

TOUGH DECISIONS FOR A LEFT-BEHIND PARENT

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In the article, [Untangling the Bureaucracy of Child Abduction](#), I discussed the immediate actions that a left-behind parent must take when their child is abducted. Once the initial shock that your child is gone resides however, there are a number of tough decisions that must be made. The two that I believe to be the most important are:

1. DO YOU PETITION FOR THE RETURN OF YOUR CHILD(REN) UNDER THE HAGUE CONVENTION THROUGH A PRIVATE ATTORNEY OR DO YOU USE A PUBLIC PROSECUTOR?
2. DO YOU PRESS CRIMINAL CHARGES AGAINST THE ABDUCTING PARENT?

I briefly touched on the first question in my article, [The Financial Aspects of Child Abduction](#). Although Article 26 of the Convention provides that Contracting States provide legal services to the left-behind parent, it allows for a [reservation](#) as such:

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Unfortunately, about half of the signatories to the Hague Convention, including the United States and Canada, claim this reservation. Left-behind parents with children taken to these countries must retain a private attorney.

Fortunately, as the parent of two children who were illegally retained in Brazil 2006 (their mother voluntarily returned them in October, 2013), Brazil did not exclude itself from providing legal aid to left-behind parents. Mexico, the country to which the most children are abducted each year from the United States, likewise offers legal aid to left-behind parents. For obvious reasons, this question is only relevant to left-behind parents whose children have been abducted to/illegally retained in countries that offer such a choice.

The following table compares the use of a private attorney to a public prosecutor for filing a petition under the Hague Convention.

ASPECT	PRIVATE ATTORNEY	PUBLIC PROSECUTOR
Access to information	Since you are the plaintiff and pay the bills, you have better access to progress in your case.	Since the government is the plaintiff and you are merely an interested party, you may have difficulty following the progress in your case.
Costs	In addition to costs for items such as translations, travel, and hotels, you will incur legal fees that can be in the tens or hundreds of thousands of dollars.	You will not incur any legal fees. You will still incur fees for items such as translations, travel and hotels however.
Speed	Your case will likely progress faster.	Your case will likely progress slower.
Credibility	Private attorneys may need to develop credibility with the judge.	As public prosecutors represent the government, they have instant credibility with the judge.
Experience	Likely to have specific experience with the Hague Convention.	Depending on the country, may not have specific experience with the Hague Convention.
Caseload	With a smaller caseload, attorney is able to respond more quickly to changes in strategy.	Depending on the country, may have too many cases to effectively manage appropriate strategy.

How did I answer this question myself? First, I asked the Office of Children’s Issues for a list of attorneys in Brazil with experience in the Hague Convention. I then contacted every name on the list and discussed my case, inquiring from each attorney their success rate, proposed strategy, and fees. After carefully considering the advantages and disadvantages of hiring a private attorney, I decided that filing through a public prosecutor (the AGU in Brazil) was a better choice for me.

Carlos Bermudez, whose son was taken to Mexico in 2007, reached a different conclusion. In explaining his decision to retain a private attorney, he stated,

Taking a court appointed attorney in Mexico would be a VERY BAD idea. . . You will get an attorney that is chosen by the local family court judge who will be handling 100 other cases and has never even heard of the Hague Convention and will more than likely be happy to take a bribe from their countrymen that live in the same town.

I must admit that I have considered at various times, retaining a private attorney in Brazil simply to provide better access to information about my case. While there is a formal procedure, it is often extremely frustrating and unproductive at times to obtain information through the proper channels. My case ended in July, 2011 (without the return of my children). Because I believed that hiring a private attorney would not ultimately change the outcome of my case, I remained without private counsel in Brazil.

Based on my experiences and an understanding of why my case ultimately fell apart, my current recommendation is somewhat different. While I still recommend that a left-behind parent utilize the AGU to file their case, I believe that they should hire a private attorney for two purposes:

1. OBTAIN COPIES OF ALL DOCUMENTS FILED IN COURT AND PROVIDE REGULAR UPDATES AS TO THE PROGRESS (OR MORE COMMONLY – LACK OF) IN THE COURT SYSTEM. WHILE THIS WILL NOT BRING YOUR CHILD BACK, IT WILL HELP TO ALLEVIATE ONE HUGE SOURCE OF FRUSTRATION IN THE LEGAL PROCESS.
2. ENSURE THAT ALL EVIDENCE SUBMITTED BY THE AGU IS FACTUALLY CORRECT AND FILE CORRECTIONS AND/OR ADDITIONAL EVIDENCE WHEN THERE IS A DISCREPANCY OR DEFICIENCY. PLEASE READ THE ARTICLE, THE BRAZILIAN JUDICIAL SYSTEM AND THE HAGUE CONVENTION, FOR A MORE THOROUGH EXPLANATION OF WHY THIS IS IMPORTANT.

The second question I posed for this article, I believe warrants a much more vigorous debate. There are a number of laws that the left-behind parent can use to press criminal charges on the abducting parent. One option is to ask the state prosecutor or district attorney to request that the local U.S. attorney issue a federal Unauthorized Flight to Avoid Prosecution (UFAP) arrest warrant provided under the Fugitive Felon Act (FFA). A UFAP warrant can be used to extradite an abducting parent to face criminal charges in the United States. In addition, the International Parental Kidnapping Crime Act of 1993 (IPKCA) states:

Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

Despite the presence of these laws, filing criminal charges is not an easy thing to accomplish. According to congressional reports, many assistant U.S. attorneys will not issue an IPKCA warrant and prosecute abducting parents because

. . . [it] could compromise efforts under the Hague civil process to return a child since some Hague countries have asserted their unwillingness to continue pursuing civil remedies if criminal charges are pending against its citizens.

Furthermore, one could conclude that federal authorities do not consider parental abduction to be a serious crime, instead focusing their efforts on prosecuting crimes against children such as murder, sexual abuse, and child pornography. Many federal authorities do not realize that our laws, courts, and experts recognize [parental abduction as a form of child abuse](#).

When attempting to obtain a UFAP warrant, the left-behind parent must understand that federal prosecutors often prefer not to spend limited funds to cover international extradition. In addition, many countries, such as Brazil, Germany and others, will not extradite a citizen to face criminal charges in another country. Under Article 5 of the 1988 Brazilian Constitution:

. . . no Brazilian shall be extradited, except the naturalized ones in the case of a common crime committed before naturalization . . .

Complicating the issue even more is an understanding that, according to information published by the U.S. Department of State, in some countries international parental abduction may not even be considered a crime. At the same time that, under Brazilian law, parental abduction is considered a crime when committed within Brazil and both parents are Brazilian, it is not a crime if a Brazilian parent takes a child to Brazil in interference with a foreign parent's custodial rights.

Most judges in foreign countries take an extremely dim view of criminal warrants being issued when a civil remedy is also being sought. There are many examples from the United Kingdom in which judges specifically refuse to order the return of children when they have been issued. In 2011, when negotiating for visitation with his daughter who had been abducted to Brazil in 2006, [Marty Pate](#) was forced to convince the local district attorney to withdraw the criminal charges against his child's mother – the same charges he had earlier convinced him to file.

Why is this? I can only speculate based on my own situation in Brazil. Many judges, I assume, believe that issuing a return order for the children is also a *de-facto* return order for the abducting parent. As such, the judge is in essence sentencing the abducting parent to jail simultaneous to the return of the children. With the abduction itself and subsequent parental alienation likely traumatic for the children, one can easily see how having a parent (particularly one the child loves) in jail would only compound the problem.

All of these obstacles however, have not stopped [Devon Davenport](#), whose child was abducted to Brazil in 2009 from seeking criminal charges. According to him,

. . . in my opinion it is still best to file criminal charges, especially if the LBP[left-behind parent] is unaware of the taking parent's exact location because criminal charges allow for INTERPOL notices (red, blue, yellow alerts) which can only be issued by a formal written request by law enforcement officials. Another reason is because FBI involvement helps in the investigative aspect- they will and are still able to conduct investigations regardless of whether or not they follow through with extradition or not. That being the case, an additional investigative effort via criminal proceedings along with civil proceedings allows for a wider range of collective evidence in the case and can potentially aid in the recovery process of the child.

With accurate data hard to come by, any conclusions reached comparing the relative success rates between criminal and civil remedies in a Hague Convention case are not reliable. Informally, some believe that seeking criminal remedies is less successful than civil alone. Once criminal charges are filed, the case takes on a whole new tone and there is no going back. With this in mind, filing criminal charges is not a decision to be taken lightly by the left-behind parent.

What would you do if your child was abducted to a foreign country? Through the series of articles I have written, I have tried to give you some insight into the experience of the left-behind parent. Because the answers to the questions I raise are not obvious, the only decision that was easy for me so far has been what to title this article.