. Part two describes the limited literature on the post-Hague situation for women, and considers some of the research on post-separation domestic violence which is relevant to women being 'Hagued' (Salter 2014, p. 19). Part three describes the methodology for the research informing this article. Part four sets three key findings: the women feeling compelled to return with children and being exposed to further intimation and controlling behaviour; experiencing homelessness and being separated from their children by orders made by the returned country's courts. These findings show how the Hague Convention, which was drafted without cognisance of the complexities of family and domestic violence, has resulted in 'Hagued' women who are victims of family and domestic violence suffering additional harm in their post-Hague lives. Part five examines how to reform Hague laws and processes to better protect women and children.

The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction 1980 ('Hague Convention' or the 'Convention') provides the legal machinery to expeditiously locate and return children who are wrongfully taken from their habitual county of residence (Hague Convention, Article 1, 2 and 11). It was adopted unanimously on 24 October 1980 by the Fourteenth Session of the Hague Conference on Private International Law by the twenty-nine member States at that time (Hague Explanatory Report April 1981, para 1). As at 19 July 2019 there were 101 Contracting States (the HCCH status table). The primary objectives of the Convention are to secure the prompt return of children deemed by legal authorities to have been 'wrongfully removed to or retained in' any Contracting State; and to ensure that rights of custody of, and access to, children under the law of one Contracting State are effectively respected in the other Contracting States (Hague Convention, Article 1). Most important for understanding how the Convention operates is the fact that it is a jurisdictional law – not a child custody or child welfare law (Trimmings and Momoh 2021, p. 3). Under the Convention, return of a child is ordered so that the merits of the custody dispute can be determined by the courts in the returned country (Schuz 2013, p. 12).

Article 8 of the Hague Convention allows 'any person, institution or other body claiming that a child has been removed or retained in breach of custody rights' to apply 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 a child (Hague Convention, Article 8). This directly allows the remaining parent to make a request for a return order. In the context that a mother has fled from a country with their child to escape family and domestic

violence, it prima facie allows the abuser to request authorities in his country and the country that the women escaped to, to work together to order the child's return.

Contracting States implement the Convention through enacting domestic law. Australia, where the research for this article was conducted, signed and ratified the Convention on 25 October 1986 and implemented it in the Family Law (Child Abduction Convention) Regulations 1986 (Cth) (Hague Regulations), which came into effect on 1 January 1987.

To facilitate the implementation of the Convention's objectives, all Contracting States are required to create an agency called the Central Authority (Hague Convention, Article 6). This agency is responsible for discharging all the legal duties imposed by the Convention, including initiating civil or administrative procedures to deal with cases of international child abduction (Hague Convention, Article 6).

Negotiated during the 1970s, the foundational assumption behind the Convention was that it would address situations where non-custodial fathers took their children across international borders without permission from the child's mother (Weiner 2002, p. 278; Silberman 2011, p. 736; Quillen 2014, p. 625; Maxwell 2017, p.87). Over time, however, it has been found that the profile of parental abductors has changed to primary carer mothers who, in many cases, are taking their children from one country to another to escape family and domestic violence (Yamaguchi and Lindhorst 2016; Freeman and Taylor 2020, p. 155; Trimmings and Momoh 2021, p. 4). Maxwell said that: Statistics indicate mothers now comprise approximately 69 per cent of abducting parents, with 72 per cent being the primary caregivers. This shift in the typical offender profile means that the purposes the Convention was drafted to achieve are perhaps less relevant (Maxwell 2017, p. 87).

While the Convention's drafters attempted to address the serious issue of parental child abduction, absent from consideration was the circumstance where a primary carer mother would need to flee family and domestic violence with her children to another country, and that these actions would invoke the force of the Convention and make her an 'abductor' of her own children (Harris Rimmer and Ogg eds. 2019; Bozin 2012, p. 2). Thus, there is no mention of family or domestic violence in the Convention (Quillen 2014, p. 625). A potential reason for this oversight by the drafters is that the Convention was drafted and re-drafted by committees consisting almost exclusively of men from the Global North (Hague Explanatory Report, paras 3 and 4) at a time before there was widespread recognition of the role of family and domestic violence specifically during separation and divorce (Salter 2014, p. 19) Under those circumstances, it is not surprising that women abductors were invisible to the Convention's drafters (Weiner 2002, p. 799).

In the context of the Central Authority implementing domestic law processes to give effect to the Convention's objectives against women abductors, there are limited options. The woman will either voluntarily return her child, or contest the hearing by raising one or more of the exceptions contained in the Convention. These exceptions include the child being over 16 years of age (Hague Convention, Article 4 and 35), or the child not being habitually resident in a Contracting State before leaving (Hague Convention, Article 4 and 35). The exception used most often by mothers who flee with their children because of family and domestic violence is the 'grave risk of harm' exception (Trimmings and Momoh 2021, p. 4-6). The woman must prove that there is a grave risk that return of the child would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation (Hague Convention, Article 35 and 13). There must be clear and compelling evidence of a grave risk of exposure to

future harm which is substantial and comparable to an intolerable situation (Re C ([1999] 2 FCR 507 at p. 517; DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services [2001] HCA 39 at para 43). In Australia, the courts do not generally consider allegations made by a mother that she is a victim of family and domestic violence to be sufficient grounds to exclude the return of her child (Family Law (Child Abduction Convention) Regulations 1986 (Cth), Reg 16(3)(b)). It is the general view in Australia that it is for the country of the child's habitual residence to protect the child from violence (ALRC 1994 [9.42]; Director-General, Department of Community Services & Timms (aka Black) [2008] FamCAFC 132 at para 39). As a process orientated regime for returning children so that the substantive legal issues of their care and protection can be determined in the return country, the Convention has been criticised because it 'operates against the interests of female domestic-violence victims who flee with their children from an abusive spouse' (Quillen 2014, pp. 621-643). Despite this, there has been little research which has focused on what happens to women survivors of family and domestic violence after they get 'Hagued'.

What is Known about Post-Hague Existence for Survivors of Family and Domestic Violence?

There is limited research on the experience of parents following a Hague Convention order to return their child to their country of origin. Smadar Lavies (2018, pp. 15-16) provides a detailed account of her experiences of fleeing to Israel with her child to escape family and domestic violence and then eventually defeating a Hague order for their return. Beyond Lavie's reflection on her own experience, the primary source of knowledge on family and domestic violence survivors and the Hague Convention is in a detailed study for the United

States Department of Justice that interviewed 22 ‘Hagued’ women survivors of family and domestic violence, their lawyers and Central Authority lawyers (Edleson *et al* 2010). The research team found that the United States courts generally tended to grant the return application and order the return of the child, notwithstanding significant evidence of family and domestic violence experienced by the woman (Edleson *et al* 2010, p. 174). They also identified that most of the women then accompanied their child back to the country of origin (Edleson *et al* 2010, p. 178). Significantly, they also found that the ‘women reported new domestic violence committed against them by their abusive husbands once they returned to the other country.’ (Edleson *et al* 2010, p. 181).

These findings in relation to ‘Hagued’ women survivors of family and domestic violence are not surprising. As Jaffe *et al*. (2003, p. 29) said 20 years ago: ‘separation is not a vaccination against domestic violence’. Many family law systems around the world now emphasise the importance of on-going post-separation relationships between children and their parents. For example, ‘In Australia, there has been considerable interest in recent years in the policy and practical implications of sharing parental care and responsibilities after separation – concepts that have culminated in the Family Law Amendment (Shared Parental Responsibility) Act 2006’ (Smyth and Moloney 2008, p. 7). Thus, it is unsurprising that women who have removed children from their fathers across international borders are at risk of losing physical custody – at least when they first return as the ‘abductor’.

In terms of post-separation violence, Humphreys and Thiara have noted that it is ‘an issue for a significant group of family and domestic violence survivors (and their children) leaving abusive relationships:’ (2003, p. 195).

> Post-separation violence is a fear and frequently a reality for women and children who attempt to escape from abusive and violent relationships. However, it is often over-looked as a danger and remains an area where the failure of effective intervention leaves women and children vulnerable and unprotected. The effect of this failure is not neutral, but compounds the abuser's control and the woman's sense of entrapment (Humphreys and Thiara 2003, p. 196).

In post-Hague situations these concerns are exacerbated by the realities those women confront. They are often in a foreign country – sometimes without the dominant language – usually unfamiliar with the legal and social service systems. Their former partner is usually in a very different situation being male and local to the jurisdiction.

A concerning emerging trend, particularly in post-separation domestic abuse is the use of technology to facilitate stalking and other forms of abuse against women, which becomes digital coercive control (Harris and Woodlock 2019, pp. 530–550). It is conducted remotely, but is omnipresent (Woodlock 2017, pp. 584–602). Even prior to the common use of social media, Southworth et al found that technological stalking was already occurring:

> As technology has expanded to include cellular telephones, Internet communications, global positioning system (GPS) devices, wireless video cameras, and other digitally based devices, abusers have used these tools to frighten, stalk, monitor, and control their victims (Southworth *et al* 2007, pp. 842–843).

More recently, Douglas has explored more contemporary types of digital post-separation abuse: 'Perpetrators can now use smartphone recording facilities to record private

conversations and activities of their (ex-) partners' (Douglas and Burdon 2018). Also, Woodlock et al added that technology stalking is a form of control:

> The use of technology in domestic violence can convey a sense of perpetrator omnipresence due to the reach that technology can afford them, with victims feeling they can never really escape the perpetrator's abuse (Woodlock *et al*., 2020).

This is a form of abuse and control easily, and increasingly, extended over children, particularly after parental separation (Dragiewicz *et al*., 2022 pp. 137–149).

The shared parenting laws in Australia and other similar laws in various jurisdictions also contribute to domestic survivors feeling they are still bound to the fathers of their children through being required to consult on major decisions and shared time. Laing (2017, p. 1315) said that, 'Abusers commonly use children as a means of indirect control of women after separation as parenting and contact arrangements provide a context in which they have ongoing access to ex-partners. In this context of post-separation violence and multifaceted efforts by the abuser to continue to exercise coercive control, survivors who are mothers are required to negotiate post-separation parenting arrangements' (Laing 2017, p. 1315).

In the United States, Zeoli et al found that when couples with young children in common separated and there was domestic abuse, the family court often included shared parenting orders. They noted:

> In most custody arrangements, victimized mothers are not allowed to completely cut ties with their assailants, the children's fathers…sometimes the assailants gain primary physical custody and survivors must depend on them for

> contact with their children. These court-mandated arrangements…provide opportunities for continued abuse (Zeoli *et al*., 2013, p. 547).

Further when there are court orders in place, as there often are post-Hague, the research of Francia et al with parents who have been through the Australian family law system showed that family violence services were not well geared towards providing assistance in these situations:

> …family violence services generally focused on the intervention, assessment and crisis stages, [so] a gap exists in support for mothers and their children in the years following separation, when court ordered contact arguably provides protracted opportunities for perpetrators of family violence to harass, abuse and control their ex-partner or children' (Francia *et al*., 2020, p. 109).

Elizabeth characterises this type of abuse as 'custody stalking', saying, 'children are … a channel through which violent and/or coercively controlling fathers can continue to violate former partners' (Elizabeth 2017, p. 186). Miller and Smolter (2011) refer to this type of abuse as 'paper abuse' because it is facilitated by court orders:

> Thus, despite the lack of physical violence, paper abuse should be recognized as an example of continued victimization, [which] can continue long after victims leave their abusive relationships (2011, p. 638).

It has long been understood that some of the most damaging and distressing forms of domestic violence are the cruel emotional torments delivered by coercively controlling men. Bagshaw and Chung (2000) wrote that data gathered from a 1998 South Australian study on female victims of family and domestic violence found that 'the vast majority reported that verbal, psychological and emotional abuse occurred daily, and was far more devastating and

long lasting in its effect. Many thought that the unpredictable nature of the abusive outbursts was particularly distressing' (Bagshaw and Chung 2000, p. 9).

In recent times, more attention has been paid to this insidious form of violence – for which separation, particularly in our technological times, poses no barrier. Further, children are often drawn into the controlling behaviour of the abusive spouse when his former partner is physically absent. They can be turned into unwilling messengers and spies, essentially tools and weapons of their fathers (Katz, Nikupeteri and Laitinen 2020, pp. 310–324; Jeffries, Field, Menih and Rathus 2016, p. 1355).

By positioning the mother in the father's country, frequently without familial, social or legal support, the Hague Convention provides the perfect context for the continuation of family and domestic violence, including coercive control, post-separation. It is to investigate this possibility that the study was conducted.

Methodology

The women participants

Interviews were chosen as the method for the collection of original data because women who have been 'Hagued' are likely to emerge from vulnerable populations where flexible and sensitive approaches should be employed (Liamputtong and Ezzy 2005). Douglas has been using the qualitative method of interviewing individuals (and focus groups) for domestic abuse research for several years. Her methods involved recruiting women through domestic abuse organisations and interviewing them about their experiences with the law (at Domestic Violence Court Assistance Program (Beenleigh); DV Prevention Centre (Gold Coasts);

DV Resource Centre (Mackay); Women's Legal Service (Brisbane); and DVConnect (Brisbane) (Douglas and Stark 2010). Similarly, for the current study, the first author undertook in-depth semi-structured interviews, as they 'are the best way of collecting high quality data … they] are guided conversations utilizing open-ended questions and various forms of informal probing to facilitate a discussion of issues in a semi-structured or unstructured manner.

As this research involved working with potentially vulnerable people the ethics process was extensive (the ethics approval reference is: GU Ref No: 2018/234). After it was finalised the first author prepared a detailed recruitment plan to identify women who had a recent Hague experience. She found several Hague matters reported on Austlii (the online Australian family court case data base) which contained the names of the lawyers involved, and hence provided early points of contact. Some worked in community organisations and others were in private practice. Introduction letters to these lawyers were drafted to discover if they had clients who would be willing to participate. This included an information sheet, consent form and a list of open-ended questions for participants. The first author also contacted women's domestic abuse support agencies and women's shelters where connections had previously been made. Social media as a recruitment source was also used, in particular, a Facebook page titled 'Getting 'Hagued' in Australia'. These strategies proved successful in recruiting participants for the study.

The ten women participants were from different countries of origin: four from Australia, four from Europe and two from the Pacific. Nine of the women chose to return with their children, with only one remaining in the country to which they fled. When those nine women first returned pursuant to a Hague order, two fathers had complete legal and physical custody of

the children and the other seven were ordered to share custody of their children and co-parent. The one woman who did not return with her child because she was too frightened of her ex-partner, now has contact with her child via telephone only. All of the women who returned eventually secured full or substantial custody of their children, either by court order or informal agreement, and mostly in their country of origin. Despite all of the challenges the women faced, none returned to their abusive partner. The details about the participants is in figure 1.

Alias	**Age at time of interview**	**Children and ages at the time of interview**	**Hagued direction**[#]
P1	Early- thirties	Boy aged seven	Back to Australia
P2	Late thirties	Girl aged three	Back to Australia
P3	Late forties	Two children, girl aged eighteen and boy aged seventeen	From Australia
P4	Early thirties	Two children, boys aged nine and eleven	From Australia
P5	Early fifties	Boy aged eight	From Australia
P6	Early forties	Boy aged nine	Back to Australia
P7	Early thirties	Girl aged nine	Back to Australia
P8	Mid-forties	Two children, boy aged five and girl aged six	Back to Australia
P9 –	Early thirties	Girl aged two	From Australia
P10	Early thirties	Girl aged six	Back to Australia

Figure 1: Details of Participants.

[#] Note 'Back to Australia' means the woman had left Australia with her children and was in another country when the previous partner in Australia made the Hague application. As such the courts in the other country ordered her children to be returned to Australia 'From Australia" means that the women left the other country with her children to come to Australia. The previous partner made the Hague application from the other country, and an Australian court ordered her children to be returned to the other country.

The interviews were conducted during 2018 and 2019; with some follow-up interviews in 2020. Some were conducted face-to-face, some were by telephone, and the remainder were undertaken using Skype. All the interviews were recorded and transcribed by the first named author. The transcripts were then analysed using an iterative coding approach to identify theme, commonalities, and differences. One of the lead findings that was revealed from the interviews was how the post-Hague experience further harmed the women while they were trying to rebuild their lives.

Post-Hague Experience

The women interviewed all spoke of experiencing further harm after being the subject of a Hague return order. There were three contexts for their experiences. The first was that the Hague order put them back into the orbit of their abusive previous partner, and they reported experiencing further intimidation and controlling behaviour. Second, the women experienced homelessness. Third the women experienced the trauma of being forcibly separated from their children. Each of these impacted on different facets of the women – as former partners, as individuals requiring social services and as mothers.

On-going post-separation intimidation and controlling behaviour

For the women, the Hague return order re-exposed them to the intimidation and controlling behaviour of their previous partner. Nine of the ten women accompanied their child to the country of origin when complying with a Hague order. This put them back in their previous partner's jurisdiction, subject to its family and child support laws and its systems and authorities which are responsible for addressing family and domestic violence.

After being ordered by an Australian court exercising Hague jurisdiction to return her then two-year-old son to an American state, P5 was able to share custody of her child with her previous partner. Although they were not living together, her ex-partner regularly threated and intimated her:

> He threatened me several times saying that he could have me arrested and charged with parental kidnapping because the … local police and the federal police were all on his side and they called him regularly to see what the situation was. And the sad truth was that he was one hundred per cent right. He'd had full support from Australia and now in the [returned jurisdiction] too (P5).

For P5, the Hague return order seemed to embolden her previous partner and he used it as a threat in attempts to control her.

P1 was 'Hagued' back to Australia when she took her child for a holiday to a European country to visit her family, even though her previous partner had agreed to the trip. Although she maintained custody of her child post-Hague, P1 described feeling very scared of her former partner: 'When I eventually returned, I stayed at my parent's house, but they weren't there … I … told all of the neighbours about my fear [of him] … So, they were all keeping an eye out for me.' P1 also notified the police of her safety fears: 'I put myself on … a register, so if you call, they come straight away … I didn't want to be living alone because the threats had started getting worse at that point in time.' P1 feared so much for her personal safety, she could not return to work:

> I couldn't go back to work, until my parents came back [from holidays] … I was too scared…he knew where I worked. I was too scared to put [my son] in day-care because…he [might] take him…I was really terrified.

Some women applied for domestic violence protection orders in the returned jurisdiction because of fears for their safety. P6, who maintained custody of her child post-Hague, was frightened when she accidentally ran into her ex-partner:

> The day I went to sign my lease, I walked … into him walking down the road … He followed me and my son … you go into panic mode … I thought, 'What do I do? … 'I'll go to the police station.' And I walked in there, shaking, and he hid outside.

An 'AVO' is an Apprehended Violence Order. It is a type of order taken out to protect victims of domestic violence when they are afraid of future violence/threats to their safety. They can also be called 'restraining orders' or 'protection orders.

P7 remained behind when her child was returned. She felt her life would be in extreme jeopardy if she returned to her ex-partner's country: 'I just have this feeling that if I ever go back … I'll end up dead … and then my daughter will lose both parents.' Her child was returned to live with a grandparent in the returned country. P7 has phone contact with her child.

Some of the fathers used the local legal system as a tool to continue their abuse. Shared parenting orders in Australia require parents to 'consult' with one another about major decisions and to make a 'genuine effort' to reach a 'joint' agreement (Family Law Act, section 65DAC). This rule on shared parenting placed the 'Hagued' women in an invidious position of having to interact and liaise with their abusive previous partners. P1, for example, had an Australian family court order which required her to undertake shared parenting with

her ex-partner. The child stayed with the father for a period of time each fortnight and the father used the arrangement to belittle, harass and abuse P1:

> He's able to contact me for discussing parenting … but it's never about that. It's always … 'You're a terrible parent …and you're scum and you're a piece of shit.' I've got emails … where he is abusing me … threatening me and making me feel scared.

For some of the women, the necessity to interact with the father post-Hague led to financial abuse. P8, like P1, was compelled into post-Hague shared parenting orders by Australian family law. She described how her previous partner reported his income to minimise his gross earnings, and thus his consequent child support payments:

> I was asking him for money for education and spousal maintenance and he refused. I rang the [relevant Government Department for child support and discovered that] he got his figures down from $135,000 a year to $40,000 … and they said they would do an investigation … I kept ringing and they still haven't even done anything yet. It's over two years ago (P8).

Technology stalking was reported as being on the rise by the women. P1's former partner tormented and threatened her by email and was aggressive during phone calls with their son:

> He's still abusing the hell out of me. Still trying to track my movements. Still putting tracking apps on iPads ... I'd get rid of one iPad, and he'd gift [our child] with another at contact, which I wouldn't realise until I got home, open his bag and I'd see another iPad. Open it. Tracking device. Now he knows where I live … The police did nothing about it. I already had it on the order that he couldn't use technology … He's just breaching and … nothing happens (P1).

P1's account has two significant dimensions. First, it is a clear example how perpetrators of family and domestic violence are using digital devices to track victims. Second, it seemed, in her situation, that the authorities were unable to address this use of devices.

The post-Hague experience of these women was a recommencing of intimidation and controlling behaviours by their previous partner. By complying with a Hague order to return to the county of their previous partner, the women became vulnerable and exposed. There can be seen a double form of paper abuse manifested in their accounts. First, the previous partner used the Hague legal process to get the child (and the mother) to return to his county. Second, once returned there was exploitation of family law orders and child support systems to further intimidate, harass and isolate the woman. Indeed, the women's stories suggests that victory with a Hague order seemed to encourage and embolden fathers, reinforcing misogynist narratives that they were the victim, that their behaviour was justified and that the authorities were on their side. For example, P5 said that upon her return with her child, her ex-partner regularly threated her, 'saying that he could have me arrested and charged with parental kidnapping because the … local police and the federal police were all on his side.' This perspective seems further supported in the claims made by the women of local authorities not acting against previous partners for their intimidation and controlling actions.

Homelessness

Returning to the country that they left immediately positions a woman post-Hague in a vulnerable context regarding accommodation and housing. This might be expected where the woman did not have citizenship or residency rights in the returned country and was therefore

unable to access social services. However, homelessness was a feature of the post-Hague experience even when the women had these rights.

P10 returned to Europe with her child 'voluntarily' when she was served with Hague process in Australia. She explained that on return she (and her child) were:

> … immediately homeless … I applied for homelessness [support] but because I'd been out of the country for seven months … they were trying to say that I wasn't entitled anymore, I'd been away for too long … I had to fight that and then they put me in emergency housing.

P10 said that the emergency housing offered was a small motel room and was not suitable to properly parent a child: '… about the size of a bedroom. The kitchen in the corner, a television and a double bed. [My child] didn't even get her own bed … For ten months we stayed there. P10 eventually succeeded in obtaining public housing: 'Now I'm in a council house which is really fucking amazing, you know. I cried for like two weeks straight when I got in here. Because I got a real house.'

Some women had to rely on the kindness of others for shelter post-return. P5 said: '… I arrived back in [the returned country] with my sister and my child. We stayed with a friend … and slept on a large airbed on the floor of her apartment for six weeks with my child in the middle of us'. P4 also received help after she became homeless: 'I came back to Australia with nothing … I was taken in by complete strangers 'cos I had nothing to come back to.' P7, made the observation that the housing and economic security for a woman if they returned with their child was not considered in her Hague hearing: 'I was like, "come on we'd be basically homeless in [the country of return]. Where were we going to go?" … [That] country's refuges couldn't help me' (P4).

P8 was homeless upon returning with her children to Australia: '… I had a parenting and a protection order in place prior to landing … And we entered the family court arena, but we had nowhere to live, and I couldn't get into a refuge.' She described how difficult it was to get accommodation, as she was not a permanent resident or Australian citizen. She said: 'No friends here wanted to know me … No family [here]. Just mum, me, and the kids … No one would give us a rental property because I had no income, and mum was on a pension [of another country].' P8 said her situation was so dire she had to rely on her family in her home country for support: 'My sister paid for us to stay in a holiday rental for a few weeks'. She eventually found a place through significant persistence:

> I found a place I thought would be really nice … and I basically turned up on their door every day … for six months and begged them to take us on … and they did … I think she could just see that I was desperate because we were just being turned away from every single place we were applying for. We had nowhere to live [initially] but we found that place.

Women who had residency rights of the country they returned to also experienced problems securing housing. P6 tried to organise a home for her and her child before she returned to Australia, but it was impossible to achieve:

> I got [Australian social security] payments upon return … I didn't easily get a refuge place. That's much work on my part. It didn't just fall in my lap … I spent three weeks before I left phoning and phoning and phoning … and having people say, 'No, no, no, you're not homeless until you arrive here.' But I was saying, 'But I know as soon as I arrive, I'm going to be.

P6 eventually found some accommodation, but it was less than ideal: 'I was in a refuge for … four months … because I had nowhere to go … no car, nothing. So, I was in a refuge in [a regional location].'

The women who participated in this study did eventually find housing. However, their experiences show how difficult it is for 'Hagued' women to find safe shelter upon return, even when they have children with them. The inherent forced migration of a Hague order seems to create homeless for women.

Separation from children post-Hague

The women also experienced post-Hague separation from their children. This was particularly traumatic for the mothers and their children. Most of the women accompanied their child post-Hague to the return country, compelled to risk re-exposure to the violence from the father and homelessness, to support, protect and be present for their child. However, on return they became subject to that country's family law and courts. The women perceived that they were punished for fleeing with their children through court-imposed reductions of their parenting rights and contact times.

P5's previous partner was given full custody of their infant son by the returned country's family court after she had fled to Australia:

> On my first day back in [returned country] my estranged husband reminded me that he had been granted Family Court orders in my absence from the [Returned Country] courts which gave him full physical and legal custody of our son … and under the orders I only had the right to supervised visitation with my son. I

> was beside myself with anxiety and grief. We'd never been apart and now I had lost my baby.

She failed to understand how judges could make such orders without knowing all the facts:

> These orders had been obtained … without the [relevant] Family Court knowing my side of the story, without knowing anything much about me or why I had fled … I desperately wanted to have the … orders amended so I could at least get shared custody of our son.

For P5, she could only explain the orders because: 'In this judge's eyes, I was just a kidnapper who had broken the law on two continents and violated my husband's parental rights.'

Some of the women commented on the apparent priority given by the family courts to uphold parents' rights to have contact with their children over safety. P4, for example, recalled how her protection order against her previous partner was promptly dismissed by an Australian family court judge so that he could have weekly visitation with their children, and then the judge gave the father practically full custody of their children:

> I got a protection order … but the judge overrode it in relation to the kids … he had to have the kids every weekend, so they were missing Friday and Monday of school … He has 77 percent custody and I have 23 percent. He pays no child support … I had to pay him money.

P4 said her: 'two boys, 12 and 14, are miserable with [the Australian court's] arrangement and she was searching for legal advice about returning to her home country with them. She outlined the convoluted shared parenting arrangement the court ordered, which meant the children missed school:

> I'm allowed my boys on the first weekend of the month in [my town], so I have to travel … over two and a half hours drive … and he travels just over an hour and a half … to pick them up … then on the third weekend of the month I have to travel to where he lives and stay there for the weekend cos, I'm not allowed to leave his town with them … I have to pay for accommodation or stay with friends.

P8 contested her co-parenting order in the Australian family court and was eventually allowed to relocate with her children back to her home country. However, the court ordered that her previous partner had the right to have the children visit him in Australia every school holiday at P8's expense:

> After getting back to [my home country] life was certainly not easy for us. … we had the nightmare contact order that the judge issued for contact once we were back, which was for me to fly the children back every holiday to him in Australia unsupervised.

P8 was frantic about this order because her son had confided in her that he was being molested by his father. Despite her financial adversity, P8 continued to challenge the Australian orders and eventually succeeded. She contacted the research team in late 2020 to advise that she now has sole parental responsibility for her children in her home country. She said that her former partner eventually gave up abusing her through the court system because 'it was costing him too much money'. She described the domestic family court process as 'brutal':

> I have sole custody and we are building our life in [my home country], safe and free of the courts. What a journey, what a long brutal journey, but I hold tight

> my gratitude that we got home, we are free, and my children are not constantly traumatised by a contact order that had no regard for their interests.

The post-Hague experience of the women involved included increased separation from their children on return. There was a sense that this was the system's retribution for fleeing with their children. However, there also was a sense of hope. The women were tenacious in their determination to protect and care for their child and some did achieve favourable parenting outcomes through the family law processes in the return country. However, when interviewed several were still embroiled in the legal process. P7 described how the Hague return order pressured her to return with her child to an unstable previous partner with predilections for guns and drugs:

> I … said if the court gave me until Christmas, I would hand her over … but then this was when I made the decision that I couldn't go back to ... because of my safety … So, I got to spend time with her at Christmas and then … we returned her.

Eventually, the returned country placed P7's child in the care of a grandparent. For P7, the post-Hague experience involved total separation from her child.

How the Hague Convention could be amended to better protect abused women

The post-Hague experience of the women who responded to family and domestic violence by fleeing to another country was characterised by further harm. Laing (2017, p. 1316) uses the term 'secondary victimization' to describe the additional harm and sense of betrayal experienced by victims of traumatic events when the responses they receive from formal or informal supports are inappropriate.' Applying the concept to domestic violence survivors …

secondary victimizations are injustices that occur to victims after a trauma' (Laing 2017, p. 1316). Although children are the subject of Hague orders, most women accompany their child to the return country. Unless a woman makes the sort of traumatic decision that P7 did of returning her child unaccompanied, Hague return orders effectively compel a woman to return to the context from which they fled. For the women interviewed this led to specific further harms. Foremost, they were forced to interact with their abusive previous partner and subsequently exposed to continued intimation and controlling behaviour. Further, the ex-partner often used their success in the Hague matter as vindication for their conduct. Second, they experienced homelessness. Third, they felt 'punished' by the courts in the returned country as 'kidnappers' with reduced contact and parenting rights.

The experience of the women reveals the Hague Convention, and how it is implemented by Contracting States, as particularly hostile to the lives of women and to contemporary understandings of family and domestic violence. Rather than protecting women and children from family and domestic violence, it seems particularly open to being used by abusers to have the legal authorities in two countries force women and children to return and continue causing them harm. From the perspective of women survivors of family and domestic violence, the Hague legal process appears to be a misogynist tool through which abusers can maintain power and control over women and children.

The international machinery for child abduction does not have to be so blind to the impacts of family and domestic violence or so amenable to paper abuse. There are three clear reform options. The first is modifying the Hague Convention. The second is changing the domestic laws that facilitate the Convention in Contracting States. The third is more nuanced judicial

interpretation of the Convention to be more sensitive to women survivors of family and domestic violence.

Amending the Convention

On paper an easy reform would be amendment of the Convention to reflect the changes in the profile of 'abducting' parents through inserting stronger defences where there is a context of family and domestic violence, and an understanding that in practice a return order in relation to a child is also an order compelling a woman to return to violence and endure harm. However, amending an international Convention is a lengthy and often fraught task. There has been some progress at the Hague in relation to family and domestic violence, but this has not amounted to an agenda of reforming the text of the Convention. Nevertheless, in 2020 the Hague Conference on Private International Law (the HCCH) finally acknowledged that domestic violence-related child abduction was a major problem. The HCCH is an intergovernmental organisation in the area of private international law, which administers several international conventions, protocols and soft law instruments. It also recognised that women caught up in the Hague legal process often raised the grave risk of harm and the intolerable situation exception under article 13(1)(b).

The HCCH's proposed solution was to produce a handbook called *The Practitioner's Guide to Good Practice for Article 13(1)(b)* (2020). Although the HCCH announced that the guide came about because of the 'increasing use in recent years of this defence in child abduction cases' (HCCH 2020) Foreword), the guide did not encourage change or amendment to the Hague Convention's approach to abused women. It does, however, contain a broad definition of 'family and domestic violence':

> The term ‘domestic violence’ or ‘family violence’ may, depending on the definition used in the relevant jurisdiction, encompass a range of abusive behaviours within the family, including, for example, types of physical, emotional, psychological, sexual and financial abuse. It may be directed towards the child (‘child abuse’) and towards the partner (sometimes referred to as ‘spousal abuse’ or ‘intimate partner violence’) and other family members (HCCH 2020, p. 9).

Although only a guide, it does demonstrate the beginning of acknowledgement and acceptance of family and domestic violence within the Hague legal process.

Amending the Hague Regulations

As Australian based researchers, the women we spoke with experienced the Hague Convention through its enactment in Australian law and administered by the Australian Central Authority and courts. The women either fled with their child to Australia and were then ‘Hagued’ by Australia and their child ordered to return, or they fled from Australia and were ‘Hagued’ overseas and ordered back to Australia. For women ‘Hagued’ in Australia, a simple reform would be the amendment of the regulations to explicitly connect the grave risk of harm exception to family and domestic violence experienced by the mother, and/or deem family and domestic violence as an intolerable situation. This recommendation to amend the Australian regulations is not new. In the 1994 seminal report of the Australian Law Reform Commission (ALRC) titled *Equality before the Law: Justice for Women*, it was recommended that the regulations be amended so that:

> … in deciding whether there is a grave risk that the child's return would expose the child to physical or psychological harm or an intolerable situation, regard may be had

> to the harmful effects on the child of past violence or of violence likely to occur in the future towards the abductor by the other parent if the child is returned (ALRC 1994, Recommendation 9.5).

However, this reform proposal has not been taken up by successive Australian governments. A 2011 Senate inquiry into how Australia administers the Hague Convention, notwithstanding many submissions arguing for the ALRC reforms to be adopted, made no recommendations regarding changing the interpretation or definition of 'grave risk' in the regulations (Senate Legal and Constitutional Affairs References Committee, International parental child abduction to and from Australia, Parliament of Australia, 2011).

An alternative line for reform might involve placing higher onus on the Australian Central Authority to more fully appraise the court exercising Hague jurisdiction of the context that a woman fled from and the whole circumstances likely to be faced by the child and their mother on return. As more is being understood about the post-Hague lives of women who have fled domestic violence, courts should insist on being appraised of these realities by the lawyers for the Central Authorities. In Australia, the government authorities who administer and enforce the Hague Convention are supposed to act objectively. In the case of *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 the court stated (at para 78):

> We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to Model Litigant guidelines. The … Guidelines, which apply to the Central Authority, requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in

> accordance with the highest professional standards. Relevantly, this includes not requiring the other party to prove a matter which the state or an agency knows to be true.

The decision in *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 points to the possibility of expectations and guidelines directed to the Central Authority requiring it to provide to the court submissions regarding the likely circumstances of the mother should she return with the child, so the court can fully evaluate the grave risk and intolerable situation exceptions.

Connected to this is the need to understand the superficial and naïve assumption that returned jurisdictions can always adequately protect against family and domestic violence in countries where the rule of law prevails. The basic statistics reveal a world where women are not safe from extreme forms of gendered violence. The Australian Human Rights Commission reports in 2015 that nearly one woman dies every week in Australia from domestic homicide. The National Coalition Against Domestic Violence reported that 72% of all murder-suicides in the United States involve an intimate partner with 94% of these victims being women, and the UK Office for National Statistics reports 19% of all adult homicides in the UK in the three years before March 2020 were domestic homicides?

The World Health Organisation 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’ (WHO 2021). As the worldwide extent of family and domestic violence has become known and the seemingly inability of authorities, social services and courts to prevent it, it seems disingenuous for courts exercising Hague jurisdiction to believe that women and children will be completely safe if ordered to return.

This needs to be feature in the material presented by Central Authorities when commencing processes in courts exercising Hague jurisdiction.

Approach of the Courts

A final possible change is focusing on how courts exercising Hague jurisdiction interpret and apply the Convention. For most of the women in this study, they were dealing with Australian courts that tended to read the Convention formalistically and narrowly. However, in some Contracting States, there have been court decisions that have interpreted the Convention in a manner that is more nuanced in relation to family and domestic violence.

Over the past twenty years some courts in the United States have decided Hague cases by allowing family and domestic violence to inform assessment of the grave risk exception (Walsh v Walsh 221 F 3d 204 (1 Cir 2000); Tsarbopoulos v Tsarbopoulos 176 F.Supp.2d 1045, 1057 (E.D. Wash. 2001); Elyashiv v Elyashiv 353 F.Supp.2D 394 (E.D.N.Y 2005); Olhin v Del Carmen Cruz Santana 2005 U.S. Dist. Lexis 408 (E.D.N.Y. 2005); Van de Sande v Van de Sande 431 F.3d 567 (7th Cir – 7 Dec 2005); Re Application of Adan, 437 F.3d 381 (3d Cir. 2006)).

In 2012, the United States Federal Court for Minnesota heard the case of Acosta v Acosta (Civil No. 12-342 (D. Minn. filed June 14 2012)) and found that a grave risk of harm to children existed where an abuser shows a propensity for family and domestic violence, along with there being other risk factors. This was followed in 2016 by the United States Court of Appeal in Gomez v Fuenmayor (812 F.3d 1005 (11th Cir. 2016)) which held that, even though a child is not directly harmed by violent conduct against a parent or his or her family,

the child may be subjected to grave risk of physical and psychological harm as a result of that family domestic violence (812 F.3d 1005 (11th Cir. 2016) at p. 3]).

A significant breakthrough regarding judicial interpretation of the grave risk exception can been identified in the New Zealand Court of Appeal decision 'the case of Jane' (*RR v COL* [2020] NZCA 209). The Court held that judicial consideration of the mother's history as a family and domestic violence survivor and her post-Hague future was pertinent to interpret the grave risk exception. Consequently, the court declined to order the return of the child. Significantly the judges asked wide ranging questions about the mother's access to support if she returned to Australia and how that would impact on her child. Significantly, the judges probed the Central Authority about the previous partner's criminal history, outstanding charges and previous family court orders. Unlike the Australian court's approach, the New Zealand Court of Appeal decided that to adequately make a return decision, and to fully explore the grave harm and intolerable situation exemption, significant attention had to be placed on the substantive merits.

For the women interviewed there is a strong likelihood that if the New Zealand interpretation was followed then their children would not have been ordered to return. This would have prevented the subsequent harms they experienced. The reforming the text of the Convention and amending domestic regulations to explicitly connect the grave risk and the intolerable situation exemptions to consideration of family and domestic violence would bolster and support courts in Contracting States to adopting an approach similar to the New Zealand Court of Appeal. However, clearly the New Zealand court and some of the decisions by United States courts (though to a lesser extent) indicate that courts can interpret and apply the

Convention in a manner that is more aware and cognisant of family and domestic violence and the post-Hague experience of women survivors of family and domestic violence.

Conclusion

From ten women who experienced being 'Hagued' after fleeing to another country with their child to be safe from family and domestic violence, this article has argued that the Hague Convention causes significant further harm. The Hague Convention facilitates this by allowing abusive previous partners to weaponize the law to file return applications turning the women into kidnappers of their own children, thereby having the full force of legal apparatuses of two states work together to return the 'stolen' child to the male abuser's state. Post-Hague, the women disclosed becoming further subjected to harm, through new exposure to the intimidatory and controlling behaviours of their previous partner, homelessness and separation from their children through adverse custody orders.

The Convention, borne from a concern with non-custodial fathers removing children, need not be so easily weaponised by abusive previous partners. It is unlikely that the women interviewed would have been successfully 'Hagued', and therefore exposed to the subsequent harm, if the Convention, or its local implementation in Australia, explicitly required consideration of family and domestic violence, and its impact on women and children, when deciding a return application. However, while there have been calls for reform and some changes to Central Authority lawyers in relation to guidance, this reform has not been taken up. However, it is possibly not required. Recent New Zealand authority has interpreted the exemptions in the Convention in a manner that is much more aware and cognisant of family and domestic violence and the experience of women survivors of family and domestic

violence. Going forward, if properly utilised by Australian lawyers, the New Zealand court decision could pave the way for Australian courts to adopt a more compassionate view of family and domestic violence related Hague matters.

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