

## Chapter 16

# Article 11: The Right to Protection from Illicit Transfer and Non-return of Children Abroad

Ziba Vaghri and Gavin Kotze

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

### What Did Children Say?

‘When questioned about what the State should do, they consider “that today much time is lost in bureaucracies and that the process should be faster” and that for this “the state should apply more rules to change this.”’ (*Western Europe/Other*)

At airports and embassies, authorities should be trained to detect when children are uncomfortable or in possible danger and individual or one-on-one interview sessions (where parents are not present) should be conducted with all children. (*Latin America/Caribbean*)

Professionals who are working in the area against child trafficking should receive training. (*Asia-Pacific*)

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## Overview

Article 11 places obligations on States Parties to provide mechanisms to protect children from being wrongfully or illegally taken from their home country, and to provide mechanisms to prevent children from being held outside their home country in breach of custodial rights. Ratifying states have a duty to take measures, including legislative and administrative action (as per Article 4), to protect against abduction and to recover and return children who have been abducted. Implementation of Article 11 therefore requires States Parties to institute effective measures that are restorative and rehabilitative including police and legal assistance, targeted border security practices and protocols, assuring the necessary care and protection of the child with a view to planned reunification, ongoing training of officials, financial and diplomatic supports for the return of children, and international co-operation mechanisms.

This Article overlaps with Article 35, which is also meant to prevent abduction of children for any purpose or in any form it might occur. However, the focus of Article 11 is distinct from that of Article 35 in two ways. First, Article 11 focuses only on international abduction, whereas trafficking and other forms of exploitation may occur within a state. Second, even though it does not refer to the identity of the abductor, encompassing as a consequence both parental and non-parental abductions, based on its drafting history it is clear that Article 11 relates primarily to parental abduction of children for personal rather than monetary or exploitative reasons (Tobin et al., 2019, p. 370).

Paragraph 2 of Article 11 specifically requires that States Parties have an absolute obligation (using the imperative term ‘shall’) to promote the conclusion of international agreements to combat illicit transfer and non-return. States Parties must therefore seek to create and join binding legal instruments that promote international co-operation to counter child abduction. These include regional instruments such as the Inter-American Convention on the International Return of Children. The principal international private law instrument in relation to Article 11 implementation is the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* (the Hague Abduction Convention). The Committee has recommended ratification of this ‘key international human rights instrument’ as a general measure of implementation of the Convention on the Rights of the Child (2003a). The Hague Abduction Convention establishes a process whereby children may return to their home country. This process is facilitated by the mandatory establishment of Central Authorities in Contracting States.

## General Principles

**Article 2** Children may face discrimination based on ethnicity or parental country of origin in situations where a State Party to the Convention does not recognise or

adhere to custody and visitation rights for a child when one parent lives outside of the State Party (UN Committee on the Rights of the Child, 2005a, para. 48).

**Article 3** The best interests principle must take into account the views of the child and the role of both parents in the development of the child. This principle encompasses substantive, interpretative, and procedural rights. The timely resolution of child abduction cases is a procedural right in accordance with best interests.

**Article 6** The potential impact of parental abduction on the well-being and development of the child strongly connects Article 11 with Article 6. Article 11 protects children from the harmful consequences that are associated with abduction, including the uprooting of the child and the consequent removal from the family context, and the losses of contacts with the other parent, relatives, and friends (Tobin et al., 2019, p. 372). Moreover, pursuant to article 13 of the *Hague Convention on the Civil Aspects of International Child Abduction*, a court may refuse to order the return of a child if there is ‘a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’ (UN Committee on the Rights of the Child, 2005b, para. 84). Survival and development of the child to the maximum extent possible, as per Article 6 of the Convention, should be taken into account.

**Article 12** States Parties to the Convention must consider the opinions of children of ages up to 18 when determining return to home country or other matters. The child’s participation rights require that the child’s views are both heard and taken seriously in decisions relating to abduction. The child’s views would need to be balanced against those facts or concerns such as where the child habitually resided before removal or retention (The Supreme Court—United Kingdom, 2014), whether the child has settled in the new environment after a year (House of Lords (UK), 2007), and whether there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The child’s views must also inform the ultimate decision as to whether the child should be returned (House of Lords (UK), 2007). The right for ‘the views of the child being given due weight in accordance with the age and maturity of the child’ have led courts to find that children 10 years old and younger can have the necessary maturity and capacity to have their views taken into account (Ontario Court of Justice, 2013; Re B (Abduction: views of the child), 1983; Superior Court—Quebec, Canada, 1997).

The child’s rights to participation may also be dependent upon the provision of legal representation. Article 12 adherence includes the right of the child to be informed generally about their rights, and how they can participate at all stages of the proceedings, including settlement discussions, in a child-friendly manner. The right of the child to have their views heard and afforded due weight is reflected in Article 13 of the *Hague Convention on the Civil Aspects of International Child Abduction*, which states that the ‘judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account

of its views.’ The *Hague Convention on the Civil Aspects of International Child Abduction* does not apply to children over the age of 16, due to presumed autonomy.

## Articles Related to or Linked to Article 11

**Article 4** places an obligation on States Parties to undertake all appropriate legislative, administrative, and other measures for implementation. Article 11(2) specifically requires States Parties to take measures to ratify relevant treaties to prevent and/or remedy child abduction. States Parties must also institute administrative measures and institute domestic legislative protections (see ‘Measures to combat the illicit transfer and non-return of children abroad’ below).

**Article 5** ensures that States Parties institute respect for the responsibilities, rights, and duties of parents to provide guidance to children. The Convention is supportive of parents’ primary role in the upbringing of children (UNICEF, 2007).

**Article 7** enshrines the right to birth registration and nationality, and to know and be cared for by one’s parents. Birth registration is a recognition of the child’s status in law and is imperative for identification after abduction. This right is arguably connected to parental abduction, especially when one parent is not recognised in the birth record (United Nations, 2006).

**Article 8** enshrines the child’s right to preservation of identity, nationality, and family relations. Deprivation of aspects of identity must be remedied speedily.

**Article 10** ensures the right of the child or parent to enter or leave a country for reunification. States Parties’ immigration laws must allow for entry of a parent who has been separated from a child due to abduction, as well as allowing for the child to leave a country for reunification.

**Article 16** enshrines the right to protection against interference with privacy, family, or home. The child’s privacy must be protected in any administrative or judicial proceedings relating to abduction and reunification.

**Article 18** recognises that both parents have common responsibilities for the development of the child. States Parties have obligations to support parents in their responsibilities, but also to provide the legal structure to ensure that parents act in the best interests of the child. States Parties must also ensure general legal equality between mothers and fathers.

**Article 19** provides protection against all forms of abuse and neglect. States Parties must institute administrative, legislative, and judicial measures for prevention of abuse or neglect, and for identification, reporting, referral, investigation, treatment, and follow-up.

**Article 20** concerns appropriate alternative care (temporary basis), with a view to reunification.

**Article 35** is closely linked with Article 11 but addresses the obligation on States Parties to undertake measures to protect children who are abducted, sold or trafficked either nationally or internationally.

**Article 39** enshrines the obligation of States Parties to take all appropriate measures for psychological recovery and social reintegration of a child victim of abuse or neglect. Article 11 obligates States Parties to ensure the return of children who have been illicitly transferred. Article 39 requires that a returned child be provided all necessary means of psychological recovery and social reintegration.

**Optional Protocol** to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

## Relevant Instruments

International Covenant on Civil and Political Rights (1966), Articles 2, 12, 16, 17, 23, 24, 26, 27

International Covenant on Economic, Social and Cultural Rights (1966), Articles 2, 10

Hague Convention on the Civil Aspects of International Child Abduction (1980)

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996)

Inter-American Convention on the International Return of Children (1989)

European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980)

European Convention on Nationality (1997)

European Convention on the Exercise of Children's Rights (1996)

## Attributes

### *Attribute One: Measures to Combat the Illicit Transfer and Non-return of Children Abroad*

Article 11(1) states the obligation to take all needed preventive, rehabilitative and restorative measures to combat international abduction and non-return of children abroad (Tobin et al., 2019, pp. 372, 374–379). With reference to the preventive measures, an essential aspect of combatting the illicit transfer and non-return of children abroad is the promotion of a legal and social environment that reduces the risk of abduction. This is crucial, as when ‘international instruments concerning child abduction have been implemented successfully, are operating effectively and are well-publicized, they may deter abductions’ (Hague Conference on Private International Law, 2005).

With reference to rehabilitative and restorative measures, the Committee has recommended that States Parties ratify the Hague Abduction Convention,<sup>1</sup> and formally recognise all other countries as parties to that Convention in order for protections to have full effect.<sup>2</sup> Furthermore, the Committee has recommended that all professionals working in areas related to international child abduction receive adequate and ongoing training.<sup>3</sup> The Committee has favourably noted practices such as providing financial assistance for recovering illicitly transferred or non-returned children.<sup>4</sup>

### ***Attribute Two: Measures to Promote the Conclusion of Bilateral or Multilateral Agreements or Accession to Existing Agreements***

Article 11(2) advises States Parties to conclude bilateral agreements with countries that are not party to the Hague Abduction Convention<sup>5</sup> and encourage other countries to become parties to the Hague Abduction Convention.<sup>6</sup> With the inclusion of this obligation, the drafters of the Convention hoped to overcome the absence of a common definition of illegal abduction. The *Travaux Préparatoires* show that the issue of what constitutes illegal abduction in various states was, in fact, raised as problematic, although a suggestion to include a definition of when removal and non-return should be deemed unlawful was rejected (Detrick et al., 1992, p. 217). As a consequence, such a definition does not exist in Article 11, and States Parties must turn to instruments such as the Hague Abduction Convention for further clarity. The ways domestic courts recognise and apply conflict of law (private international law) matters vary from country to country. Therefore, there was strong support for the emphasis on the need for bilateral and multilateral agreements.

However, it needs to be underlined that the existence of the Hague Abduction Convention and other regional treaties creates some inconsistency between instruments of international private law and the provision of the Convention on the Rights of the Child (Tobin et al., 2019, p. 373). For example, the Hague Abduction Convention only applies to children under the age of 16, in contrast to the age of 18 for the Convention on the Rights of the Child. Moreover, an application for return of a child under the Hague Abduction Convention may only be made if that Convention is in force between the two countries involved. Bilateral agreements

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<sup>1</sup>See, for example, concluding observations for Philippines (2009, para. 79).

<sup>2</sup>See, for example, concluding observations for Mauritius (2006, paras. 39, 40).

<sup>3</sup>See, for example, concluding observations for Croatia (2004, para. 46).

<sup>4</sup>See, for example, concluding observations for Sweden (2005c, para. 27).

<sup>5</sup>See, for example, concluding observations for Sweden (1999, para. 15).

<sup>6</sup>See, for example, concluding observations for Canada (2003b, paras. 28, 29).

can be in place to provide similar protections between countries where the Hague Abduction Convention is not in force (e.g., the Australia-Egypt agreement<sup>7</sup>).

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<sup>7</sup>Agreement Between The Government Of Australia And The Government Of The Arab Republic Of Egypt Regarding Cooperation On Protecting The Welfare Of Children, (Cairo, 22 October 2000), Australian Treaty Series [2002] ATS 3.

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