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HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

An analysis of the applicable law and institutional framework of fifty-one jurisdictions and the European Union.

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June 22, 2004

Honorable Richard G. Lugar, Chairman
Honorable Joseph R. Biden, Jr., Ranking Member
Senate Committee on Foreign Relations
Dirksen Senate Office Building
Washington, D.C. 20510-6225

Dear Senator Lugar and Senator Biden:

In response to your request for the Law Library of Congress to update our previous report of August 2000 on the Hague Convention (No. 28, 1980) on the Civil Aspects of International Child Abduction, it is my pleasure to transmit to you an updated and significantly expanded series of comparative analyses that provide a detailed introduction to the Hague Convention No. 28, a discussion of the implications of relevant European Union regulation, and fifty-one national reports that detail the applicable law and institutional framework applicable to the Hague Convention No. 28 in those countries.

This Convention has been recognized by some as one of the most successful of the more than forty Hague Conventions that have been coordinated and drafted by the Hague Conference on Private International Law, an intergovernmental organization that works toward the progressive unification of private international law. Certainly few issues are more important than ensuring that the best interests of children are addressed when custodial relationships are complicated by transnational boundaries.

The Law Library staff of foreign law attorneys and analysts who prepared these analyses take great pride in serving as the legal research arm of the United States Congress. Although there are too many of them to recognize by name here, they are identified in the table of contents and at the end of their respective works. The four additional members of our staff who deserve great credit for the editing and assembly of this report are Jamie Martin, our Editor; Irene Chang, our Directorate Secretary; Lisa Ann Tekancic, my Administrative Assistant; and Kersi Shroff, the Chief of our Western Law Division. On behalf of Dr. Rubens Medina, the Law Librarian of Congress, we hope that this report will assist the Committee in its important work.

Respectfully submitted,

Walter Gary Sharp, Sr.

WALTER GARY SHARP, SR.
Director of Legal Research

NOTE ON METHODOLOGY

The Senate Committee on Foreign Relations requested the Law Library of Congress to update its previous report of August 2000 on the Hague Convention (No. 28, 1980) on the Civil Aspects of International Child Abduction, and to add, to the extent possible, reports on all of those jurisdictions that are recognized by the United States as parties to the Convention. Of the seventy-nine jurisdictions (not including the United States) that are a party to the Hague Convention No. 28 as of May 4, 2004, the United States recognizes fifty-nine jurisdictions as a party; this series of comparative analyses includes reports on forty-nine of those fifty-nine jurisdictions. It also provides a detailed introduction, a discussion of the implications of relevant European Union regulation, analyses on two additional jurisdictions (Belarus and Georgia) not recognized as a party by the United States, a chart that provides the dates for entry into force for the eighty parties, a detailed bibliography, and the text of the Convention.

The remaining ten jurisdictions recognized by the United States as a party that are not addressed in this report were omitted, because the Law Library did not have either the expertise on staff or the collections available to prepare a report, or because the party has done very little or nothing to implement the Hague Convention No. 28. Appendix A identifies those parties to the Hague Convention No. 28 that are not covered by this report. It is also important to note that the enclosed report on Denmark was not updated from our previous report of August 2000 because we no longer have a Nordic law specialist on staff.

Finally, most reports contain Uniform Resource Locator (URL) references and citations to websites that are not part of the loc.gov domain. These URLs are provided to cite authority to the source of information that we have relied upon to prepare the report and as a convenience for the reader; however, some of these online references may link to subscription services not generally available to the public or may not be maintained by the originators.

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INTRODUCTION

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

The Hague Convention on the Civil Aspects of International Child Abduction is an intergovernmental agreement reached at The Hague on October 25, 1980 (Hague No. 28, hereinafter the 1980 Convention), by the Hague Conference on Private International Law (HCPIL). It entered into force on December 1, 1983, and governs issues related to parental kidnapping or the removal of children under the age of 16 across international borders and involving the jurisdiction of different countries' courts. The 1980 Convention has the stated objectives of securing the prompt return of children wrongfully removed to or retained in any contracting state and of ensuring that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.[1]

As of January 2004, there were 80 Member States of the 1980 Convention. Of these, the accessions of 59 have been accepted by the United States, the most recent one being Brazil (*see* appended Chart). Under the current review process of the U.S. Department of State (DOS) affecting the twenty contracting states whose accession has not yet been accepted by the United States, the DOS is expediting acceptance in the sequential order of their joining the 1980 Convention. Non-Member States of the 1980 Convention include primarily Middle Eastern, African, Asian, and Central Asian countries or territories.[2]

I. Member States: Issues and Problems

Although the 1980 Convention may be considered a milestone in the uniform treatment of cases of international child abduction and it has been hailed as one of the most successful Hague Conventions, some inherent weaknesses in the agreement have meant that it has not always worked as intended. Non-Governmental Organizations (NGOs) have also criticized the 1980 Convention, or the Central Authorities responsible for its domestic implementation, for allowing many cases to remain unresolved and their numbers to be underestimated.[3]

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[1] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 1, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. For an online text, *see for example* www.hcch.net or the United States Department of State (DOS) Bureau of Consular Affairs website, *at* http://travel.state.gov/hague_childabduction.html. Wrongful removal is defined in art. 3 of the 1980 Convention; art. 4 deals with the children to which it applies.

[2] The website of the Permanent Bureau (secretariat) of the Hague Conference on Private International Law maintains a list of Member States of the 1980 Convention and has abundant related material. That list has 74 jurisdictions; it counts Hong Kong and Macao as one entry under "China" and does not separate out the five overseas territories/crown dependency of the United Kingdom, hence the difference of 6 parties compared with the Law Library count. The Permanent Bureau also has been developing the International Child Abduction Statistical Database (INCASTAT), an electronic database containing annual statistics from many of the states parties to the 1980 Convention. For a description, *see* Permanent Bureau, *Information Document*, Preliminary Document No. 10 of July 2002 for the Attention of the Special Commission of September/October 2002. In 1999, the Hague Conference established INCADAT, a database of significant decisions contributed by some of the Member States, chiefly in the form of summaries of leading child abduction cases but many with the full text of the case attached. The bilingual (English and French) database is at www.incadat.com.

The U.S. DOS maintains a list of states parties with the United States and provides some individual reports on relevant laws on children of both member and non-member countries.

[3] Ernie Allen, foreword to *International Forum on Parental Child Abduction: Hague Convention Action Agenda* (a report by Prof. Nigel Lowe, Director of the Centre for International Family Law Studies, Cardiff University, Wales, United Kingdom) iii (Apr. 1999), www.pact-online.org/pdf/forum_report.pdf. The Forum was held Sept. 15-16, 1998. The report was apparently sponsored by the National Center for Missing & Exploited Children (NCMEC), a national clearing house and resource center funded under a cooperative agreement from

With regard to Member States, problem areas can be categorized as those related to compliance (*e.g.,* differing interpretations of the 1980 Convention or insufficiently trained judges) and those related to non-compliance (*e.g.,* non-enforcement of procedures, refusal to return children).

A. Problems Related to Compliance

It has been argued that attempts by the 1980 Convention to provide for cultural neutrality in abduction disputes may be undermined by subjective state judgements in the domestic courts of the Member States.

Serious problems apparently emerged with the 1980 Convention with regard to the interpretation of defenses to return. The most common defense, under article 13, is that a return may be refused if there is a "grave risk" to the child of potential physical or psychological harm or an intolerable situation. Instead of construing the provision narrowly, as intended, courts in return proceedings imposed their own view of the "best interest of the child" (a principle where the court ruling on custody, not return, should apply).[4]

In addition to the problem of courts' interpretation of defenses provided for the return of children, the ambiguity of certain 1980 Convention terms like custody rights may result in different interpretations and prevent uniformity.[5] "Rights of custody" are defined for the purposes of the 1980 Convention as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" (article 5(a)).

A third area in which domestic courts may impose subjective interpretations is the issue of children's rights and human rights. Some states' courts have reportedly interpreted a child's right to be heard (under article 12 of the UN Convention on the Rights of the Child) as grounds for turning Hague hearings into domestic ones, thereby undermining the legitimacy of the 1980 Convention's procedures.[6]

B. Problems Related to Non-Compliance

Problems of non-compliance by some Member States, such as attempts to condition the return of children; the lack of adequate procedures to enforce access and visitation rights; and in particular the

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the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dept. of Justice. Mr. Allen was President and Chief Executive Officer of the NCMEC at the time the report was produced. In 1999, the Center established the International Centre for Missing & Exploited Children, to serve as a global resource center with an international network.

[4] Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention,* 33 N.Y.U. J. INT'L L. & POL. 83 (2000); abstract by Caylin E. DeBlasio, *available at* http://www.nyu.edu/pubs/jilp/main/issues/33/f.html, with hyperlink to full text. Ms. DeHart was an Attorney Adviser with the Office of the Assistant Legal Adviser for Private International Law, United States Department of State, and U.S. Delegate to the Hague Conference on Private International Law for the development of the 1996 Protection of Children Convention at the time the article was written. For other views of the 1980 Convention *see for example* in the same journal issue: Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, *id*. at 125, *via* http://www.nyu.edu/pubs/jilp/main/issues/33/f.html, and Carol S. Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, *id*. at 49, *via* http://www.nyu.edu/pubs/jilp/main/issues/33/d.html. Some additional papers are also available via Australia's Family Court website, *at* http://www.familycourt.gov.au/papers/html/child_abduction.htm.

[5] Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221 (2000).

[6] *Id.*

continued resistance to return children at all, based on routine invocation of article 13 (the "grave risk" defense) among others; have inhibited the intended operation of the 1980 Convention.[7]

In the 2001 DOS report to the U.S. Congress on compliance with the 1980 Convention, Austria, Honduras, Mauritius, and Panama were cited as "noncompliant countries;" Mexico as a country that is "not fully compliant;" and Germany and Sweden, among others, as "countries of concern."[8] Although some steps have apparently been taken by Germany (*see below*) and Sweden to remedy the situation, instances of non-compliance and intransigence apparently continue to be reported.[9]

C. Proposed Remedies

It has been suggested that increased specialization of judges to handle only Hague cases and targeted judicial training programs might help limit interpretation problems, as well as decrease delays in the judicial process. Reform of national laws might also expedite the process. Means of strengthening the 1980 Convention's abduction procedures might include giving state officials the authority to locate and return children and better enforcing return orders in general.[10] To combat the wide variation in practice of the 1980 Convention's operation and overcome weaknesses of the 1980 Convention, agreement on a Good Practice Guide developed by the Permanent Bureau of the HCPIL has been welcomed.[11] The Permanent Bureau also determined that it would establish a Consultative Group of experts to advise on preventive measures against abductions.[12]

In addition, judicial conferences on international child protection have been facilitated by the Permanent Bureau, to allow judges and experts from Member States to discuss problem areas and make recommendations for improvements. Several such seminars have been held between Germany and the United States; for example, one was held at Germany's initiative in 2001.[13]

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[7] DeHart, *supra* note 4; and for a detailed look at problems with compliance as of March 2001, *see* Peter Nygh, *Review of the Hague Convention on the Civil Aspects of Child Abduction–the March 2001 Meeting of the Special Commission* [of the HCIPL], a paper presented at the 25th Anniversary Conference, Justice, Courts & Community, July 26-29, 2001, Sydney, Australia, *available at* http://ww.familycourt.gov.au/papers/html/nygh.html. Mr. Nygh was a Member of the Australian Delegation to the Fourth Review Special Commission.

[8] *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (Apr. 2001), *at* http://travel.state.gov/2001_Hague_Compliance_Report.html. Many of the countries are also cited as being problematic in the *Senate Concurrent Resolution 98–Urging Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (Senate-Mar. 23, 2000), *available at* http://thomas/cgi-bin/query/z?c106:S.CON.RES.98:.

[9] *See for example* Hickman's Resource Center, *Overview: German History of child Abduction & Boycott of Access*, *at* http://www.michael-hickman.org/eng/german_history/german_history_caboa.html; CRC Watchdog, *Quality Human Rights Violations Made in Germany: Innerstate & International Events - 2001*, *at* http://www.crc-watchdog.org/content/germany/events_01.html; William McGurn, *Sweden Fights To Protect Child Abductors: Amanda Won't Be Home for Christmas*, OPINION JOURNAL (WSJ), Dec. 23, 2002, *at* http://www.freerepublic.com/focus/news/811221/posts.

[10] Silberman, *supra* note 5.

[11] *See for example House of Commons Hansard Debates for 3 May 2001* (pt 35), under "Child Abduction" and "Sir John Stanley (Tonbridge and Malling), United Kingdom Parliament site, *at* http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmhansard/vo010503/debtext/10503-35.htm.

[12] *See Guide to Good Practice*, *at* http://www.hcch.net/e/conventions/guide28e.html and *Background Document, at* http:/ftp.hcch.net/doc/prevmeas_backe.doc.

[13] *See Judicial Seminar on the International Protection of Children*, De Ruwenberg, Oct. 20-23, 2001, *available at* http://www.hcch.net/e/conventions/seminar.html.

II. Non-Member States: Issues and Problems

Various reasons have been adduced in cases where a given jurisdiction has not become a contracting state. At present many African countries may be either too embroiled in civil unrest or too impoverished to focus on issues like parental child abduction; if anything, the concern is fighting abuses of children's rights, such as their being kidnaped to be soldiers. There also may not be much pressure on African countries to join because of the relative lack of international child abduction cases involving them. For example, the largest number of open abduction cases the United States has with an African nation is reportedly seventeen with Nigeria.[14]

In regard to countries of Islamic tradition, acceding to the 1980 Convention is apparently problematic because of their different concept of family law. Such countries tend to give privilege to nationality or religion, either in accordance with specific provisions of their Civil Codes or in accordance with existing case law.[15] Although under international law "the interests of the child" generally guide parenting arrangements following marital disputes, Western legal systems characteristically provide for an equal sharing of parental responsibility and the concept of joint custody, whereas under Islamic law parental responsibilities are distributed in a non-equal and complementary manner. Custody is attributed to the mother, depending on the sex of the child and different interpretations of Koranic law; parental authority, insofar as guardianship is involved, is attributed to the father. Moreover, according to Islamic law, Islamic personal status is given priority if conflicts of nationality arise in a mixed marriage with a non-Islamic spouse.[16] Islamic law and its relation to secular law may also vary from country to country and within a single country. For example, multiethnic Iraq has many different religious schools but also a Civil Code, developed under secular governments since 1959, that has relatively modern legal protections for a Muslim country and that prohibits male favoritism in child custody disputes. Iraqi professional women have voiced concern, however, that a Governing Council decision approved on December 29, 2003, ordering that family laws be "canceled" and issues be placed instead under the jurisdiction of Islamic law, may jeopardize such protections, even if at present there is no threat of its becoming law.[17]

It may be noted that Islamic law may also be applied in Western state parties to the 1980 Convention and enforced in Western courts. This complicating factor creates a burden on those courts

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[14] U.S. DOS Bureau of Consular Affairs, *"Open Abduction Cases by Country," available at* http://travel.state.gov/2003_June_Hague_Attach.html.

[15] Caroline Gosselain, *Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States–A Research Paper*, p. 9, prepared for the Permanent Bureau as Preliminary Document No. 7 of August 2002 for the Attention of the Special Commission of September/October 2002, *available at* http://www.hcch.net/e/conventions/report28e.html, under the heading "2002."

[16] *Id.* at 8-9. *See also* U.S. DOS Bureau of Consular Affairs website, *at* http://travel.state.gov/islamic_family_law.html. For overviews of the Islamic family law systems of several individual countries, *see for example* ANNE-MARIE HUTCHINSON *and* HENRY SETRIGHT, INTERNATIONAL CHILD ABDUCTION (Bristol, England, Family Law, 1998).

[17] Pamela Constable, *Women in Iraq Decry Decision To Curb Rights–Council Backs Islamic Law on Families*, THE WASHINGTON POST, Jan. 16, 2004, *at* http://www.washingtonpost.com. The decree is described as "brief and vague" and apparently makes no specific reference to family law issues or to branches of Islamic law (such as the strict *sharia* legal doctrine) that would replace the Civil Code. This ambiguity, according to lawyers and other experts in Iraqi women's groups, is of particular concern, however, because different Islamic sects in Iraq apparently advocate different policies for the legal and marital rights of women. *Id.*

to preserve the state's public order, constitutional rights, and the legal standard of human rights while respecting the needs in special cases of persons who maintain a foreign nationality.[18]

For other states, the multiple legal systems of religious minorities makes adherence to the 1980 Convention problematic, because no single uniform family law is applicable. Insofar as possible, states like India, Indonesia, Malaysia, the Philippines, and Singapore leave domestic law issues to each minority judicial system to handle. In Malaysia, moreover, legislative competence in Islamic law is attributed to each state rather than to the Federation.[19] In general among Asian countries, private international law rules are not uniform, even if individual countries are homogeneous societies with a homogeneous legal system.

Some countries, like Indonesia and Japan, simply have not seen any benefit in joining the 1980 Convention, because removal of children from their territory is not currently a problem. It has been pointed out that for Japan, "politically, there is no strong incentive" to ratify the 1980 Convention, because it would have to return abducted children to foreign spouses. At present, Japan does not enforce child custody orders from foreign countries, nor is parental kidnapping deemed a crime there. As for future prospects for Japanese membership in the 1980 Convention, a Foreign Affairs Ministry spokesman commented that Japan has been studying the 1980 Convention since its ratification and therefore has not yet ratified it.[20]

Other countries, like Papua New Guinea and the Philippines, have indicated in the past that they were considering membership, but they have not taken any steps to actualize it.[21] Still others, for example the People's Republic of China, have sent observers to a Special Session of the 1980 Convention and reportedly indicated an intent to become a Party, but have not yet done so.[22]

III. Related Major International and Regional Child Abduction Agreements

There are several other major international and regional agreements having to do with international parental child abduction in addition to the 1980 Convention. On October 19, 1996, the HCPIL opened for signature the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* (Hague No. 34) (hereinafter the 1996 Convention). It entered into force on January 1, 2002.[23]

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[18] Germany is a case in point. *See* Mathias Rohe, *Islamic Law in German Courts*, *available at* http://www.comune.pisa.it/casadonna/htm/hawwa/rohe.pdf.

[19] Jun Yokoyama, *General Survey of Private Law Issues in Asia* 5 (c. 2003), *at* http://www.soc.nii.ac.jp/jsil/Panel%20E1%20Yokoyama%20paper.pdf.

[20] Doug Struck *and* Psychic Sakamaki, *Divorced From Their Children in Japan, Foreign Fathers Have Few Custody Options*, WASHINGTON POST Foreign Service, 2003, included in *Dads Divorce Magazine-Essays*, *available at* http://www.dadsdivorce.com/mag/essay.php/0717Japan.html; Children's Rights Council Japan, *Children's Rights Issues in Japan,* http://www.crcjapan.com/en/issues.html, as last modified Jan. 1, 2004.

[21] *See* Parliament of Australia, Senate, *Helping Australians Abroad: A Review of the Australian Government's Consular Services,* Ch. 2: International Consular Arrangements, under 2.8, *at* http://www.aph.gov.au/Senate/committee/fadt_ctte/consular/report/c02.htm. No date given; from the context it seems to be a 1997 document. Section 2.8 states that the Australian Government had "been encouraging regional countries and major migrant source countries to accede to the Convention."

[22] Nygh, *supra* note 7.

[23] These are mentioned in Gosselain, *supra* note 15.

Regional agreements include the Council of Europe's *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* of May 20, 1980 (also known as the Luxembourg Convention)[24] and the *Inter-American Convention on International Return of Children* (Montevideo Convention) that was opened for signature on July 15, 1989, by the Organization of American States.[25] Also noteworthy is a new Regulation of the European Union, adopted in November 2003, whose aim is to curb the number of child abduction cases among EU Member States. Directly applicable in March 2005, the Regulation establishes which court will have jurisdiction over such cases, provides for automatic recognition and enforcement of access rights among all Member States, and recognizes the right of the child to enjoy contact with both parents.[26]

There are also more general conventions on the protection of children. The United Nations set down basic principles for the legal protection of children worldwide in the United Nations *Convention on the Rights of the Child* of November 20, 1989.[27] As of November 2003, 192 countries had become state Parties to this Convention – more than any other human rights treaty in history.[28] The Vienna Convention on Consular Relations of April 24, 1963, like the U.N. Convention, serves as a basis for cooperative bilateral agreements concerning child custody (*see also below*). The African Union does not have a convention on international parental child abduction, but there is the *African Charter on the Rights and Welfare of the Child*, which was adopted by the Organization of African Unity on July 11, 1990. The Charter has provisions on the best interests of the child, the enjoyment of parental care, and the prevention of parental abduction, among others.[29]

Thus, even if a state is not a Member of the 1980 Convention, it may cooperate with other states by means of other international instruments in the handling of parental abduction and child custody cases.

IV. Bridging the Gap Between Member and Non-Member States

One means of circumventing the differences in approach to custody issues between Western and Islamic legal traditions may be the 1996 Hague Convention. The HCPIL describes it as, providing "a remarkable opportunity" for building bridges between legal systems with diverse cultural or religious backgrounds, and notes that Morocco, which has an Islamic legal system, was one of the first states to ratify it.[30] The 1996 Convention is seen as reducing some of the flaws in the 1980 Convention noted

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[24] 19 I.L.M. 273 (1980).

[25] Available in English translation on the OAS website, *at* http://www.oas.org/juridico/english/treaties/b-53.htm.

[26] *See* Council Regulation (EC) 2201/2003, *Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000*. 2003 OJ [Official Journal of the European Communities] (L338/1) (Dec. 23, 2003). The Regulation is discussed in detail in the Law Library of Congress report on the European Union, *infra*.

[27] G.A. res. 44/25, annex, 44 U.N. GAOR supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. The text is available on the Office of the High Commissioner for Human Rights of the U.N. website, along with the status of ratifications and States' reservations, *at* http://www.unhcr.ch/html/menu3/b/k2crc.htm.

[28] *See How Many Countries Have Ratified the Convention? at* http://www.unicef.org/crc/faq.htm.

[29] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *available at* http://www.africa-union.org/home/Welcome.htm (click "Official Documents" then "Treaties, Conventions, & Protocols"). The Charter entered into force on Nov. 29, 1999. Some 46 of 53 African Union Member States have signed and/or ratified the Charter.

[30] *See News and Events* for 2003, entry date 01/04/2003, *at* http://www.hcch.net/e/events/events.html.

above by providing for new jurisdictional rules, specifications on choice of law, and a strong enforcement regime. In so doing, it makes the non-return of the child a final resort.[31]

Another possible means of resolving international custody and access conflicts is through the use of bilateral instruments. These may take various forms, *e.g.*, bilateral conventions on administrative and judicial cooperation (including those inspired by multilateral conventions like the 1980 Convention and Luxembourg Convention, limited cooperation agreements, and specific bilateral agreements), consular cooperation agreements, and administrative agreement protocols. France, for example, has forged agreements of these types with Algeria, Egypt, Lebanon, Morocco, and Tunisia. The Franco-Moroccan and Franco-Tunisian conventions have been described as appearing to be the nearest syntheses of the Hague and Luxembourg Conventions. While including "classical provisions" found in multilateral Convention-inspired bilateral instruments, a 1988 Franco-Algerian Convention also innovates by prescribing that the rights of custody and the rights of access across international borders must be linked. Australia, Belgium, and Canada have also concluded bilateral agreements with Islamic countries.[32] The U.S. DOS has indicated, however, that the U.S. Government prefers to enter into multilateral treaties in matters of private international law, because they provide most of the mutual benefits to be expected from a bilateral treaty (while also facilitating the development of a unified legal regime among the states parties) and do not entail the "long, uncertain, and resource intensive process" that is required for Senate consent to bilateral treaties.[33]

Judicial conference may also be a means of resolving problems related to child abduction cases between states party to and not party to the 1980 Convention. As a result of a January 2003 United Kingdom-Pakistan judicial conference on child and family law, for example, the two sides reached a consensus on principles to be followed in handling such cases involving their respective citizens.[34]

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[31] DeHart, *supra* note 4.

[32] Gosselain, *supra* note 15, at 11-22.

[33] *Frequently Asked Questions* (regarding international parental child abduction), *available at* http://travel.state.gov/ci_faq.html.

[34] *See United Kingdom-Pakistan Judicial Conference on Child and Family Law*, London, England, Jan. 15-17, 2003, *at* http://www.hcch.net/e/conventions/seminar.html.

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IMPLICATIONS OF EUROPEAN UNION REGULATION

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

In the European Union (E.U.), a community composed of multicultural and multiethnic societies, where citizens move freely across borders, the abduction of children is a growing problem. Frequently, abductions occur among E.U. citizens, residents of a particular Member State, who decide either to wrongfully remove or illegally retain a child in the territory of another E.U. Member State. The Members that have witnessed an increased number of abduction cases are France, Germany, and the United Kingdom, while others, such as Greece and Portugal have dealt with fewer cases. Since all the Members are contracting parties to the 1980 Hague Convention on the Civil Aspects on International Child Abduction, E.U. citizens whose custody rights have been violated have extensively utilized the procedures established by this Convention.

However, as of March 1, 2005, any abduction cases involving E.U. Members will also be governed by a new Regulation adopted on November 27, 2003. Several of its key provisions on jurisdiction and returning children will take precedence over the equivalent provisions of the Hague Convention. The latter will continue to govern issues not dealt by the Regulation, as well as abduction cases involving E.U. Members and third countries that are also parties to the Convention.

One of the Regulation's objectives is to eventually eliminate the abduction of children in the Community through the abolition of *exequatur*,[1] so that decisions on access rights and the return of the child in one Member State will be automatically recognized and enforced in another Member State.

Another important step is the recognition and enforcement of the right of a child to retain contact with both parents. The European Commission anticipates that application of this Regulation by the Member States may have "a deterrent effect" on future abduction cases.[2]

I. Council Regulation (EC) No 2201/2003

A. Legal Basis

The Council Regulation (EC) No 2201/2003 bears the title: *Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000*.[3] Its legal basis is provided by articles 61(c) and 67(1). The first authorizes the Council to adopt measures in the area of judicial cooperation in civil matters, and the latter allows the Members States to share the right of initiative to introduce a new piece of legislation with the Commission for a limited period. The Regulation was based on a proposal from

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[1] Many civil law countries require that in order for a foreign judgment to be enforced domestically, an *exequatur* must be issued. An *exequatur* proceeding is a requested court order declaring that a foreign judgment is enforceable. *See* Dahls' Law Dictionary, at 185.

[2] *See* COM(2002) 222 final.

[3] OJ L338/1 (12/23/2003).

the Commission and on an initiative presented by France in 2000, regarding mutual enforcement of judgments on rights of access to children.

B. Scope

The scope of this Regulation is not limited to issues related to child abduction. In general, it intends to solve conflicting issues related to jurisdiction, recognition, and enforcement of judgments in family relations and questions of parental responsibility. Recognition and enforcement of judgments in family matters is an important aspect in the Union's effort to create a common judicial area in civil matters, based on trust and confidence in the judicial systems of its Members.

Protection of children and according respect to their basic rights are reflected in a number of provisions. Certain principles which are common to the legal systems and traditions of the Members, such as equality of all children before the law irrespective of marriage of parents and the best interest of the child, are recognized in the Preamble of the Regulation. Mention is also made to article 24 of the Charter of Fundamental Freedoms Protection, proclaimed in Nice in 2000, which recognizes three basic rights that are relevant and essential in abduction cases: children's voices and opinions must be heard on issues that are of concern to them; the child's best interest must be taken into consideration; and a child has the right to maintain a personal relationship and contact with both parents on a regular basis.

C. Definitions

Several of the terms and concepts used in the Regulation were modeled after the Hague Convention. Thus, "wrongful removal or retention" of a child occurs when:

- the removal or retention violates the rights of custody acquired by judgment or by operation of law or by an agreement of the Member State where the child had its habitual residence immediately prior to being removed or retained;
- the custody rights were actually exercised, either jointly or alone, at the time of removal or retention.

The term of "rights of custody" is defined as including the rights and duties relating to the care of a child and especially the right to determine the residence of the child. "Rights of access" include the right to take a child to a place other than his habitual residence for a limited period.

II. Critical Issues in Abduction Cases

A. Central Authority

The Members are required to designate one or more Central Authorities to ensure the smooth and effective application of the Regulation. These authorities may communicate through the European Judicial Network established in 2001.[4] The Members must also forward the names, addresses, and means of communication for the Central Authorities, and the languages accepted for the communications, to the Commission within a 3-month period after this Regulation enters into force.[5]

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[4] By virtue of Decision No 2001/470/EC.

[5] The Regulation enters into force on Aug. 1, 2004.

A parent whose custody rights have been violated may proceed either through the Central Authority of his residence or directly approach the central authority of the Member State where the child has been taken. The Central Authority is empowered to perform the following tasks:[6]

- collect and exchange information on the status of the child and on decision related to the child
- provide information and assistance to those who have custody rights
- facilitate communication between courts, especially in case a court has decided not to return a child under article 13 of the Hague Convention (In this case, a copy of the court's order on non-return and other documents must be transferred to the court in the Member State where the child has its habitual residence immediately prior to being wrongfully removed or retained.)
- facilitate communication between the court which has jurisdiction with another court, if the original court decides to transfer the case to a court in another Member State on the grounds that the child in question has a particular connection to the other State and the second court is better suited to hear the case.

III. Return of the Child[7]

Recital 17 of the Preamble clarifies that in case of wrongful removal or retention of a child, the provisions of the Hague Convention will continue to apply, as complemented by article 11 of the Regulation. A parent whose custody rights have been violated has the right to file an application to request the return of the child based on the Hague Convention. In this case, the Regulation imposes a number of procedural safeguards, which must be followed by the courts of the Member States. These require that:

- the child be given a chance to be heard during the proceedings, depending on his age and maturity;
- the court must act expeditiously in such proceedings based on national law provisions;
- the court should render its decision within 6 weeks after the application is filed before the court, unless it is impossible to do so;
- the court cannot refuse to return a child based on article 13b of the Hague Convention if it has been established that security measures have been taken to protect the child after his return;
- the court cannot refuse to return the child unless it has heard the person who requested the return of the child.

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[6] *See* art. 55 of the Regulation.

[7] *See* art. 11 of the Regulation.

IV. Jurisdiction[8]

The Regulation establishes that the court of the Member State where the child had its habitual residence immediately prior to being illegally removed or retained, retains its jurisdiction, until the child acquires a habitual residence in another Member State and:

- the person with custody rights has acquiesced to the child's removal or retention; or
- the child has resided in that other Member State for a period of at least 1 year, after the person with custody rights has had or should have had the knowledge of the whereabouts of the child, and the child has settled in his new environment. In this case, a number of additional conditions must exist, including the requirement that no request to return the child has been filed within a year from the person with custody rights discovering the child's whereabouts; a request to return the child has been withdrawn, and others.

V. Enforceability of Judgments concerning Rights of Access and Judgments Requiring the Return of the Child[9]

An important innovation introduced by this Regulation is the abolition of *exequatur,* or the filing of a request in a domestic court to declare a foreign judgment enforceable. As a result, the rights of access granted in a judgment are recognized and enforceable automatically in another Member State, provided that the judge who decided on question of visitation rights has issued a certificate.[10]

The same applies to judicial orders for the return of the child; there is no requirement for a declaration of enforceability to be issued by a domestic court. The judge, who ordered the return of the child will issue a certificate of enforceability, provided that the following criteria are met:

- the child was given an opportunity to be heard, unless it was not appropriate due to the child's age;
- the parties involved had an opportunity to be head; and
- the court that issued the order had taken into consideration the provisions of article 13 of the Hague Convention.

VI. Conclusion

As the EU moves into gradually establishing a common judicial area in civil matters, and as abduction of children becomes a more common phenomenon, especially in interstate marriages, the need to establish concise rules to resolve conflicts of jurisdiction at the EU level in cases of parental abduction and child retention has become apparent. Adoption of Regulation (EC) No 2201/2003 by the EU accomplishes three basic objectives: resolves a thorny conflict of jurisdiction matter, by determining that the court of the Member State where the child was habitually resident prior to being illegally removed or

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[8] *See* art. 10 of the Regulation.

[9] *See* art. 40 of the Regulation.

[10] The form of the certificate is appended to the Regulation.

retained, retains its jurisdiction until the child acquires a habitual residence in another Member State; recognizes the child's right to enjoy contact with both parents; and abolishes *exequatur* procedure through the automatic recognition and enforceability of access rights by all Members. However, whether or not the applicability of this Regulation, as of 2005, by EU Members will discourage future child abduction cases across the Community, as the Commission anticipates, remains to be seen.

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ARGENTINA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Argentina[1] effective June 1, 1991. On May 31, 1998, pursuant to article 45 of the Convention, the Argentinean government transmitted a declaration rejecting the extension of the Convention to the Falkland Islands by the United Kingdom of Great Britain and Northern Ireland. Argentina also reaffirmed its sovereign rights over the Malvinas (Falkland Islands), South Georgia, and South Sandwich Islands. It applies to all countries Argentina recognizes as parties thereto.[2]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Argentina is the *Dirección General de Asuntos Jurídicos-Dirección de Asistencia Judicial Internacional* of the Ministry of Foreign Affairs, International Commerce and Worship.[3]

A. Return Requested from Abroad

The Central Authority addresses only the administrative and informational functions, because the judiciary always decides on the return of a child or the visitation schedule. Once an application for return has been received, the Central Authority will verify that the petition complies with all the requirements provided for under the Convention. Before seeking a child's return or voluntary visitation from the parent in whose residence the child is located, the Central Authority must obtain the prior approval of the requesting parent. If the child's return or voluntary visitation schedule does not take place at this first stage, the petition will have to be submitted by a private attorney to the competent court. The Central Authority will provide the appropriate court with a general background of the Convention and will also offer its assistance to the court during the proceedings.

The Central Authority's role is administrative and informative, whereas the judiciary decides on the feasibility of the application for return or access rights.

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[1] Law 23857 of Oct. 19, 1990 *in* BOLETIN OFICIAL [B.O.] Oct. 31, 1990.

[2] Countries where the Agreement is effective with the Argentine Republic: Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Colombia, Costa Rica, Croatia, Chile, China, Hong Kong Region, China- Macau, Cyprus, Denmark, Ecuador, Slovakia, Slovenia, Spain, United States of America, Former Republic of Yugoslavia, Fiji, Finland, France, Georgia, Germany, Greece, Honduras, Hungry, Ireland, Iceland, Israel, Italy, Luxembourg, Malta, Mauricio, Mexico, Moldova, Monaco, Norway, Netherlands, New Zealand, Panama, Paraguay, Poland, Portugal, UK (Isle of Man, Cayman Islands, Falkland Islands, Montserrat, Bermuda), Check Republic, Romania, Saint Kitts and Nevis, South Africa, Sweden, Switzerland, Turkmenistan, Turkey, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zimbabwe.

[3] Law 24190 *Ley de Ministerios*, art. 17 inc. 11 and Decree 488/92 and Ministerial Resolution 203/94. Ministry of Foreign Affairs, International Trade and Worship, General Department for Legal Matters, Division for International Legal Assistance, address: Esmeralda 1212 - 4th floor (1007) - Federal Capital - Argentine Republic, Telephone: (54) 11 4 819-7000 extensions: 7629/7187, Fax: (54) 11 4 819-7170/7121 email: menores@mrecic.gov.ar .

However, the Central Authority does not provide legal assistance to private individuals during the proceedings before Argentine courts. A private lawyer will have to be hired to carry out the judicial aspect of the request. Those who cannot afford a private lawyer, and who qualify, may obtain the assistance of a public funded attorney.

Similarly, once the judicial stage has been instituted, the Central Authority will be at the Court and the parties' disposal to provide any information necessary for the implementation or application of the Convention with regard for the best interest of the child.

When the minor's domicile has not been located, the Argentine Central Authority will inform Interpol, the agency which will be in charge of locating the minor in question.

B. Return Requested from Argentina

The petitioner must fill out a standard set of forms from the Central Authority and return them to the Central Authority in triplicate. This form requests all the information necessary to locate the child, including identity information concerning the child and the person who has taken the child; the child's date of birth; the reasons for claiming the return; and information on the presumptive domicile of the child. A copy of the judicial decision or agreement on the custody of the child may also be attached.[4] Seeking legal counsel is recommended in order to complete the form, although this is not required. In case the petition is addressed to a non-Spanish speaking country, the forms will have to be submitted both in English and Spanish.

Once all documents have been submitted, the Central Authority will evaluate whether the case meets all the requirements of the Convention. If the case is admitted, the Central Authority will send the return and visitation petition to the Central Authority of the requested country. The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority together with the procedural norms applied by the competent courts. In many cases the petitioner will have to hire a private attorney in the requested country. If the petitioner cannot afford to hire a private attorney, he may investigate whether he qualifies under Argentine law to receive free legal advice and become eligible for such assistance abroad.

The petitioner will be kept informed by the Argentine Central Authority about the status of his case since both Central Authorities will be in constant contact about the case.

Argentina has also become a member to the Inter-American Convention on International Return of Minors (IACIRM) adopted in Montevideo, Uruguay, on July 15, 1989, and ratified by Argentina on November 1, 2000.[5] This Convention applies to any return case involving a minor whose permanent residence is in any of the member countries[6] and has been illegally or wrongfully taken abroad. The Convention also applies to the enforcement of visitation and custody rights.[7] The IACIRM also provides

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[4] Jose Carlos Arcagni, *La Convención de la Haya sobre los Aspectos Civiles de la Sustracción Internacional de Menores y el Derecho Internacional Privado Tuitivo*, 1995-D REVISTA JURÍDICA ARGENTINA LA LEY, Sec. Doctrina, 1032 (Buenos Aires, 1995).

[5] Law 26358 of November 1st, 2000 in Boletin Oficial (B.O.) Dec. 12, 2000.

[6] Member countries are: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay and Venezuela, *see* http://www.oas.org/juridico/spanish/firmas/b-53.html.

[7] *Supra* note 5, art. 1.

that for members of the Organization of American States that are party to this Convention and also party to the Hague Convention on Civil Aspects of International Child Abduction, the IACIRM will apply, unless stated otherwise between the parties through bilateral agreements.[8]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Under the Criminal Code,[9] the punishment for anyone who takes and hides a minor 10 years of age or younger from the control of his parents, guardian, or person in charge of him is 0imprisonment from 5 to 15 years.[10] Scholarly opinion is not clear on whether a parent who takes a child from the other parent is guilty of this crime.[11] However, a number of court decisions[12] have suggested that any parent who takes and keeps a child out of the control of the parent who has been judicially assigned the custody of the child is guilty of this crime.

Law 24270[13] created the crime of *Impedimento de Contacto de Hijos Menores con sus Padres no Convivientes* (preventing minors from having contact with the non-custodial parent). Therefore, the parent or a third person who illegally prevents or obstructs contact between a minor and his non-custodial parent will be punished with imprisonment from 1 month to 1 year. If the child is younger than 10 years of age or handicapped, the punishment is imprisonment from 6 months to 3 years.[14]

The same sanctions would apply to the parent or third person who, in order to prevent the parent not living with the child from contacting him, takes the child to another domicile without judicial authorization. If, with the same purpose, such a person takes the child out of the country, the punishment would increase up to double the minimum and half of the maximum.[15]

In such cases, the court must take all necessary measures to restore the parent' s contact with the child within 10 days.[16] The court must also establish a provisional visitation schedule to be applied for not more than 3 months, or if there is already a visitation schedule, the court must enforce it.[17]

Although articles 5 and 21 of the Convention guarantee some type of visitation schedule during the return proceeding, the courts have interpreted these provisions narrowly considering that the

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[8] *Id.* art. 34.

[9] O. y Florit, *Código Penal de la República Argentina,* Editorial Universidad, Buenos Aires, 1997.

[10] *Id.* art. 146.

[11] *Id.* at 347.

[12] Cámara Nacional Criminal y Correccional, Sala II, December 3, 1987, *in Boletín de Jurisprudencia Cámara Nacional Criminal y Correccional, 1987,* No. 4 at 1680; Sala III, May 27, 1992 *in Boletín de Jurisprudencia Cámara Nacional Criminal y Correccional, 1992,* No. 2, at 141; Sala I, June 28, 1994, *in Boletín de Jurisprudencia Cámara Nacional Criminal y Correccional*, 1994, No. 2, at 77.

[13] Law 24270 of Nov. 3, 1993, amending the Criminal Code published in *B.O.*, Nov. 25, 1993.

[14] *Id*. art.1.

[15] *Id*. art. 2.

[16] *Id*. art. 3.1.

[17] *Id*. art. 3.2.

Convention does not expressly require member countries to establish or enforce a visitation schedule during the conventional procedure.[18] There are some scholarly opinions to the contrary; some authors[19] have interpreted the Convention as very clear in requiring Central Authorities to file petitions for visitation, as well as return purposes. According to J.C. Arcagni, the Convention does not require the precondition of enforcing parental visitation rights to the issue of abduction itself. According to this author, the narrow interpretation that the courts have adopted may be due to the fear that visitation rights that may require taking the child out of his habitual residence or domicile may create the risk of abduction.[20] Thus, in order to avoid such risks and conflicts, the Central Authorities will have to play a very important role to secure the conditions and timing of the visits through permanent and effective supervision over the minors.[21]

According to sources from the Argentine Central Authority, Dr. Ignacio Goicoechea, to date, all Argentine courts have waited for the court deciding on the issue of the custody of the child to establish the visitation schedule provided for under Article 21 of the Convention. However, in many cases a voluntary agreement between the parties was reached during the return proceedings.

The Argentine Civil Code[22] establishes that in some cases, express consent of both parents will be required in order for the minor to carry out certain actions.

This provision refers to parents legally married and living together with the child, as well as parents that are separated or divorced, especially when one of the parents has physical custody of the minor, and the other has only visitation rights.

Authorization to leave the country is included among the actions for which express consent is required by both parents. This means that either the father or the mother may grant or deny this authorization, or grant it for a limited period of time, and therefore express his agreement or disagreement regarding a possible change of residence of the minor.

When a parent wishes to relocate with the child in a foreign country, he will need to acquire the court´s authorization when a legal custody arrangement has been settled. This is also the case when a parent has only physical custody of the minor, since according to article 264 of the Argentine Civil Code, consent of both parents is required in order to leave the country. Of course, the problem arises when a parent is denied the relocation by the courts, and he decides to abduct the child.

III. Court System and Structure – Courts Handling the Hague Convention

When Argentina is the requested country and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be either the civil ordinary courts in the Federal Capital and national territories or the provincial courts, which may be family courts in those provinces that have such, or the civil courts. The case may be appealed to the respective Court of Appeals

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[18] *Id.* at 1034-1035.

[19] *Id.* at 1035.

[20] *Id.*

[21] *Id.*

[22] Código Civil, Zavalia, Buenos Aires, 1999, art. 264 quarter.

and, if admissible, to the Supreme Court. So far, there has been only one case that has reached the Supreme Court.[23] In this case, the Supreme Court finally ordered the return of the child who was illegally taken from Canada to Argentina by her mother. The child went back to Canada after an extremely protracted process (over a year), compared to the Convention's standard (not more than 6 weeks).

In 2000, the Argentine courts decided a very interesting case,[24] applying the Convention, without the intervention of the foreign Central Authority. The case involves a German man who married an Argentine woman in Denmark. They had a daughter who was born in Argentina. When the girl turned 4 months old, the family moved to live in Germany. After 2 years, the couple separated and the mother was granted the child's full custody by a German lower court. Later, the mother and child traveled to Argentina, and from there, the mother notified to the German court she and her daughter were going to establish their permanent residence in Argentina. The German Court of Appeals revoked the lower court decision granting the child's custody to the mother, but at the same time did not grant it to the father. The German Court of Appeals maintained that it lacked international jurisdiction on this child's custody issue, because her permanent residence was in Argentina. This occurred, because of the legitimate right of the mother, who had exclusive custody of the child, and therefore, had the right to determine the permanent residence of the child.[25]

In view of the German court's decision, the father requested the return of his daughter to Germany before the lower courts in Argentina, who granted the petition under the provisions of the Hague Convention. The mother appealed the decision, and the Argentine Court of Appeals reversed the lower court decision, on the basis that the Hague Convention was not applicable in the case, because the child in question was not illegally or wrongfully moved from Germany. The mother had the exclusive custody of the child, which included the right to establish their permanent residence. The final decision on the case, rejecting the return of the child to Germany, was consistent with the aim of the Hague Convention, which is mainly to prevent that, through illegal means, the child is taken away from the competent courts to decide the custody of the child. However, in this case, it was the same German court that decided its lack of jurisdiction, pointing out that the case should be decided by Argentine courts.[26]

IV. Law Enforcement System

Both the Central Authority and the courts have requested assistance from the police and Interpol to locate children and secure the enforcement of authorities' orders.[27] In Argentina children are sought by Interpol, not only in the cases derived from International Conventions, but also in those originated in countries where no conventions exist.

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[23] Wilmer, E.M. c/ Oswald, M.G., LA LEY, 1996-A, 260, Supreme Court, June 14-1995.

[24] C1 CC San Isidro, Sala 1, Aug. 31, 2000, M., V.c/G.B., M. s/ *Restitución de menor y tenencia y régimen de visitas* in Revista El Derecho, Jurisprudencia General, Vol. 191, Buenos Aires 2001.

[25] I.M. Weinberg de Roca, LA APLICACIÓN DE LA CONVENCIÓN DE LA HAYA SOBRE RESTITUCIÓN DE MENORES SIN INTERVENCIÓN DE AUTORIDAD EXTRANJERA REQUIRENTE, in *Id.* at 115-116.

[26] *Id.* at 121.

[27] Soraya Nadia Hidalgo, *Restitución Internacional de Menores en la República Argentina*, 1996-C REVISTA JURÍDICA ARGENTINA LA LEY 1393 (Buenos Aires, 1996).

According to the Argentine Central Authority, since January 2000 to the present, the request statistics are as follows:

Return requests (outgoing)	**Return requests (incoming)**
Pending: 78	Pending: 19
Closed: 92	Closed: 32
TOTAL: 170	TOTAL: 51

Visitation requests (outgoing)	**Visitation requests (incoming)**
Pending: 13	Pending: 3
Closed: 16	Closed: 7
TOTAL: 29	TOTAL: 10

On June 11, 2003,[28] the National Registry of Information about Missing Minors was created under the National Program for the Prevention of the Abduction and Trafficking of Minors and Crimes Against their Identity, created by Resolution 284/02, within the Ministry of Justice, Security, and Human Rights. The Registry will establish a database that will collect all information related to cases of children that have been abducted or missing. The database will be available on Internet and will include all information needed to locate them and also to check on the status of the search.[29]

Both parents are required under the law to authorize, not only the minor's travel abroad, but also the issuance of a passport to a minor. The withdrawal of such a passport, as well as the denial or restrictions on the issuance of visas, may only be ordered by a court. Therefore, in order for a minor, who is not traveling with both parents, to leave the country, he will have to present his valid passport, as well as the absent parent's authorization to travel, before the border authorities. Administrative measures and court orders may become ineffective if border controls in the country are not duly carried out. This is the case for dry/land boundaries due to the length of the Argentine borders. However, border controls are highly effective with regard to air carriers and ferries.

When a court orders a prohibition to leave the country, such an order is given to border authorities, including Federal Police, Immigration, Interpol-Argentina, and Aeronautic Police.

V. Legal Assistance Programs

Legal Assistance Programs are not available. A private attorney must be hired if a voluntary return fails, and judicial proceedings need to be started. However, a public defender may be available if the claimant can prove that he cannot afford a private attorney.

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[28] Law 25746 of July 1, 2003 in B.O. July 2, 2003 regulated by Decree 1005/2003 of Oct. 30, 2003 in B.O. Oct. 31, 2003.

[29] *Id.* arts. 1 and 2.

VI. Conclusion

The Ministry of Foreign Affairs has a website[30] to provide information on those conventions referred to child protection from different viewpoints or scopes. It is addressed to those who, on account of their duties, must enforce some of those mentioned international conventions. It is also addressed to those who are included in some of the situations covered by the conventions and need to know whom to address the application in order to prevent unnecessary delays. The website intends to disseminate the rights derived from the Convention on the Rights of the Child and point out some helpful hints for their protection.

However, due to the lack of human and financial resources, the government has not been able to provide more comprehensive information to prevent abductions. The role of non-governmental organizations (NGOs) has been very important in this regard, because they fill a gap that cannot be filled by governments.

NGOs, such as the Argentine chapter of Missing Children,[31] have webpages on the Internet to provide assistance to parents whose children are missing. The webpage provides a comprehensive multilingual database which includes pictures of the missing children, as well as a progressive age picture, showing how a child could have aged through the years, based on the latest available picture. It also provides their identification and physical description.[32] There are other local NGOs, such as *Fundacion PIBE*, based in the Province of Tucuman, which also provides information and support to parents of missing children through their webpage.[33]

The application of the Convention in Argentina appears to be successful, particularly in expediting the return of minors. The Convention is an example of the humanization of private international law, with its most important goal being the well-being of the child. Of all the cases to which the Convention was applied, the one reaching the Supreme Court in 1995 has had extensive media coverage. This promotion of the Convention raised public awareness, and Argentineans became more conscious about the serious issues involved in international parental child abduction.

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November 2003

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[30] http://www.menores.gov.ar.

[31] http://ar.missingkids.com.

[32] *Id.*

[33] http://www.pibe.org.ar. *See also,* Fundación Niños Unidos para el Mundo, http://www.foundchild.org.ar.

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AUSTRALIA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Commonwealth of Australia is a federation of the six states of New South Wales, Queensland, Victoria, South Australia, Tasmania and Western Australia, and the Australian Capital Territory and Northern Territory. It has a common law based system of law. The Constitution of Australia adopts the enumerated powers doctrine, under which the federal Parliament may make laws "for the peace, order, and good government of the Commonwealth," while the undefined residue of powers is left to the states. Commonwealth laws are guaranteed to prevail over inconsistent state laws, but there is nothing to stop a state from legislating on the subject of a power granted to the Commonwealth. In section 51(xxi) and (xxii) of the Constitution, the federal Parliament is granted legislative power over marriage, divorce, parental rights, and the custody and guardianship of infants.

The exercise of the federal power over family matters is represented by the enactment of a Commonwealth statute, the Family Law Act 1975 (FLA), as amended. The FLA set up a federal Family Court, a superior court of record with jurisdiction in family laws, including issues relating to children. Many constitutional challenges were mounted against the FLA, most of which have now been resolved, but the State of Western Australia continues to apply its own laws.

It is in pursuance of the powers contained in the FLA that Australia ratified the 1980 Hague Convention on the Civil Aspects of International Child Abduction, and it came into force in 1987.[1] A November 2001 Commonwealth Attorney-General's Department Guide for Parents and Practitioners on International Child Abduction gave a total of 173 applications under the Convention for orders for return or access, reflecting 76 abductions to Australia and 97 from Australia.[2] The number in relation to countries not covered by the Convention may be much higher. The number of abductions was believed to be increasing. A 2001 paper explained the increase as a consequence of the growing number of bi-national or multi-cultural marriages. The offspring of such marriages often have dual nationality and can easily enter the country of the abducting parent.[3]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Family Law (Child Abduction Convention) Regulations (Child Abduction Regulations) issued pursuant to the powers contained in the FLA 1975, section 111B give effect to the Convention. The

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[1] Australian Treaty Series 1987, No. 2.

[2] Jennifer Degeling and Nan Levett, INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR PARENTS AND PRACTITIONERS, Commonwealth of Australia, Attorney-General's Department (November 2001) at 16, *available at* http://www.law.gov.au/childabduction/.

[3] Krista M. Bowie, INTERNATIONAL APPLICATION AND INTERPRETATION OF THE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (March 2001), *available at* http://www.familycourt.gov.au/papers/html/bowie.html.

Convention by itself is not part of Australian law, and only the Child Abduction Regulations are so accorded.[4] Accordingly, the provisions of the Convention cannot override the terms of the Regulations.[5]

The Hague Convention applies to any child under the age of 16 years who was habitually resident in a contracting state immediately prior to the removal or retention. The term "habitually resident" is not defined in the Convention, but under Australian case law it is to be understood according to the ordinary and natural meaning of the two words; its determination is a question of fact and is often based on the conduct of the parties.[6] The Australian Family Court is stated to favor a slightly wider interpretation of the Convention than courts in England, and changing a child's residence requires proof that both parents had a shared intention to remain in a new country.[7]

Under the Child Abduction Regulations, when a child has been removed from a Convention country to Australia, or retained in Australia, an application must be sent to the Commonwealth Central Authority which must be satisfied that it is in accordance with the Convention (Regulation 12). The Commonwealth Attorney-General's Department is the Australian Central Authority. Issues involving the Hague Convention are dealt with by that Department's International Civil Procedures Unit, a part of the Family Law Branch.[8] The Commonwealth Central Authority may seek an amicable resolution of the differences between the applicant and the person opposing the return of the child or the voluntary return of the child. "Removal" and "retention" of a child are defined as being in breach of the rights of custody of a person or institution if at the time of removal those rights were actually exercised or would have been so exercised except for the removal (Regulation 3).

The information required to be included in the application should be in the form of an affidavit stating that the child was habitually resident in the requesting country at the time of the wrongful removal or retention. The affidavit should include information on the child's place of residence, the person with whom the child lived, any period spent outside the country, the name of the school and the time spent there, the child's grade, etc. The right of custody over the child should also be described based on the law of the state or country of habitual residence. The affidavit must also explain the incidents and circumstances surrounding the removal of the child in order to provide a proper understanding of the situation. A copy of any court order granted prior to the removal must be included, and a copy of the applicable statute on custody must also be supplied. Evidence that the applicant was actually exercising the right of custody over the child should be provided in the form of an affidavit from the applicant's lawyer stating how those rights were being exercised.[9]

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[4] *McCall and McCall; State Central Authority (Applicant); Attorney-General (Commonwealth) (Intervener),* (1995) FLC ¶92-551 at pp. 81,507, 81,509, and 81,517. The Family Law (Child Abduction Convention) Regulations 1998 are available on the Commonwealth Attorney-General's Department online database SCALEPLUS, *at* http://scaleplus.law.gov.au/. They were most recently amended on June 5, 2002.

[5] Anthony Dicky, CHILD ABDUCTION IN FAMILY LAW (CCH, 1999).

[6] 17 Laws of Australia, FAMILY LAW, ¶17.8[23]-[25].

[7] Anne-Marie Hutchinson, Rachel Roberts and Henry Speight, INTERNATIONAL PARENTAL CHILD ABDUCTION 67 (1998).

[8] Family Law and Legal Assistance Division, *at* http://law.gov.au/www/familylawHome.nsf/.

[9] For fuller details of the information to be included in the affidavits in support of the application, *see* the United States Department of State, *at* http://travel.state.gov/abduction_australia.html.

Once accepted by the Commonwealth Central Authority, the application will be forwarded to the relevant Central Authority in the country where the child is located. If a child's exact location is not known, a warrant may be issued by a court for the possession of the child. The Central Authority will also assess whether it is appropriate to negotiate a voluntary return and may make initial contact with the abducting party.[10] If the negotiations fail or negotiations are considered inappropriate, the case will be forwarded to the Crown Solicitor (state attorney) who will file an application with the Family Court. Direct contact between the applicant and the Crown Solicitor is discouraged, and communications are normally handled by the Central Authority. The application must be listed for a preliminary hearing before the Family Court within 7 days, at which time a date will be set for the defending party to file a response and for a full hearing. The hearing is before a single family specialist judge, and the judgment is usually formulated on the basis of the documentary evidence, together with any affidavits deemed necessary. The court may require a family and child counselor or welfare officer to report on such matters that are relevant to the proceedings, and the reports may include any other matters that relate to the welfare of the child (Regulation 26). Oral evidence may be called in cases in which there is a wide discrepancy in the evidence. The Court will take into account the wishes of a child who has sufficient maturity to understand the proceedings.[11] A child of an appropriate age and degree of maturity should be separately represented, and the court should make an order for the presence of such a representative.[12]

The Court, if satisfied that it is desirable to do so, may make an order for the return of the child to the country in which he habitually resided immediately before the removal or retention, or make any other order it considers to be appropriate to give effect to the Convention (Regulation 15). It must make an order for the return of the child if the application was filed less than one year after the day on which the child was removed to, or first retained in, Australia (Regulation 16(1)). The Court may refuse the return of the child if the person opposing the return establishes that the following prescribed exceptions to the return apply:

> (a) the applicant was not actually exercising rights of custody when the child was first removed to, or retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or
>
> (b) return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
>
> (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take his views into account; or
>
> (d) return would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms (Regulation 16).

If a period in excess of 1 year has elapsed prior to an application being made for the return of a child, the Court is required (subject to the above prescribed exceptions) to make an order for the return of the child immediately, unless it can be proved that the child is now settled in his new environment (Regulation 16(2)).[13]

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[10] Hutchinson, *supra* note 7, at 66.

[11] *Id.* at 67.

[12] Family Law Act 1975, §68L.

[13] *Supra* note 6, ¶17.8[29].

The Court must refuse to make an order to return the child if it is satisfied that:

a) the removal or retention of the child was not within the meaning of the Child Abduction Regulations; or

(b) the child was not a habitual resident of a Convention country immediately before removal or retention; or

(c) the child had reached the age of 16; or

(d) the child was removed to, or retained in, Australia from a country which at that time was not a Convention country; or

(e) the child is not in Australia.

The burden for "substantiating settlement lies with the defending parent who must demonstrate that the child is both physically established in a new location and is emotionally settled and secure."[14] The rationale of the Hague Convention is considered as being clear in that the object is the expeditious return of the child, and therefore the function of the Court should not be hampered by interpretations which interfere with the administration of the Convention.[15] Similarly, terms in the Convention should be given their literal meaning, and its expressions should be understood according to their ordinary and natural meaning and should not be treated as terms of art with special meaning. The Family Court of Australia has had recourse to the explanatory report of the drafters and negotiators of the Hague Convention.[16]

On an order of return being made by the court, the responsible Central Authority must make the necessary arrangements for the return of the child to the country of habitual residence. Unless the court order is stayed within 7 days of its making, the child must be returned to the country of habitual residence.

The Child Abduction Regulations also make provisions granting rights of access to a child in Australia (Regulation 24). The Hague Convention, article 21, calls on Central Authorities to promote the peaceful enjoyment of access rights, and the Child Abduction Regulations require the Commonwealth Central Authority to take such steps as are necessary for the purpose of enabling the performance of the obligations under the Article.

On July 1, 2000 the Migration Regulations were amended to ensure that a visa for migration to Australia would not be granted to a child without the permission of everyone with a right to decide where the child can live. If there is a dispute between parents over the removal of a child to Australia, the migrating parent is required to demonstrate their legal right to decide where the child may live.[17]

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[14] Hutchinson, *supra* note 7, at 67.

[15] For citations to Australian case law on this and the following points of interpretation of the Convention, *see supra* note 6, ¶17.8[14].

[16] Hague Conference on Private International Law, CONVENTION AND RECOMMENDATIONS ADOPTED BY THE 14TH SESSION AND EXPLANATORY REPORT BY ELISA PEREZ-VERA (The Hague, 1982).

[17] Migration Amendment Regulations 2000 (no.2) 2000 No.62, amending the Migration Regulations 1994 ¶4015-4018, http://scaleplus.law.gov.au/html/ Commonwealth of Australia, Attorney-General's Department, AUSTRALIA'S COMBINED SECOND AND THIRD REPORTS UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD, Part V, Section H "Illicit Transfer and Non-return (art. 11)," *available at* http://www.law.gov.au/.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The FLA, section 65Y, makes provisions against the removal of a child who was the subject of a custody order from the person who had care and control of the child. The penalty for the offense is imprisonment for up to 3 years. In 1983, amendments were enacted creating a further offense to remove a child from Australia during pending proceedings or in contravention of a court order.[18] For children abducted from overseas into Australia, the FLA provides authority for the issuance by a court of a "location order" and a "recovery order." A location order calls for any person to obtain and provide to the Registrar of the court information on where a child is to be found. Once located, a recovery order authorizes the return of the child to the person seeking his recovery without exposing the abductor to any violence. The Act grants various enforcement powers to search premises, places, vehicles, aircraft and to arrest, remove, or take possession of the child.[19]

According to the Family Law Council, the provisions of the Family Law Act have not proven effective in preventing children from being unlawfully removed from or retained outside Australia. First, the offense is limited to cases in which court orders are in force or proceedings are pending. Secondly, the provision has no application to the common situation in which a parent takes a child abroad with the consent of the other parent and then retains the child. In a majority of cases of domestic abductions, the parent from whom the child is taken has no court order, and the abducting parent has not committed a criminal offense.

Under state laws, criminal provisions exist, including child stealing and abducting a child under the age of 16 years. These provisions were not specifically designed to cover parental child abduction, although there are some provisions which may be applicable in cases of such abductions.

The (Commonwealth) Criminal Code Act 1995, Division 27, section 27.2, contains provisions relating to kidnapping, child abduction, and unlawful detention. Under it kidnapping is extended to cover the situation in which a person takes or detains another person without consent with the intention of taking the person out of the jurisdiction. A person who takes or detains a child is deemed to be acting without the child's consent. If the person removing the child is that child's lawful custodian or acts with the consent of the custodian, it is a defense.

A note is made of the change in terminology in Australia regarding custody and access. In 1996, these were replaced by a system of shared parenting based on parental responsibility. The joint responsibility is applicable whether or not the parents are married.[20] Reference is now made to a child's "residence," that is, with whom the child lives, and the "contact" that the child has with certain persons. The change, however, does not affect the use of the terms "custody" and "access" in the Hague Convention, as the statute specifically provides that the terminology of the Convention continues to apply to Australian parents.[21]

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[18] *Supra* note 12, §65Y(1) & 65Z(1).

[19] *Id.* § 67Q.

[20] In Western Australia unmarried mothers alone continue to exercise parental responsibility and residence rights over the child.

[21] Family Law Reform Act 1995, §111B(4).

With regard to the effect of the change of terminology on abductions when both parents are responsible for the child, the removal of a child by one parent prevents the other parent from exercising his responsibilities. This amounts to a parental abduction arising from the taking over of all responsibilities for a child's care without regard for the other parent who shares those responsibilities.

B. Parental Visitation

The concept of parental responsibility introduced by the 1995 Act is defined to include "all the duties, powers, responsibilities, and authority which, by law, parents have in relation to children."[22] Each of the parents of a child who is not 18 has parental responsibility for the child, and any change in the nature of the relationship of the parents does not result in a change in the responsibility. "It is not affected, for example, by the parents becoming separated or by either of them marrying or re-marrying."[23] Thus, the parents generally retain the same responsibilities they exercised over the children before the breakup of their marriage. This is the situation irrespective of whether the child resides with one parent and the other has contact with the child.

The 1995 Act encourages the parents of a child to agree about matters concerning the child, giving the best interests of the child paramount consideration, rather than seeking an order from a court. A "parenting plan" may be drawn up dealing with various matters, including the person with whom the child is to live; contact between the child and another person; maintenance of the child; and any other aspect of parenting responsibility. The plan may be registered in a court, and if so done, the court may vary the child welfare provisions in the best interests of the child.[24]

The Hague Convention also requires that rights of access granted in the laws of members states be respected. The Child Abduction Regulations (Regulation 24) vest upon the Central Authority the duty to promote the enjoyment of those rights, a duty which is administrative and non-mandatory in nature. The Central Authority may thus initiate or instruct legal representatives to seek an access order. Moreover, while the Convention does not place an absolute obligation on the Court, it may consider the best interests of the child in determining whether an access order should be made. If a foreign access order is in existence, it is given the "greatest weight" and would be overridden only by the paramount consideration of the welfare of the child.[25]

III. Court System and Structure – Courts Handling the Hague Convention

The federal Family Court deals with all legal matters which follow from family breakups and divorce, the custody and welfare of children, access arrangements and property disputes. In Western Australia, a separate Family Court of Western Australia exists to exercise federal and non-federal jurisdiction in family law and adoption matters. Under a system of cross-vesting of jurisdiction between federal, state and territory courts, the Family Court of Australia is vested with the full jurisdiction of the

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[22] Family Law Act 1995, § 61B.

[23] *Id.* § 61C(2).

[24] *Id.* § 63B.

[25] *Supra* note 6, ¶ 17.8[44].

state and territory Supreme Courts.[26] Cross-vesting reduces uncertainties as to the jurisdictional limit of the courts and ensures that proceedings which ought to be tried together are tried in one court. The website of the Family Court of Australia contains a section on child abduction, with links to papers and reports, as well as judgments by the Family Court and the High Court.[27]

An appeal may be brought as a matter of right to the Appeals division of the Family Court of Australia sitting with three judges, and a further appeal may be made to the High Court of Australia, if the Appeals division or the High Court certifies that a question of law has arisen.

The nature of the litigation arising in administering the Hague Convention is considered to be in a class by itself and is described as being neither adversarial nor inquisitorial. As in other family matters, applications under the Convention are processed expeditiously. Hearings are held in open court, but the names of the persons involved in the proceedings must not be disclosed by the media, the sanction against which is a criminal penalty.

The Child Abduction Regulations (Regulation 2(1)) confer jurisdiction of child abduction cases on any court which exercises jurisdiction under the Family Law Act. This includes a court of summary proceedings.

In the majority of cases, the Central Authority makes an application for an order for the return of a child, as the Regulations grant them primary responsibility for instituting proceedings. However, the Full Court of the Family Court expressed the view in *Panayotides v Panayotides*[28] that such proceedings can be properly brought by any person, institution, or other parties whose rights of custody have been breached by the removal or retention.

In *State Central Authority v. Ayob,*[29] the Court ruled against a literal interpretation of the Child Abduction Regulations because of the clear import of provisions in the Convention. It is accepted in Australia that the Convention is to be interpreted broadly, without attributing to it any specialist meaning which it may have acquired under domestic law.[30] Thus, important expressions in the Convention on "rights of custody" and "habitually resident" have been interpreted more broadly than under Australian domestic law.[31]

The reason for the prompt return of the child is to ensure that the courts in the home country determine who should have parental responsibility, and as such, where the child should live.[32] It is

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[26] Jurisdiction of Courts (Cross-Vesting) Act 1987. In 1999, the Australian High Court invalidated parts of the cross-vesting arrangements in *Re. Wakim,* [1999] HCA 27 (17 June 1999). The Jurisdiction of Courts Legislation Amendment Act 2000, No. 57, and the Jurisdiction of Courts (Miscellaneous Amendments) Act 2000, No. 161 were passed to address some of the objections of the Court.

[27] Family Court of Australia, *at* http://www.familycourt.gov.au/missing/html/abduction.html.

[28] (1997) FLC, ¶ 92-733, at pp. 83,883-83,884.

[29] (1997) FLC, ¶ 92-746 at pp. 84,072, and 84,074.

[30] As stated by the Family Court in England in Re. F [1995] 2 Fam LR 31, 41.

[31] Dickey, *supra* note 5, ¶ 211.

[32] Re S (A Minor), [1993] Fam 242, 250.

assumed that the issues are best determined by the courts of the country in which the child has the most obvious and substantial connection.[33]

IV. Law Enforcement System

The procedure of the Hague Convention is designed to enable a court or administrative authority to immediately return the child to its country of habitual residence.

In granting an order for the return of a child, a court may grant to the Commonwealth or State Central Authorities:

- a warrant for the apprehension or detention of the child, including the right to stop and search a vehicle, vessel, or aircraft, or to enter and search such premises;
- an order that the child not be removed from a specified place;
- an order that the child be placed with an appropriate person or institution pending the determination of the application for return.

The procedure is designed to enable the authorities to return the child to the person seeking the child's recovery without exposing the abductor to possible violence.

However, it is acknowledged that as parental abduction remains solely a civil matter, it does not obtain a priority of police resources, nor are detection procedures, such as telephone interception and the use of listening devices, made available.

V. Legal Assistance Programs

Applications made in Australia under the Hague Convention are automatically funded by the Government and no means test is applicable. The Hague Convention, article 26, paragraph 3, allows a contracting state to make a reservation that it will not be bound to meet certain costs of recovery of a child. Australia has not made such a reservation, while a significant number of countries have done so.

The Australian Central Authority does require foreign applicants to deposit sufficient funds with their legal representatives to cover the costs of the air fares, prior to processing an application through the courts. There is an Overseas Custody (Child Removal) Scheme to compensate Australian applicants who do not have the financial means for air travel.

Under the Child Abduction Regulations (Regulation 30), the Court can order the abducting parent to pay the expenses of the applicant, including necessary traveling expenses, costs incurred in locating the child, legal representation costs, and other costs incurred for the return of the child. However, in family matters each party bears its own expenses and order for the payment of costs are rarely made.

The parties to a Hague Convention application may engage legal representatives at their own expense and apply for legal aid (assistance). Legal aid is available in all of Australia, subject to means and merits tests. Each state and territory adopts its own eligibility criteria.

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[33] Dickey, *supra* note 5, ¶ 202.

VI. Conclusion

Given the objective of the Hague Convention to expeditiously return children taken from one country to another, the Family Court of Australia has interpreted the Convention in a manner which accords with its spirit. As required under the Vienna Convention on the Law of Treaties, the Court has followed the primary rule of interpreting the Hague Convention in good faith in accordance with the ordinary meaning to be given to its words. It has also made use of the Explanatory Report to the Convention to confirm the meaning arrived at or to remove an ambiguity or overcome a manifestly absurd or unreasonable result.[34]

The number of cases of parental abduction has increased since the Hague Convention came into force in Australia in 1988. One explanation for the increase may be the significant increase in the number of countries that have ratified the Convention and the resulting greater awareness of the problem. The Attorney-General's Department, however, notes that the increase has mainly been in relation to the United Kingdom, the United States and New Zealand.[35]

The statutory Family Law Council after investigating several issues relating to child abductions referred to it by the Attorney-General, has made several recommendations, including that:

- steps be undertaken to improve the data collected on child abductions
- parental child abduction, whether internally or from other countries, should not be criminalized and alternative means should be adopted for improving the recovery rate of abducted children
- the courts be given broad discretionary powers to recover the costs associated with the recovery of children abducted from abroad from the person responsible for the abduction.

To improve the operation of the Hague Convention, Australia has signed the additional Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996.[36] This Convention is intended to eliminate competition or dissonance between the authorities of different states with regard to orders for the protection of children. It requires that contracting states accept limitations on the jurisdiction of their authorities in order to avoid conflicts in matters of jurisdiction and applicable law. To implement the Convention, Australia's Commonwealth Parliament passed the Family Law Amendment (Child Protection Convention) Act 2002, which received royal assent on September 3, 2002.[37] Full implementation of the Act required amendments to state and territory legislation, and it did not go into force until August 1, 2003. Apart from conflicts of jurisdiction, the Act also guarantees the mutual recognition and enforcement of parental responsibility orders by Convention countries. A benefit for Australia is the 1996 Convention's use of the term "parental responsibility." Australian parents had sometimes been

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[34] *Supra* note 6, § 17.8 [14].

[35] *Supra* note 2, at 15.

[36] Hague Conference on Private International Law, Convention No. 34, *at* http://www.hcch.net/e/conventions/menu34e.html.

[37] Commonwealth Numbered Acts 1973 and database, *at* http://scaleplus.law.gov.au/.

disadvantaged when other Convention countries refused to recognize that parental responsibility gave Australian parents the essential "right of custody" under the 1980 Convention.[38]

In countries that are not signatories to the Convention, Australian Embassies endeavor to provide what assistance they can to Australians whose children have been taken to those countries. In some countries, such as Lebanon, which have contributed many immigrants to Australia, the Australian Embassy has tried to develop ties with the local courts, in order to facilitate cooperation in child custody matters. The Embassy in Beirut reported that in October 2002, a large delegation of Lebanese lawyers attended a conference in Sydney and were able to meet Australian judges and gain insight into the operation of the Family Court of Australia.[39]

In October 2000, Australia and Egypt signed an Agreement on cooperation in protecting the welfare of children. This entered into force on February 1, 2002. The Agreement, intended to establish formal procedures to assist Australians whose children have been abducted to Egypt, establishes a Joint Consultative Commission which will assist in encouraging dialogue between parents and facilitate the return of children.[40]

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[38] *International Child Abduction News, Nos. 24 and 25* (June-Sep. 2002), *at* http://www.law.gov.au/childabduction/.

[39] Australian Embassy - Beirut, AUSTRALIA AND LEBANON: 2002 - THE YEAR IN REVIEW, http://www.lebanon.embassy.gov.au/bilateral/2002.html.

[40] AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT REGARDING COOPERATION ON PROTECTING THE WELFARE OF CHILDREN (Cairo, Oct. 22, 2000) Australian Treaty Series [2002] ATS 3, *at* http://www.austlii.edu.au/.

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AUSTRIA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Austria ratified the Hague Convention on the Civil Aspects of International Child Abduction[1] [hereinafter the Hague Convention] in September 1988,[2] and it became effective for Austria on October 1, 1988.[3] Austria made no reservations to the Convention and the implementing legislation provides effective and generous mechanisms for processing Hague Convention requests. Nevertheless, it has been alleged that refusals to return children to foreign countries frequently occur in Austria,[4] and in 2001, 2002, and 2003, the U. S. Department of State listed Austria as a non-complying country[5] on the basis of one case that in 2003, caused the European Human Rights Court to issue a judgment against Austria.[6]

I. Domestic Laws and Regulations Implementing the Hague Convention

A. Statutory Law – Implementation in General

The Austrian Implementing Act for the Hague Convention [hereinafter the Implementing Act][7] became effective on October 1, 1988, together with the Convention. The Implementing Act designates the Austrian Federal Ministry of Justice [hereinafter the Ministry] as the Central Authority[8] within the

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[1] The Hague, Oct. 25, 1980 T.I.A.S. 11670.

[2] Promulgated Sept. 14, 1988, BUNDESGESETZBLATT [BGBl, official law gazette for Austria] no. 1988/512.

[3] BUNDESGESETZBLATT [official law gazette of Germany] 1991 II at 336.

[4] A German newspaper article suggested that Austria was almost as reluctant as Germany to return abducted children [C. Brinke, *Im Zweifel für den Kidnapper,* SÜDDEUTSCHE ZEITUNG 12 (Oct. 21, 1999)].

[5] The U. S. Department of State's assessment of non-compliance [U.S. Department of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (Jun. 2003) http://travel.state.gov/2003haguereport.html (last accessed Jan. 3, 2004)] was based on one case in which the Austrian Courts refused to return a child after ordering its return on the grounds that circumstances had changed between the decision and its enforcement [Oberster Gerichtshof (OGH) decision, Oct. 15, 1996, docket no. 4 Ob 2288/96 s., 38 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG, INTERNATIONALS PRIVATRECHT UND EUROPARECHT (ZfRV) 33 (1997)].

Various diplomatic and administrative attempts were made yet these did not resolve this impasse The Austrian Ministry of Justice tried to get the parties to agree to more generous visitation rights, yet these efforts failed. The Austrian press expressed surprise at the intensity of U.S. diplomatic and administrative efforts which was viewed as an attempt to influence the Austrian courts [Kindesentführung: US-Tadel an Österreich, Die Presse (Jul. 11, 2000) http://www.diepresse.at (last accessed Jan. 3, 2004)]. The position of the United States was vindicated by the judgment of the European Court for Human Rights [*infra* note 6]. Various aspects of the case are discussed throughout this report.

[6] European Court of Human Rights, Apr. 24, 2003, Sylvester v. Austria, 2003 Eur. Ct. H. R. 36812/97 .

[7] Bundesgesetz zur Durchführung des Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung HKÜG] , June 9, 1988, BGBl. no. 1988/513.

[8] Requests are to be directed to the Federal Minister at the following address:
Der Bundesminister für Justiz
A 1070 Wien
Museumstrasse 7
AUSTRIA

meaning of article 6 of the Hague Convention and makes provisions for fitting Hague Convention requests into the Austrian administration of justice. In December 2003, the Implementing Act was amended by centralizing venue for Hague Convention proceedings in a smaller number of Districts Courts, so as to build judicial specialization and allow the judges to decide the cases faster.[9]

When a request arrives from abroad, the Ministry must first examine whether the child is located in another country, in which case the request will be forwarded in accordance with article 9 of the Convention. If it appears that the child is in Austria, the Ministry is called upon to have the request and the underlying documents translated into German, if they have been provided in a foreign language. This is done at the expense of the Austrian Federal Government. The Ministry then forwards the request to the president of the Austrian District Court [Bezirksgericht], which has venue over the case, who in turn assigns the case to the appropriate judge.

Upon receipt of the case, the judge must grant legal aid, including attorney services, to the requester, irrespective of the latter's financial circumstances. If the parties cannot be persuaded to settle on the return of the child, the judge must decide the case expeditiously in a non-contentious proceeding. In the enforcement of returns or visitation privileges, the judge may involve the youth welfare agencies, if this is deemed beneficial for the child.

The president of the District Court must keep the Ministry apprized of any steps taken in the proceeding and written explanations must be given if the proceeding is not terminated within 6 weeks. The Ministry may also ask the court and requester's counsel about the status of the proceeding.

B. Implementation by the Courts

In the past 15 years, the Austrian Supreme Court, in its role as the second and final appellate instance, has ruled on questions of law in a fair number of Hague Convention proceedings.[10] In some of these cases the Supreme Court upheld return refusals when the abducted child did not have a habitual abode in the country from where he was taken[11] and when the claiming parent did not have custody or had not exercised custody.[12] In one such case the Supreme Court had upheld a return refusal, because the mother had been awarded sole custody in Canada, the habitual residence of the child, even though the Canadian courts had ordered the mother to stay in Canada with the child.[13] These cases appear to indicate that the Austrian courts will refuse the return of the child, unless all the requirements of the Hague Convention are met. Moreover, the Austrian interpretation of the purposes of the Convention and of its

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[9] Ausserstreit-Begleitsgesetz [Companion Act to the Non-Contentious Proceedings Act]. Dec. 31, 2003, BGBl I no. 2003/112, art. 24, amending [HKÜG § 5, effective date Jan 5, 2005.

[10] The reported cases involve claiming parents from other European countries, and from Canada and New Zealand. The only reported case involving an abduction from the United States appears to be the Sylvester case, *supra* notes 5 and 6.

[11] OGH decision, Oct. 25, 2002, 44 ZfRV 98 (2002)

[12] OGH decision, Oct. 30, 2003, docket no. 80b121/03g; OGH decision, Apr. 15, 1998, docket no. 7 Ob 72/98h, ÖSTERREICHISCHE JURISTEN-ZEITUNG 667 (1998).

[13] OGH decision, Feb. 12, 1997, docket no. 35/97s, 70 ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN GERICHTSHOFES IN ZIVILSACHEN, no. 27 (1998). The Court distinguished the case from its 1992 decision [OGH, Feb. 5, 1992, docket number 2 Ob 596/91, 34 ZfRV 32 (1993)] in which a similar order by English authorities was deemed to indicate joint custody.

limits is similar to that of the German courts. In fact, German case law is frequently cited in the Austrian decisions.[14]

A few of the Supreme Court decisions deal with the exception of article 13, subparagraph (b) that justifies a refusal when the return of the child would involve the risk of grave harm. In such cases the Supreme Court has held that one of the purposes of the Hague Convention is to protect the best interest of the child by not returning him to a dangerous situation.[15] The evaluation of the facts in the individual cases is left to the courts of lower instance, and their judgments prevail unless errors of law are apparent.[16]

According to the Supreme Court, not every inconvenience or separation or minor difficulty, such as language difficulties or length of separation from the habitual residence amounts to a serious danger.[17] However, the "grave harm" exception was applicable in a case involving the claiming father's proven violence against the mother, as well as his unemployment and history of substance abuse.[18] The exception was also deemed applicable in the denial of enforcement in the Sylvester case,[19] because of the criminal prosecution of the taking mother in the state of residence, in conjunction with a custody decision over the abducted infant that was pronounced *in absentia* of the taking mother.

On visitation, the Supreme Court has ruled that Austrian domestic law governs the granting of visitation in Hague Convention requests, and that the Central Authority does not determine the extent of visitation, but merely serves to facilitate the request of the claiming parent.[20]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Best Interest of the Child

An explanation of Austrian domestic law on issues related to child care and custody may help to provide understanding of the legal environment in which Hague Convention requests are adjudicated in Austria. In particular, an understanding of the concept of the best interest of the child is essential. This concept is of overriding importance in all domestic decisions concerning children,[21] and it is possible that this philosophy may carry over into the adjudication of Hague Convention requests.

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[14] OGH decision, Feb. 12, 1997, *supra* note 13.

[15] OGH decision, May 29, 2000, docket no. 7 Ob 123/001, 42 ZfRV 30 (2001).

[16] OGH decision, Mar. 28, 2000, 41 ZfRV 186 (2000).

[17] OGH decision, Oct. 17, 2003, docket no. 1Ob246/03p.

[18] OGH decision, June 19, 1997, 38[ZfRV] 249 (1997).

[19] *Supra* notes 5 and 6.

[20] OGH decision, Jan. 18, 2000, 41 ZfRV 147 (2000).

[21] M. Schwimann, 1 ABGB PRAXISKOMMENTAR 388 (Wien, 1997); B. Verschraegen, *Das Kind "Helene," in* F. Matscher *et al.*, EUROPA IM AUFBRUCH – FESTSCHRIFT FRITZ SCHWIND 227 (Wien, 1993).

The criteria for determining the best interest of the child are expressed in the section 178 (a) of the Civil Code,[22] which translates as follows:

> In adjudging the welfare of the child, the personality and the needs of the child must be taken into appropriate consideration, in particular, his or her aptitudes, abilities, inclinations, and potential for development, as well as the lifestyle of the parents.

To determine what is in the best interest of the child, the court has to hear the child in all proceedings that involve custody, visitation, and related issues, unless the best interest of the child allows for no delay in the proceeding or the child is not capable of giving an intelligible response. Questioning can be delegated to the suitable youth welfare professional under certain circumstances, such as the questioning of a child younger than age 10.[23]

B. Child Abduction – Civil Provisions

Austrian civil law appears to have no provisions on domestic child abductions. It appears that if the court is invoked about a domestic child abduction, the ensuing decision will be a custody decision that will decide according to the governing Civil Code provisions,[24] and these emphasize the best interest of the child.

C. Custody

In July 2001, a family law reform[25] became effective that brought significant changes to Austrian custody law. Prior to that reform, joint custody was generally not possible for divorced parents.[26] Since the reform, joint custody remains in effect when parents get divorced or separate permanently. However, one of the parents must be designated as the primary caretaker, with whom the child is to reside primarily. As to all other aspects of child care, the parents may agree on a division of tasks among them, and they may also agree that only one parent should have custody.[27] The parent who is not the primary caretaker has extensive rights of visitation, as well as the right to be kept informed and to be consulted.[28]

In determining custody, the family courts play a central role. They must review the custody agreements of the parents and approve of them if they are in the best interest of the child. When a child is in an unsuitable custody situation, anyone may petition the court to remedy the situation, and a number of relatives, youth officials, as well as parents and foster parents, may petition for a change in custody.[29]

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[22] Allgemeines Bürgerliches Gesetzbuch [ABGB], June 1, 1811, GESETZE UND VERORDNUNGEN IM JUSTIZFACHE no. 946, as amended.

[23] Currently Ausserstreitgesetz [old AusserStrG], August 9, 1854, REICHSGESETZBLATT [RGBl] number 1854/208, as amended, § 182 (b), formerly ABGB § 178 (b); as of January 1, 2005, Ausserstreitgesetz [new AusserStrG], Dec. 12, 2003, BGBl I no. 111/2003], § 105

[24] ABGB §§ 145-178 (a).

[25] Kindschaftsrechts-Änderungsgesetz 2001, BGBl I no. 2000/135.

[26] H. Weitzenböck, *Die Schwerpunkte des neuen österreichsichen Kindschaftsrechts*, 54 DAS STANDESAMT 289 (2001).

[27] ABGB, § 177.

[28] ABGB, § 178.

[29] ABGB, § 176.

D. Child abduction – Criminal Provisions

The abduction of a child or a minor from the person who has custody is a criminal offense. It is punishable with up to 3 years in prison, if the child was younger than age 14, and with up to 1 year in prison if the minor is between the ages of 14 and 16. In either event, the offense can be prosecuted only upon request of the person whose custody rights had been breached.[30]

E. Visitation

The parent who does not have custody or is not the primary caretaker has rights of visitation, and the extent of these rights may be determined by the court if the parents cannot agree.[31] Since the 2001 reform of family law, visitation is viewed not only as a right of the parent, but also as also as a right of the child. The best interest of the child is to be considered in any judicial determinations, and parents have duties of good conduct,[32] the violation of which may lead to changes in visitation rights or their entire cancellation.[33]

The court may decide that visits must be supervised by an observer, of this appears to be in the best interest of the child, particularly if the child and the visiting parent have not seen each other for a long time or if there are reasons to fear that the visiting parent may behave inappropriately. Observed visits are a novelty in Austrian law, having been introduced through the 2001 Family Law Reform,[34] and practice on how these cases are to be handled may not as yet have evolved.[35]

Difficulties may also arise in the enforcement of visitation rights decisions. Whereas contempt of court measures have been available in the currently effective version of the Non-Contentious Proceedings Act,[36] it appears that the courts tread carefully when contemplating coercive measures in decisions that relate to the welfare of the child.[37]

III. Court System and Structure – Courts Handling the Hague Convention

Although Austria is a federated country, procedural law and the administration of justice are centralized in the Federation. Judicial independence is guaranteed by the Constitution which also prohibits forum shopping by requiring the courts to assign all cases to judges according to an assignment plan made in advance.[38] The Austrian court system is very specialized, providing, in addition to the courts of

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[30] Strafgesetzbuch [Criminal Code], Jan. 23, 1974, BGBl no. 1974/60, as amended, § 195.

[31] ABGB, §§ 148 and 178.

[32] ABGB, § 145 (b).

[33] Weitzenböck, *supra* note 26 at 292.

[34] Old AusserStrG, § 185c; new AusserStrG § 111.

[35] Weitzenböck, *supra* note 33.

[36] Old AusserStrG, § 19.

[37] Weitzenböck, *supra* note 33. *See also infra*, note 48 and 49 and accompanying text.

[38] Bundes-Verfassungsgesetz, BGBl. no. 1/1930, art. 87, as amended.

ordinary jurisdiction, special courts for labor disputes and administrative matters, while constitutional issues are decided by the Constitutional Court.[39]

Hague Convention requests are adjudicated by the courts of ordinary jurisdiction, in non-contentious proceedings.[40] These family court proceedings tend to be even more inquisitorial than Austrian proceedings in general, thus allowing the judge much latitude in organizing the proceeding, while requiring a less formal conduct by the parties. The judge decides what use is to be made of the youth welfare offices to provide counseling, evaluations, or other services. The judge may also call for expert testimony by child care professionals. However, in doing so, the judge must balance the desirability of investigations with the obligation to speed the proceeding as much as possible, as is provided in the Convention and the Implementing Statute. In the interest of speed, it is even permissible for the Austrian court to deny a hearing.[41]

In the past, Austrian case law justified procedural delays to protect the welfare of the child.[42] Since the judgment of the European Human Rights Court in the Sylvester case,[43] the Austrian Supreme Court, when remanding a case, has urged the lower courts to decide speedily.[44]

The chain of appeals in Hague Convention requests goes from the single judge at the local court [Bezirksgericht] to a panel of judges at the Regional Court [Landesgericht] as the first appellate instance,[45] and from there to a panel of judges at the Supreme Court as the second and last appellate instance. In appeals before the Regional Courts, new developments may be pleaded and the facts may be reevaluated. Before the Supreme Court, only questions of law are reviewed, and the Supreme Court will deny certiorari if the lower court judgment contains no errors that need to be corrected.[46]

IV. Law Enforcement System

Enforcement of final Hague Convention decisions is carried out by applying the measures provided for contempt of court in non-contentious proceedings.[47] The primary means of coercion foreseen by the statute are the issuance of orders and the imposition of coercive fines or detention. In addition, direct force may be exercised through the bailiff or the police forces. The court of execution may also involve the youth welfare agencies in effecting the return of the child or in the enforcement of visitation rights.

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[39] F. Schwind and Fritz Zemen, *Austria*, *in* I INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW A 67 (Tübingen, 1973).

[40] HÜKG § 5.

[41] OGH decision, Apr. 28, 1992, docket no. 4 Ob 1537/92, 34 ZfRV 32 (1993).

[42] OGH decision, Jun. 19, 1997, 38 ZfRV 249 (1997).

[43] *Supra* note 6.

[44] *Supra* note 17.

[45] Jurisdiktionsnorm [Court Organization Act], August 1, 1895, RGBl no. 1895/111, as amended, § 3.

[46] Currently, old AusserStrG, § 14; E. Feil, VERFAHREN AUSSER STREITSACHEN 236 (Wien, 2000); as of Jan. 2005, new AusserStrG, §§ 53 and 62.

[47] Currently old AusserStrG , § 19; Feil, *supra* note 46, at 237. Verfahren ausser Streitsachen 237 (Wien, 2000); as of Jan. 5, 2005, new AusserStrG § 110 in conjunction with its § 79.

If necessary, the court may also appoint a warden, at the expense of the non-complying party.

It appears that in the past the Austrian courts have been reluctant to use all the coercive means at their disposal when enforcing the return of a child. At least, this appears to have been the case in the Sylvester case,[48] when two attempts at enforcing the return of the child could not be carried out, because the mother could not be located. According to the new Act on Non-Contentious Jurisdiction, the courts may be even more justified in refusing enforcement, because the law now specifically states that the court my refrain from initiating or continuing enforcement if this would be detrimental to the best interest of the child.[49]

A Supreme court decision of 1996,[50] also in the Sylvester case, indicates that the welfare of the child can still be raised as an issue even after a court decision ordering the return of a child becomes enforceable. According to the 1996 holding of the Supreme Court, the local court called upon to execute the decree to return the child must first decide whether this execution would serve the welfare of the child. This decision is to be made in accordance with Austrian law, while taking into consideration the purposes of the Hague Convention. It appears that a decision refusing the return of the child at such a late stage in the proceeding must be made by the court on its own initiative if the court becomes aware of circumstances warranting such a measure. In addition, the party ordered to produce the child may also request a denial of the execution at this stage. In order to do so, the party must bring new evidence of circumstances that indicate that the welfare of the child would be seriously endangered by the execution. Such execution decisions are again appealable in two instances up to the Supreme Court.

The sequence of events in the Sylvester case was as follows: on October 30, 1995, the Austrian mother abducted the child, a 13 month old infant, from the State of Michigan, where she and the child and the father, a U.S. citizen, had been residing. The Austrian District Court ordered the return of the child on December 20, and the appellate court upheld this decision on January 19, 1996. The Supreme Court rejected the appeal on February 27, 1996, but there was a 2-month delay before the file of the case was returned to the District Court, which issued an enforcement order on May 8, 1996. The actual enforcement on May 10 could not be carried out because the mother could not be found by the bailiff.

Further court applications by the taking mother led to a decision of October 15, 1996, of the Austrian Supreme court in which the Court upheld a refusal to return the child, on the grounds of changed circumstances.[51] The lapse of time made the father unfamiliar to the child, and the increased importance of the taking mother's allegations of the father's sexual misconduct was more damaging considering the child's increased age. Further applications for the return of the child were dismissed by the District Court and Appellate Court in April and May of 1997, primarily because of the threatening criminal prosecution of the taking mother in Michigan, and the importance of a safe harbor agreement by the father was downplayed.

On April 14, 2003, the European Court of Human Rights issued a judgment against Austria[52]

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[48] *Supra* notes 5 and 6.

[49] New AusserStrG, §110, ¶ 3.

[50] *Supra* note 5.

[51] *Id.*

[52] *Supra* note 6.

holding that Austria's manner of enforcing the underlying return decision violated the claiming parent's and the abducted child's right of privacy and family life that is guaranteed by article 8 of the European Human Rights Convention.[53] The Court also awarded costs and damages for non-pecuniary suffering to the claimant. The Court held that the 2-month delay between the Supreme Court decision of February 27, 1996 and the return of the file to the enforcing District Court was inappropriate, as was the lack of action on the part of the authorities to locate the child at time of enforcement.

It should not be difficult to locate a child in Austria, because Austria is a small country and residents and visitors must report any changes in their residence or temporary abode to the local authorities. Landlords and innkeepers are required to cooperate in the observance of these legal provisions that are enforced by the Federal police, and in smaller communities, by the local administrative authorities.[54]

V. Legal Assistance Programs

As of January 1, 2005, Austria will provide legal aid for all court proceedings of claiming parents, and this assistance will include representation by an Austrian attorney, free of charge.[55] Even under current law, there appears to be little need for legal aid in Hague Convention requests, because Austria has made no reservation to article 26 of the Convention and, therefore, should be willing to bear the expenses from any administrative action and court proceedings. Moreover, Austria has provided, in the Implementing Act, that translations of documents will be made at the expense of the Austrian Federal Government and that legal assistance is provided to requesting parties at the trial stage through the assignment of a law clerk, and for appellate proceedings, through the appointment of an attorney, both free of charge to the party requesting the return of the child or the granting of visitation rights.[56]

Austria grants legal assistance to needy parties in Austrian proceedings. A party must apply for this benefit with the trial court where the case is pending and the decision on the granting of legal aid and on the extent and types of benefits to be provided is made by that court, after evaluation of the circumstances of the individual case. Legal aid benefits can be fairly extensive, covering costs directly related to the proceeding. Not included as a benefit, however, is the cost of investigative work during the pre-trial phase or in preparation of enforcement.[57]

VI. Conclusion

Austria has recently undertaken steps to improve Hague Convention proceedings. Following the controversy with the United States over the Sylvester case, Austria has drafted legislation to centralize venue in a handful of local courts and to increase the already generous level of legal assistance for claiming parents. These measures have been enacted and are scheduled to go into effect in January 2005. Following the European Human Rights Court's judgement against Austria, also in the Sylvester case, it

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[53] Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, EUROPEAN TREATY SERIES No. 5, ratified by Austria Mar. 20, 1952, BGBl no. 1958/210.

[54] Meldegesetz 1991, BGBl. no. 1992/2.

[55] HKÜG, as amended by Ausserstreit-Begleitgesetz, *supra* note 9, § 5.

[56] HKÜG, as initially enacted, § 5.

[57] Zivilprozessordnung, Aug. 1, 1895, RGBl. no. 1895/113, as amended, §§63 - 73.

appears that the Austrian judiciary aims at faster adjudications of initial decisions, appeals, remands, and enforcement orders.

It may be too early to tell what new case law will result from the 2001 Family Law Reform and the, not as yet effective, 2004 reform of family proceedings and how these will affect Hague Convention requests. In the meantime, a guess may be hazarded that Austrian courts will continue to refuse the return of a child if the prerequisites of the Convention are not met and if the return is deemed to be contrary to the best interests of the child. It is possible that in determining what is best for the child, the same high standards may be imposed in Hague Convention requests that are required by law in domestic cases. It appears moreover, the visitation cases will continue to be adjudged according to Austrian law.

Prepared by Edith Palmer
Senior Legal Specialist
March 2004

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BAHAMAS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Bahamas acceded to the Hague Convention on the Civil Aspects of International Child Abduction, [hereinafter the Hague Convention] on January 1, 1994, and the Hague Convention went into force between the Bahamas and the United States on that same date. Since then, the Hague Convention has gone into force between the Bahamas and 27 other parties as a result of declarations of acceptance by other original members and mutual declarations of acceptance by the Bahamas and other states that have acceded to the Hague Convention.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

On July 30, 1993, the International Child Abduction Act, 1993, received Royal Assent and came into force in the Bahamas.[2] Since treaties are not self-executing or automatically in force upon ratification in the Bahamas, this statute incorporates the text of the Hague Convention as a schedule to the Act. The body of the Act consists of 11 sections. In sections 2 and 3, the Minister for Foreign Affairs is designated to be the Central Authority for the purposes of the Act. Section 4 declares that the Supreme Court of the Bahamas has jurisdiction to entertain applications made under the Hague Convention, and section 5 gives it authority to issue interim orders when Convention applications are pending. Section 6 gives the Minister of Foreign Affairs authority to request reports in pending cases of the Ministries of Social Services and Health, as well as of the courts. Section 7 provides that foreign decisions or determinations in custody cases and other relevant proceedings may be proved with "duly authenticated copies." Section 8 authorizes the Supreme Court to make findings that the removal of a child from the country was wrongful under the Hague Convention, and section 9 provides for the payment by the government of membership fees. Section 10 gives the Rules Committee of the Supreme Court rule-making powers with respect to procedures, notices, authenticated copies, and other objects of the Act. Section 11 authorizes the Minister of Foreign Affairs to amend the Schedule to bring it into conformance with any changes to the Hague Convention.

The only reported amendment to the International Child Abduction Act, 1993, corrected a mistake in the original statute to add the word "may" to section 10 so that it reads "the Rules Committee may make rules for … carrying out the objects of [the] Act.[3]

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[1] *See* http://www.hcch.net/e/status/abdshte.html.

[2] 1993 Bah. Laws, No. 27.

[3] 1996 S.I. No. 38.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The International Child Abduction Act does not contain prohibitions on the abduction of children. For the applicable criminal laws, reference must be made to the Penal Code of the Bahamas. The version of the Penal Code that was in force in the Bahamas at the time that the Hague Convention entered into force for that country contains several provisions applicable to child abduction. The first of these states that "whoever kidnaps any person shall be liable to imprisonment for 10 years."[4] The Code defines "kidnapping" to include unlawfully imprisoning any person and taking him out of the jurisdiction of the Bahamian courts without his consent.[5] Because the consent of a child would be a defense to the charge of kidnapping, securing a conviction under this section can often be difficult. Therefore, in appropriate child abduction cases, the abducting parent might be alternatively charged with the crime of stealing another person under the age of 14. The Penal Code defines this crime, which is also punishable with up to 10 years imprisonment,[6] to include unlawfully taking or detaining a person "with intent to deprive of the possession or control of him any person entitled thereto."[7] However, in this case, the law also generally provides that "a person is not guilty of stealing … another person by anything that he does in the belief that he is entitled by law as a parent or guardian."[8] Thus, in cases brought against a parent for unlawfully stealing a child, it might often be necessary to show that the parent acted in defiance of a court order or other official warning that had been communicated to him.

In the case of females, the Penal Code provides that "a person is guilty of abduction of a female who, with intent to deprive of the possession or control of the female any person entitled thereto … unlawfully takes her from the lawful possession, care or charge of any person" or "detains her from returning to the lawful possession, care or charge of any person."[9] This crime is punishable with up to 2 years imprisonment. In the case of females between the age of 16 and 17, having had reasonable cause to believe the woman was 18 or older is a valid defense. The Penal Code does not contain similar provisions for the abduction of males.

B. Parental Visitation

At the date that the Hague Convention went into force for the Bahamas, section 7 of the Guardianship and Custody of Infants Act stated as follows:

> The [Supreme] Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parties, and to the wishes as well of the mother as of the father, and may alter, vary,

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[4] Penal Code, Rev. Laws Bah. Ch. 77, s. 291 (1987).

[5] *Id.* § 306.

[6] *Id.* § 292.

[7] *Id.* § 308.

[8] *Id.* § 309(4).

[9] *Id.*

> or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.
>
> The power of the court under subsection (1) of this section to make an order as to the custody of a child and the right of access thereto may be exercised notwithstanding that the mother of the child is then residing with the father of the child.[10]

This section has not been interpreted in any reported decisions from the courts of the Bahamas, but would appear to give the Supreme Court broad powers in matters respecting visitation. The available laws of the Bahamas do not indicate that section 7 has been amended since the Hague Convention went into force for the Bahamas.

III. Court System and Structure – Courts Handling the Hague Convention

As was mentioned previously, the International Child Abduction Act gives the Supreme Court of the Bahamas responsibility for hearing Hague Convention applications.[11] The Supreme Court, consisting of 12 appointed justices, is both a trial court and an appeals court for decisions rendered by the lower magistrate courts. There are 2 justices assigned to the Supreme Court in Freeport to hear cases from the Northern Region of the country.[12] The other justices are assigned to the Supreme Court in the capital region of New Providence.

Appeals of decisions of the Supreme Court justices may be heard by the Court of Appeal. The Court of Appeal, which has jurisdiction in criminal, constitutional, and civil matters, consists of six justices, but panels of three justices are formed to decide most cases. The Court of Appeal operates under a separate statute[13] and a separate set of rules from the Supreme Court.[14]

The Bahamas was a British colony until 1973. Under the terms of the independence order that established a Constitution for the Bahamas, a provision was made for retention of final appeals to the Judicial Committee of the Privy Council in conformance with the provisions of the British statutory instruments establishing that body.[15] Similar provisions in London were inserted in the Constitutions of the other Commonwealth Caribbean countries when they attained independence and for many years, the Privy Council has served as a common high court for most of the Commonwealth Caribbean countries. However, in recent years, most of the former British colonies in the region have agreed to replace the Privy Council with a Caribbean Court of Justice. At the present time, the inauguration of this court has been postponed until the end of 2004.[16] One country that appears to have decided to retain the Privy

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[10] III Bah. Rev. Laws, ch. 118, § 7 (1987).

[11] 1993 Bah. Laws, No. 27, § 4.

[12] *See* http://bahamas.gov.bs/bahamasweb/aboutthegovernment.nsf/subjects/judiciary.

[13] Court of Appeal Act, II Bah. Rev. Laws, ch. 40 (1987), as amended.

[14] Supreme Court Act, II Bah. Rev. Laws, ch. 41 (1987), as amended.

[15] Constitution, 1973 S.I. No. 1080, § 105.

[16] *Caribbean Politics: Creation of Caribbean Court Delayed Again,* Economist Intelligence Unit, Feb. 17, 2004.

Council as its highest court is the Bahamas, despite the fact that the actual number of cases that are taken from Nassau to London every year is very small. Nevertheless, as long as the Privy Council remains the highest court for the Bahamas, the possibility exists that a Hague Convention case may be appealed outside of the jurisdiction. The Privy Council usually hears cases in panels composed of British Law Lords joined by a justice of a participating jurisdiction. Since the Privy Council generally follows British precedents, the British influence in the Bahamian legal system will continue.

IV. Law Enforcement System

There are no available reported decisions in which the Hague Convention has been interpreted by Bahamian judges. However, the reports on compliance prepared by the U.S. Department of State indicate that enforcement of the treaty in that country has been a persistent problem. In the 2003 report, the Department of State wrote as follows:

> In our April 2001 report, the Bahamas was listed as a Country of Concern. Despite recent action taken to move long-standing cases forward through the courts, we do not believe that the Bahamas's performance has improved. The judicial and administrative authorities continue to fail to act expeditiously in proceedings for the return of a child as required by article 11. There are currently no open cases for the Bahamas. The case that was open previously for over [5] years has been resolved in court, and the Supreme Court ordered the child to remain in the Bahamas with the taking parent. The other case mentioned in the 2001 Compliance Report that was open for [3] years has also been resolved in the courts with the court finding return to the [United States] was not required under the Hague Convention. A case opened in December 2001 has been closed at the left-behind parent's request.

The Bahamian Central Authority is consistently non-responsive to inquiries and requests by the Central Authority in the United States as required pursuant to article 7. The Bahamian Central Authority has also been non-responsive to repeated representations by the U.S. Embassy during the past year.[17]

No information respecting any subsequent developments is currently available.

V. Legal Assistance Programs

The Hague Conference on Private International Law's status sheet for the Hague Convention does not indicate that in acceding to the Hague Convention, the Bahamas made a reservation that it would not be bound to assume any costs relating to applications resulting from the participation of legal counsel or advisers. However, whether financial assistance might be available to foreign parties seeking the return of a child abducted to the Bahamas is not clear. The failure of the Bahamas to provide legal aid in at least certain types of appellate proceedings was criticized by the Inter-American Commission on Human Rights in 2001.[18] Section 9 of the International Child Abduction Act does authorize the Government to pay out sums for the purposes of the Hague Convention, but there does not appear to be a formal scheme for private applications for such sums.[19]

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[17] U.S. Department of State, 2003 COMPLIANCE REPORT, at 10, *available at,* http://travel.state.gov/2003haguereport.html.

[18] Report No. 48/01, *available at* http://www.cidh.org/annualrep/2000/eng/ChapterIII/Merits/Bahamas12.067.htm.

[19] 1993 Bah. Laws, No. 27, s. 9.

VI. Conclusion

The Hague Convention has been fully incorporated into Bahamian law. However, although there are no reported Hague Convention cases from the courts of that country, the experiences documented in the U.S. Department of State's compliance reports indicate that officials have not processed applications with the due diligence required by the agreement. The few cases mentioned in these reports to actually be heard by the judiciary did not result in the return of children who had been allegedly abducted. Therefore, it does not seem that the Bahamas has yet established a practice of returning abducted children under the terms of the Hague Convention.

Prepared by Stephen F. Clarke
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March 2004

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REPUBLIC OF BELARUS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Belarus, which became an independent state in December 1991, is a non-member state of the Convention on the Civil Aspects of International Child Abduction, because it did not participate in the Hague Conference on Private International Law at the time of its 14th Session, as required by article 37 of the Convention. The Republic of Belarus acceded to the Convention in 1998. The National Assembly (the Parliament) of Belarus ratified the Convention on October 13, 1997, and entered into force on January 13, 1998.[1] The Convention has been entered into force between Belarus and the following countries: Argentina, Australia, Bosnia and Herzegovina, Canada, Chile, China (Macao Special Administrative Region), Colombia, the Czech Republic, Finland, Germany, Georgia, Greece, Hong Kong, Hungary, Ireland, Israel, Italy, The Netherlands, New Zealand, Norway, Poland, Portugal, Serbia and Montenegro, Slovak Republic, Spain, Switzerland, and the United Kingdom (also for Bermuda, the Cayman Islands, the Falkland Islands, the Isle of Man and Montserrat).

According to article 38 of the Convention, Belarusian accession to the Convention is effective only in the relationship between Belarus and those contracting states that have declared their acceptance of the accession. Also, the Convention entered in force between the Republic of Belarus and the following states: Brazil, Costa Rica, Malta, Moldova, Paraguay, Fiji, Trinidad and Tobago, Uruguay, and Uzbekistan. The United States has not recognized Belarusian participation in the Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

Although the Republic of Belarus acceded to the Hague Convention with the purpose of international recognition and improvement of its image on international arena, Belarus's accession to the Convention did not influence the development of the national legal system. Unlike those in other newly independent states of the former Soviet Union, the Constitution of Belarus does not provide for the priority of international obligations over domestic regulations, and the conclusion of an international agreement by the Belarus authorities does not require automatic adoption of national implementing legislation.

The basic principles of Belarusian legislation in regard to family relations and child protection are determined by the Code of the Republic of Belarus on Marriage and Family, adopted by Belarus legislature on July 24, 1999. The Code declares protection of parenthood and child's rights, the main priority of family legislation. The Code establishes that family and marriage related rights are protected by the judiciary, state authorities of guardianship and curatorship, and civil registry authorities.

Although a member of the United Nations since the creation of this organization, the Republic of Belarus has very limited experience in independent participation in bilateral and multilateral treaties. The problem of parental child abduction, especially international abductions, is not an acute problem for Belarus because of its long years of continuing international isolation, the domination of conservative Soviet traditions in family relations, the strong state interference in family relations, the absence of new legislation, and the lack of resources for enforcement of already passed laws. As of January 2003 (latest

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[1] VEDAMASTSI NATSYIANALNAGA SHODU RESPUBLIKI BELARUS [Bulletin of the National Assembly of the Republic of Belarus, official gazette] 1998, No. 18, Item 209.

data available), Belarus had no open abduction cases and received no incoming return applications. Also, the Permanent Bureau on the Guide to Good Practice of the Convention reported that it did not receive any submission or comment in regard to Georgia's participation in the Hague Convention.[2]

A major related legislative provision is included in the Constitution of Belarus; article 32 states that "marriage, the family, motherhood, fatherhood, and childhood will be under the defense of the state." The Constitution establishes that parents or persons replacing them will have the right and will be obliged to nurture children, and be concerned for their health, development, and learning. A child must not be subjected to cruel treatment or humiliation, enlisted for work which may cause harm to his physical, intellectual, or moral development." In regard to the separation of children from their families against the will of the parents and other persons replacing them, the Constitution permits such separation on the basis of a court ruling, if the parents or other persons replacing them do not fulfill their duties.[3]

The Law of the Republic of Belarus on Acceding to the Convention on Civil Aspects of International Child Abduction, adopted simultaneously with the instruments of ratification, assigns the Ministry of Justice of the Republic of Belarus to be a Central Authority, with the responsibilities prescribed in article 7 of the Convention.[4] According to implementing legislation, the Central Authority is obliged to provide general information to the applicant; however, it is not clear what kind of information and/or services are available. It appears that there is no cooperation between the Ministry of Justice and child welfare services. Belarus is a unitary state and the Ministry of Justice has jurisdiction over all the country, including all administrative provinces and regions; therefore, the Convention extends to all Belarusian territory as required by article 40. Despite the fact that Belarus established a state union with the Russian Federation in 1996, and the Union Treaty provides for equal rights of citizens of both countries and the unification of legislation as its ultimate goal,[5] presently, Belarusian international obligations do not extend on Russian territory.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

According to the Criminal Code of the Republic of Belarus adopted on June 24, 1999, parental abduction is not recognized as a crime. The Law considers as an abduction the kidnapping of a child by a person who is not child's parent or legal guardian without the consent of parents or legal guardians if it was committed for a particular purpose. The Criminal Code prosecutes the abduction or exchange of a child for mercenary purposes, or for other vile motives, and punishes such crimes by up to 5 years in prison.[6] The abduction may be open or hidden and may be the result of deceit, misuse of trust, or restraint of the child. Under the Law, a child is any person under 16 years of age. The child's consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The Law determines "mercenary purposes," as intending to receive

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[2] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Convention Status Report, *at* http://www.hcch.net/e/conventions/menu28e.html.

[3] CONSTITUTION OF THE REPUBLIC OF BELARUS. Adopted March 15, 1994, with the changes and additions enacted by referendum on Nov. 24, 1996.

[4] *Supra* note 1.

[5] *Supra* note 1, 1999, No. 32, Item 863.

[6] CRIMINAL CODE OF THE REPUBLIC OF BELARUS, art. 123.

material profits from the abduction, *i.e.*, ransom or taking a child's clothes. Base motives are those that contradict moral principles, for example, taking revenge on a child's parents. If a childless woman abducts a child with the purpose of educating him and creating a good family environment for him, such an abduction does not qualify as an abduction from vile motives.[7] However, the Criminal Code states that such action will be considered as an abduction committed under softening circumstances.[8]

Parental kidnapping is not considered a criminal offense in Belarus. Only those who abduct somebody else's child may bear criminal responsibility for a child's abduction. Hence biological and/or adoptive parents may not be prosecuted as kidnappers or child abductors. If divorced or separated parents disagree in regard to who will keep the child, the abduction of one's own child from the other parent or from an orphanage or another special institution is not considered to be an abduction under Belarusian criminal legislation. The Law also prohibits prosecuting close relatives of a child (for example, grandparents) for abduction, if they acted for the sake of the child, even if the interests of the child were misunderstood. It should be noted that the criminal legislation of Belarus does not impose punishment for removal of a child from the country or for retaining a child outside Belarus with intent to obstruct the lawful exercise of parental rights. Retainment is not considered as a separate felony.

Criminal acts such as parental child abduction occur very seldom in Belarus. If a foreigner whose home country recognizes the participation of Belarus in the Convention commits such a crime, the child is subject to return. All other cases fall under the laws of the respective state. In such cases, the Ministry of Justice of the Republic of Belarus, which was designated as a National Central Authority to discharge the duties imposed by the Convention, must cooperate with foreign authorities in order to discover the child, to prevent possible harm to the child, and to secure the child's return. Abilities of the Ministry of Justice to locate an abducted child are limited, because under Belarusian law only children who are staying without parental supervision are subject to mandatory registration with local social service agencies.[9]

B. Parental Visitation

Family legislation in Belarus is based on the 1999 Code of the Republic of Belarus on Marriage and Family. The major principle of Belarusian family law is that decisions relating to a minor should be based on his best interests; however, no specific act regulates issues related to parental visitation.

According to the Code, all children under 16 years of age are considered minors and both parents have equal rights and duties with regard to their offspring, even after divorce. In case of a dispute, a court-awarded custody is allowed to one of them. Unresolved disputes may be taken to the court. The Constitutional Court of Belarus ruled that no other institutions or authorities except the courts are eligible to decide issues related to granting custody.[10] Parents may recover custody of their children unless the court decides that this would harm the child. In accordance with tradition, custody almost always is awarded to the mother of the child; the father sometimes receives the right of access as determined by the court. However, there is no means of enforcing court decisions, and as stories in local newspapers reflect,

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[7] BULLETIN OF THE USSR SUPREME COURT, No. 2 (1974) at 10.

[8] A. LUKASHOV, COMMENTARIES TO THE CRIMINAL CODE OF THE REPUBLIC OF BELARUS, Minsk, 2000, at 365.

[9] Instruction of the Ministry of Education No. 17/03 of July 27, 2000, SBOR UKAZAU PRESIDENTA I URIADU RESPUBLIKI BELARUS [Collection of Regulations Issued by the President and Government of the Republic of Belarus], 2000, No. 51, Item 2648.

[10] Ruling of the Constitutional Court of the Republic of Belarus on the Conformity Between Part Two of Article 116 of the Code of Marriage and Family of the Republic of Belarus and the Constitution of the Republic of Belarus No. J68/98 of June 26, 1998, in JUDGEMENTS AND SEPARATE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS, 1997-1998, Minsk, 1999, at 181-183.

a father's right to visitation is often violated by mothers and other relatives who have been awarded custody of the child.[11]

Usually, in the case of the dissolution of a marriage the courts decide which of the parents should get custody of the child. If parents are absent, the issue of custody for minors will be resolved by the guardianship agencies of local public education departments. These agencies decide disputes about the exercise of family rights; have the power to deprive access to parents living at a distance depending on the interests of the child; are party to custody suits; and may commence actions that would deprive a parent or parents of their parental rights.

III. Court System and Structure – Courts Handling the Hague Convention

The structure of the judicial system in Belarus is determined by the Law on Court Organization. In Belarus, the courts consist of the Supreme Court and regional, city, and district courts of general jurisdiction. Justice is administrated by a trial of civil disputes and criminal cases. All cases are tried by a panel that consists of a professional judge and two lay assessors. A number of minor administrative infractions, as well as the majority of family matters are tried by a single judge and not by a collegiate court. The judges in Belarus are appointed by the President of the Republic, and the President may relieve them of their office.

Except for economic courts, which have exclusive jurisdiction in commercial disputes, no other special courts exist in Belarus. All cases related to the implementation of international obligations, as well as civil and family related matters, are handled by regular courts of law. As the Chief Justice of Belarus stated in his interview with the national newspaper VO SLAVU RODINY, the nation's "judicial system has not been brought nearer to the realities of contemporary life. The system has proved cumbersome, conservative, and costly."[12] The autocratic regime established by President Lukashenko completely undermined independence and further diminished the authority and significance of judicial institutions in the country. Judicial reform programs drafted in the mid 1990s foresaw the creation of specialized courts, including courts for family, juvenile, and other cases, were not implemented.

Cases of domestic child abduction occasionally are brought to the court; however, because of national traditions, such cases are usually resolved inside the families. No cases of international child abduction or application of the Convention on the Civil Aspects of International Child Abduction have been reported.

IV. Law Enforcement System

The absence of international parental abduction cases in Belarus may be attributed in large part to the influence of cultural and ideological traditions that have determined the features of Belarusian society and have prevented international marriages. Other reasons include the international isolation of Belarus and bureaucratic difficulties related to acquiring a valid travel passport for children.

International observers conclude that the enforcement of the Convention might be associated with some difficulties because of the Ministry of Justice's lack of experience in dealing with family related

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[11] A. Miasnikau, *Deti Razdora*, BELORUSSKAIA DELOVAIA GAZETA [Belarusian Business Newspaper], Mar. 17, 1999, *available at* http://www.site.securities.com.

[12] *Belarus: Supreme Court Head Views Judiciary*, via FBIS, Document ID: FTS 19971230000387.

issues.[13] Because both the Ministry of Justice and the Ministry of Education, which supervises local guardianship and curatorship agencies and whose personnel is more familiar with the related work, are empowered with the administrative authority to order the return of an abducted child, close interagency cooperation may be required.

Although the Convention is a direct implementing document, it requires the adoption of special laws by the Belarusian Parliament because the Constitution of the Republic of Belarus does not provide priority for and direct application of international legal norms. Belarusian courts have relatively little experience in dealing with the application of international legal norms and may have problems with their enforcement.

V. Legal Assistance Programs

Legal assistance in Belarus could be obtained through the attorneys licensed to practice law in this country. *Pro bono* work is also practiced by attorneys, although not widely. The best source of assistance and information are the officers of the guardianship agencies. Belarus's authorities do not accept any costs related to the implementation or enforcing of the Convention. In signing the document, Belarus made a reservation regarding the instrument of accession and declared that the state will not assume any costs resulting from the participation of legal counsel or court proceedings.

VI. Conclusion

The Hague Convention on Civil Aspects of International Child Abduction prescribes basic principles of resolution of disputes in regard to the parental abduction of children. Unlike in other participating states, in Belarus these principles did not become the basis for national legislation, and the Belarusian legal system has not yet elaborated national norms that correspond to the provisions of the Convention. The national judiciary continues to reject foreign decisions and international legal acts in favor of traditional domestic laws. The cooperation of Central Authorities of the Member States with the Ministry of Justice of the Republic of Belarus is minimal, because of the political isolation which the country has imposed upon itself. At the same time, the Convention is of great significance for Belarus, whose citizens have the right and possibility of using an internationally recognized mechanism for the return of a child in case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the countries that recognize Belarusian accession to the Convention.

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November 2003

[13] Human Rights Watch, ABANDONED TO THE STATE, Report, Brussels, 1999, at 119.

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BELGIUM

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980, was signed by Belgium on January 11, 1982. It was ratified on February 9, 1999, and entered in force for Belgium on May 1, 1999.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

In accordance with article 6, paragraph 1, Belgium has designated as Central Authority the Ministere de la Justice, Direction generale de la Legislation civile et des Cultes, Service Entraide judiciaire internationale, Boulevard de Waterloo 115, 1000 Bruxelles, Belgium.

According to the Constitution of Belgium,[2] the Convention became part of the legal system of Belgium upon its approval by Parliament, its ratification, and its publication. The courts will apply it whenever called upon to do so.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

For a decision relating to the wrongful removal and retention of a child, the competent court is the District court (Tribunal de premiere instance) where the child resides, and this court is also competent in proceedings under the Hague Convention. The proceedings are governed by the provisions of the Judiciary Code (Code judiciaire).[3]

Criminal prosecution of parents for child abduction under articles 368-371 of the Criminal Code was abolished and the articles were repealed.[4]

B. Parental Visitation

For a decision relating to parental visitation, the competent court is the District court where the child resides. This court is also competent in proceedings under the Hague Convention. The proceedings are governed by provisions of the Judiciary Code.[5]

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[1] Law of Aug. 10, 1998, on the Approval of the Convention, Moniteur Belge (MB), Apr. 24, 1999.

[2] Constitution of Belgium of Feb. 17, 1994, MB, Feb. 17, 1994, as amended, art.167, VI A, Les Codes Larcier, 2003.

[3] Judiciary Code, arts. 1322bis - 1322octies, 1034bis-1034quinquies, I, Les Codes Larcier, 2003.

[4] Law of Nov. 28, 2000, on the Criminal Protection of Minors, MB, Mar. 17, 2001, art 52.

[5] *Supra* note *3*.

III. Court System and Structure – Courts Handling the Hague Convention

General trial courts in civil matters are the District courts (Tribunaux de premiere instance), one in each territorial district. Appeal against their decisions goes to the Courts of appeal (Cours d'appel), which also have specified trial jurisdiction. Decisions of the Courts of appeal, as well as those of the District courts, are subject to annulment by the Court of Cassation (Cour de cassation) for breach of law. Trial courts in child-return proceedings, visitation, and enforcement of related orders under domestic Belgian law, as well under the Hague Convention, are the District courts.[6]

IV. Law Enforcement System

The District courts enforce their decisions. Decisions not subject to further remedy are immediately enforceable. This is done by court bailiffs and the police.

V. Legal Assistance Programs

The Ministry of Justice, Direction-General of Civil Legislation and Cults, Office of International Legal Aid, is entrusted with legal assistance under the Hague Convention. Further assistance can be obtained from the court in legal proceedings.[7]

VI. Conclusion

Belgium is in full compliance with the Hague Convention. The powers under the Convention are exercised by the Central Authority - the Ministry of Justice, as stated above, and the pertinent courts.

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January 2004

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[6] *Id.*

[7] *Id.* arts. 86 and 105.

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BELIZE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Belize was not a participant member of the Hague Conference on Private International Law at its 14th Session in accordance with article 37 of the 1980 Convention on the Civil Aspects of International Child Abduction. However, on June 22, 1989, in compliance with the stated article, it acceded to the Convention. Three months after Belize's accession to the Convention, it entered into force on September 1, 1989.[1]

At the time of filing the instrument of accession to the Convention, Belize made the following reservations to the Convention in accordance with article 42:[2]

1. Any application or other documents transmitted to the Central Authority under the Convention must be accompanied by a translation into English and not in French.

2. Belize will not be bound to assume any costs relating to applications under the Convention resulting from the participation of a legal counsel or advisers, or from court proceedings, except insofar as these costs may be covered by its system of legal aid and advice.

The Convention is in force with the following countries that have accepted the accession of Belize: Argentina, Australia, Canada, the Czech Republic, Finland, France, Germany, Greece, Hong Kong, Hungary, Ireland, Israel, Italy, Luxemburg, Mexico, The Netherlands, Norway, Portugal, Serbia and Montenegro, Slovak Republic, Spain, Sweden, Switzerland, the United Kingdom, the United States of America, and Venezuela.

I. Domestic Laws and Regulations Implementing the Hague Convention

In implementation of its obligation to enforce the provisions of the Convention within its territory, on August 22, 1989, Belize enacted the International Child Abduction Act.[3] The enactment declared that, subject to the provisions of the Act, "the provisions of the Convention set out in the Schedule to this Act shall have the full force of law in Belize."[4] As a result, the Convention became a part of the legal system of Belize. Further, the Act also entrusted the functions of the Central Authority under the Convention to be discharged by the Minister of Social Services.[5]

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[1] http://www.hcch.net/e/status/stat28e.html, art. 38.

[2] http://www.hcch.net/e/status/stat28e.html, Belize.

[3] THE LAWS OF BELIZE, v. 4, ch. 177, § 3.

[4] *Id.* § 3.

[5] *Id.* § 5 and §2(b).

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Criminal Code of Belize declares the abduction of children to be a criminal offense and prescribes punishment for those found guilty. A person who "steals" a child younger than 12 years of age, whether with or without his consent, is liable to imprisonment for 10 years.[6] Anyone who abducts an unmarried female under 18 years of age is liable to imprisonment for a period of 2 years.[7]

B. Parental Visitation

The Belize Family Court has the exclusive jurisdiction for entertaining applications in all matters relating to children under the Convention. However, in other matrimonial proceedings, including divorce, judicial separation or nullity, etc., the Supreme Court of Judicature may make such orders, with respect to the custody, maintenance, and education of the children, as may appear just in the circumstances.[8] Accordingly, parental visitation rights appear to be granted by the Supreme Court of Belize.

III. Court System and Structure – Courts Handling the Hague Convention

For the purpose of the Belize Convention, the Minister[9] for social services will be the Central Authority under the Convention, but the court having jurisdiction to entertain applications under the Convention is the District Family Court,[10] established under the Family Courts Act.[11] The court has the power to exercise jurisdiction throughout Belize. No other court has jurisdiction to deal with or try offenses or causes or matters over which the Act has conferred exclusive jurisdiction to the Family Court.[12] When an application has been made to the Belize Family Court under the Convention, that court, at any time before a determination of the application, may give such interim direction as it deems fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.[13] Therefore, for a decision under the Convention relating to parental visitation, the competent court shall be the Belize Family Court.

Before ordering the return of the child, the authority of the contracting state may direct the applicant to obtain from the authorities of the state of the child's habitual residence a decision or other

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[6] THE LAWS OF BELIZE, v. 3, The Criminal Code, c. 101, § 55.

[7] *Id.* § 56.

[8] THE LAWS OF BELIZE, v. 2. The Supreme Court of Judicature Act, c. 91, § 153.

[9] *Supra* note 3, §5.

[10] *Id.* § 6.

[11] THE LAWS OF BELIZE, v. 3, The Family Courts Act, c. 93, § 3.

[12] *Id.* § 6.

[13] *Supra* note 3, § 7.

determination that the removal or retention of the child was wrongful within the meaning of article 3 of the Convention.[14]

The Belize Family Court and the District Family Courts have jurisdiction to try or otherwise deal with offenses, causes, or matters relating to the Juvenile Offenders Act, Family Maintenance Act, Illegitimate Persons Act, and Married Persons (Protection) Act, except on matters relating to such provisions whose jurisdiction has been expressly given to the Supreme Court.[15] A judge constitutes and presides in proceedings before the Belize Family Court, which has jurisdiction throughout Belize. However, a District Family Court in each judicial district, other than the Belize judicial district, comprising no fewer than three and not more than five Justices of the Peace of that district, appointed on the basis of their knowledge and interest in family matters, constitute a District Family Court.[16]

The subordinate inferior courts are the District Courts and the "Summary Jurisdiction Courts" in each district.[17] There are two constitutional courts in operation in Belize, namely, the Supreme Court of Judicature and a Court of Appeal.[18] The Supreme Court consists of a Chief Justice and such other judges as may be appointed. The Court of Appeal consists of a President and two other judges.[19] Both of them are superior courts of record.

The Supreme Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. It also exercises appellate jurisdiction to hear appeals from decisions of Family Courts and other inferior courts.[20] The Court of Appeal is competent to hear appeals against the decisions of the Supreme Court and such other decisions of the Supreme Court, delivered in exercise of its appellate criminal jurisdiction from the decisions of the inferior courts, which involve a question of law.[21] An appeal of the decisions from the Court of Appeal may be filed before Her Majesty in Council on questions involving interpretations of the Constitution.[22]

IV. Law Enforcement System

In order to assist the Belize Family Court in carrying out its functions and to enforce its orders, the Public Service Commission appoints a number of officers as bailiffs, employees, counselors, and social workers to the court such as may be necessary for the stated purpose.[23] For the purpose of

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[14] Ch.177, Schedule, art. 15.

[15] *Supra* note 11, § 9 and the Schedule.

[16] *Supra* note 11, §§ 3 and 5.

[17] THE LAWS OF BELIZE, v. 3, The Inferior Courts Act, c. 94.

[18] THE LAWS OF BELIZE, v. 1, Const., c. 4, § 94.

[19] *Id.* §§ 95 and 100.

[20] *Supra* note 11, § 17.

[21] THE LAWS OF BELIZE, v. 3, The Court of Appeal Act, c. 90, §§ 14 and 24.

[22] *Supra* note 6, § 104.

[23] *Supra* note 18, §§ 22 & 29.

execution of their functions, all such officers of the Belize Family Court appointed to offices corresponding to those in a magistrate's court, have like powers, privileges, and immunities as are appurtenant to their offices in a magistrate's court. In case no such officers have been appointed for the Family Court, the staff of the magistrate's court in the Belize judicial district may be required to assist the Belize Family Court in the exercise of its functions. Assistance may also be available, if required, from the department of the police, for helping the above-named officers. Officers are appointed similarly in the offices of the District Family Courts for their assistance with identical duties, privileges, and immunities.[24]

V. Legal Assistance Programs

Legal service and legal aid services are predominantly centered in Belize City.[25] The center is staffed by one full-time attorney. Professional legal representation is mandatory only for murder. In all other cases, criminal or civil, access to legal representation and advice is wholly dependent on poorly resourced legal aid and the occasional pro bono work the center is able to attract from private attorneys.

VI. Conclusion

Belize appears fully compliant with the Hague Convention on the Civil Aspects of International Child Abduction. The country has made the Convention a part of its legal system and has also set up specific courts for assistance on international child abduction. Moreover, abduction of children constitutes a criminal offense under the laws of Belize. According to a report submitted to the United Nations Committee on the Rights of the Child, there have been only a few known isolated instances of illegal abduction of children in Belize.[26]

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November 2003

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[24] *Supra* note 11, § 5.

[25] http://www.belize.gov.bz.

[26] http://www.hri.ca/index.aspx.

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BERMUDA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Bermuda is an Overseas Territory of the United Kingdom. A Governor, appointed by the Queen of the United Kingdom, is responsible for the defense, police, and internal and external affairs of the country. The Governor is required to consult with the Governor's Council, which is composed of the Governor, the Premier, and two or three Cabinet Ministers nominated by the Premier. The Bermuda legislature enacts domestic laws. The United Kingdom extended the Hague Convention on the Civil Aspects of International Child Abduction[1] to Bermuda through a Note that was filed with the Ministry of Foreign Affairs in the Netherlands on December 21, 1998. The extension of the Convention to Bermuda was recognized by the United States on March 1, 1999.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Convention was implemented in Bermuda by the International Child Abduction Act 1998[2] and the Children Act 1998.[3] The Children Act 1998 was substantially amended in 2002 to "remove any distinction in law between children born inside or outside marriage …[and to] reform the law governing custody of and access to children."[4]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

There are a number of laws in Bermuda that address the issue of child abduction, ranging from criminal offenses to preventive measures. Generally, the laws of Bermuda define a child in the context of family law as being under the age of 18. However, this age varies in some criminal statutes, as well as in the International Child Abduction Act where, in accordance with the Convention, a child is defined as an individual under 16 years of age.[5]

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[1] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter "the Convention"].

[2] International Child Abduction Act 1998 : 23.

[3] The Children Act 1998 : 38, as amended. This Act also appears to be referred to as the Children and Care Services Act 1998.

[4] The Children Amendment Act 2002 : 36.

[5] *Supra* note 2, § 2.

1. The Criminal Code

The Criminal Code of Bermuda[6] provides that it is a misdemeanor to abduct an unmarried girl under 16 years[7] of age from the custody or protection of her father, mother, or any other person lawfully in charge of her. Anyone found guilty of this misdemeanor is liable upon conviction by "a court of summary jurisdiction to imprisonment for 12 months, and on conviction on indictment, imprisonment for 2 years."[8] The defense that the offender believed that the girl was over the age of 16, or that she was taken with her consent, or at her suggestion, is expressly excluded from this offense.[9]

The Criminal Code also makes it an offense to remove a child under 14 years of age from his parent, guardian, or any other person lawfully in charge of the child:

> 203(1) Any person who, with intent to deprive any parent, guardian ,or other person who has the lawful care or charge of a child under 14 years of age, of the possession of such child that
>
> > (a) forcibly or fraudulently takes or entices away or detains the child
> >
> > (b) receives or harbors the child, knowing [him] to have been so taken or enticed away or detained
>
> is guilty of a felony, and is liable to imprisonment of 4 years.
>
> 203(2) It is a [defense] to a charge or any of the [offenses] constituted by this section to prove that the accused person claimed a right to the possession of the child, or, in the case of an illegitimate child, is its mother or claimed to be its father.[10]

B. Parental Visitation

In cases of parents seeking divorce, the court in Bermuda cannot make "absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order" is satisfied that appropriate arrangements for children within the family have been made.[11]

Custody and access of children is governed by the Children Act 1998. Under this Act, the Court is bound to determine custody of, and access to, children on the basis of what is in the best interests of

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[6] Criminal Code Act 1907 : 13.

[7] *Id.* § 188. In cases where the abduction is with "the intent to have carnal knowledge" of the girl, the age is raised to 18.

[8] Criminal Code Act 1907, § 202.

[9] *Id.* § 202(2-3).

[10] *Id.* § 203.

[11] Matrimonial Causes Act 1974: 74, as amended, § 45.

the child.[12] The court can take into account the views and preferences of a child[13] and, where an application is made for an order of access to the child, the court can appoint a professional to assess and report on the "needs of the child and the ability and willingness of the parties … to satisfy the needs of the child,"[14] and bases its decision accordingly.

C. Child Access and Custody Cases Involving Multiple Jurisdictions

The Children Act 1998 provides that in cases where jurisdiction is being exercised by judicial tribunals in other states or territories, the courts in Bermuda "will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place with which the child has a closer connection."[15] As such, the courts in Bermuda will only exercise their jurisdiction if the child is habitually resident[16] in Bermuda at the commencement of the application for an order of access or custody, or in cases where the child is not habitually resident, but where:

- [he] is physically present in Bermuda at the commencement of the application
- substantial evidence concerning the welfare of the child is available in Bermuda
- no application for custody of or access to the child is pending before an overseas tribunal in another place where the child is habitually resident
- no overseas order in respect of custody of or access to the child has been recognized by a court in Bermuda
- the child has a real and substantial connection with Bermuda
- on the balance of convenience, it is appropriate for the jurisdiction to be exercised in Bermuda.[17]

The Court can, however, supersede an order,[18] or make or vary regarding the custody of, or access to, a child if the child is present in Bermuda and the court believes that the child would, on the balance of probabilities, suffer serious harm if he was to remain with the custodial parent, be returned to the custody of the custodial parent, or be removed from Bermuda.[19]

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[12] *Supra* note 4, at § 36B(a).

[13] *Id.* § 36(I).

[14] *Id.* § 36E.

[15] *Id.* § 36B(b).

[16] *Id.* § 36L(3). Removing or withholding the child in another country without the consent of the custodial parent does not alter the place of habitual residence unless there has been an undue delay in the commencement of proceedings from the custodial parent.

[17] *Id.* § 36L(1).

[18] *Id.* § 36R.

[19] *Id.* § 36M

The courts in Bermuda can also, upon application, supersede orders from an overseas tribunal if there has been a material change in circumstances that affects, or is likely to affect, the welfare of the child. A number of additional criteria must be met before the court will exercise its jurisdiction under this section, including the requirement that the child is habitually resident in Bermuda and no longer has a real and substantial connection with the place where the overseas order was made.[20]

In cases of custody and access orders made by overseas tribunals, the courts in Bermuda recognize the orders as enforceable unless:

- the respondent was not given reasonable notice about the commencement of proceedings, or an opportunity to be heard in the proceedings
- the law of the jurisdiction in which the order was made did not require the tribunal have regard to the welfare or best interests of the child
- the order of the overseas tribunal is contrary to public policy in Bermuda
- the overseas tribunal would not have had jurisdiction if it were a court in Bermuda.[21]

In cases of conflicting orders from different overseas tribunals, the courts in Bermuda recognize and enforce the order that "appears to the court to be most in accord with the welfare of the child."[22]

To avoid any conflict between custody orders and the operation of the Convention, the International Child Abduction Act provides that "when an order is made for the return of a child … any custody order relating to him will cease to have effect."[23]

The International Child Abduction Act defines the merits of rights of custody mentioned in article 16 of the Convention as "making, varying, revoking or enforcing a custody order."[24]

III. Court System and Structure – Courts Handling the Hague Convention

A. Family Proceedings Generally

The court in Bermuda that addresses family matters is the Family Court and, in certain cases, the Magistrates' Court and the Supreme Court.[25]

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[20] *Id.* § 36Q.

[21] *Id.* § 36P.

[22] *Id.* § 36P(4).

[23] *Supra* note 2, § 13.

[24] *Id.* § 11.

[25] Children Act 1998, § 2.

B. Under the Convention

The Supreme Court of Bermuda is the court specified in the International Child Abduction Act to have jurisdiction to consider applications under the Convention.[26] When an application has been made to the court under the Convention it can give interim directions either to secure the welfare of the child concerned or to prevent a change in circumstances that are relevant to the determination of the application.[27] The court can also declare that the "removal of any child from, or retention outside of, Bermuda is wrongful within the meaning of article 3 of the Convention."[28]

The Supreme Court Act 1905[29] provides that applications under the Convention are to be made by originating summons that contains:

- the name and date of birth of the child in respect of whom the application is made
- the names of the child's parents or guardians
- the whereabouts, or suspected whereabouts, of the child
- the interest of the plaintiff in the matter and the grounds of the application
- particulars of any proceedings (including proceedings out of the jurisdiction and concluded proceedings) relating to the child.[30]

IV. Law Enforcement System

The Central Authority in Bermuda is the Attorney General.[31]

The enforcement powers of the courts with respect to custody and access orders have been substantially strengthened by the Children Amendment Act 2002, providing a number of ways to enforce custody and access orders and preventive measures to stop the removal of children from Bermuda.

The Act allows the court, on application, to issue orders to restrain individuals from harassing, molesting, or annoying the applicant and the child within the lawful custody of the applicant.[32] In cases where the court believes that children are being unlawfully withheld from the custodial parent, or parent with rights of access, it can authorize the wronged party, or someone acting on behalf of the wronged party, to "apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access."[33]

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[26] *Supra* note 2, § 6.

[27] *Id.* § 7.

[28] *Id.* § 10.

[29] Rules of the Supreme Court 1985, GN 470/1985, as amended.

[30] *Id.* Order 118.

[31] *Supra* note 2, § 5.

[32] *Supra* note 4, § 36S.

[33] *Id.* § 36T.

If the court, upon application, believes that there are reasonable and probable grounds that:

- the child is being withheld from a person entitled custody of, or access to, the child
- a person prohibited from removing a child from Bermuda by a court order or separation agreement is proposing to do so
- a person entitled to access to the child proposes to remove the child from the jurisdiction and not return him

the court it can make an order directing the Provost Marshal General and/or a police officer to locate, apprehend, and deliver the child to a person named in the order.[34]

If the custodial parent fails to comply with an order from the court granting access to the child to the other parent, the court can impose conditions to ensure that the non-custodial parent has access, require the monitoring or supervising of rights of access by a children's officer, or require that the parents mediate the matters in dispute with a children's officer, or another person appointed by the court.[35]

In addition to this, to prevent the unlawful removal of children from Bermuda, the courts can, upon application, issue an order requiring a person to:

- transfer property to a specified trustee to be held on conditions specified in the order
- in cases where child support payments have been ordered, make the payments to a specified trustee
- post a bond of an amount considered appropriate by the court, with or without sureties, payable to the applicant
- deliver to the court their passport, the child's passport, and any other travel documents that the court may specify, or other individual specified by the court.[36]

If a court is satisfied that a child has been wrongfully removed to, or is being wrongfully retained in Bermuda it can:

- make an interim order for custody or access if it is appropriate for the welfare of the child
- order a party to return the child to such a place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.[37]

To prevent the abduction of children from parents during divorce proceedings, the petitioner or respondent can make an *ex parte* application to a judge for an order that prohibits the removal of a child

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[34] *Id.* § 36T(2).

[35] *Id.* § 36F.

[36] *Id.* § 36U(3).

[37] *Id.* § 36O(c) and (e).

under the age of 18 from the family from Bermuda without the leave of the court, unless terms can be specified in the order.[38]

V. Legal Assistance Programs

Bermuda has made a reservation that the costs mentioned in article 26 will not be born by any Minister or authority in Bermuda.[39] However, it provides that Legal Aid may be provided to applicants in accordance with the provisions of the Legal Aid Act 1980.[40]

The Legal Aid Act 1980 provides legal aid on a means tested basis to parties in civil proceedings and appeals, accused persons in criminal trials, and appellants in criminal appeals.[41] The basic requirement for legal aid is that the applicant have a disposable income of less than $12,000 Bermudan dollars (US$12,060) a year and disposable capital of less than $10,000 Bermudan dollars (US$10,0050). Individuals granted legal aid may be required to pay a sum of money into a Consolidated Fund if their disposable income is more than $5,000 Bermudan dollars (US$5,025) a year and they have more than $5,000 in disposable capital.[42]

VI. Conclusion

The Children Amendment Act 2002 substantially revised Bermuda's family laws concerning custody to and access of children. This Act established a comprehensive system of laws that allows the implementation of preventive measures to try and deter potential abductors from removing children from Bermuda. This system, combined with measures under the International Child Abduction Act, attempts to ensure that the welfare of the child involved is protected in all cases.

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January 2004

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[38] Matrimonial Causes Rules 1974, § 94.

[39] *Supra* note 2, § 13.

[40] Legal Aid Act 1980 : 56.

[41] *Id.* §§ 3 & 10.

[42] *Id.* § 11.

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BOSNIA AND HERZEGOVINA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Bosnia and Herzegovina, which is one of the former Yugoslavia successor states, declared its sovereignty in October of 1991, and then on March 3, 1992, declared its independence from Yugoslavia. Bosnia and Herzegovina became a party to the Hague Convention on the Civil Aspects of International Child Abduction on December 1, 1991, after ratification of the Convention by the Bosnian legislature *Skupstina* on September 27, 1991.[1] Through a letter received by the depositary, Bosnia declared itself to be bound by the Convention since August 23, 1993. Bosnia and Herzegovina is a non-Member State of the Convention on the Civil Aspects of International Child Abduction, because it did not participate in the Hague Conference on Private International Law at the time of its 14th Session as required by article 37 of the Convention, and in Bosnia the Convention applies as a result of ratification. Because no objections were received from the contracting states, it appears that Bosnian accession has been accepted by all parties to the Convention. Belarus, Costa Rica, Iceland, Georgia, Moldova, Turkmenistan, and Uzbekistan issued separate statements on acceptance of Bosnian participation in the Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

Bosnia and Herzegovina acceded to the Hague Convention with the purpose of international recognition and improving its independent image on the international arena. The issue of parental child abduction was an acute problem in post-socialist Yugoslavia with active ethnic migration, porous borders, and widely accepted inter-ethnic marriages in the pre-civil war period. Bosnia's accession to this Convention did not directly affect the development of the national legal system, because amendments to domestic civil and criminal legislation and reform of judicial institutions were conducted with the purpose of fulfilling obligations accepted by Bosnia and Herzegovina by joining European institutions and most of the European legal instruments. The Constitution of Bosnia and Herzegovina was adopted as an annex of the Dayton Peace Agreement and came into force with its signing in Paris on December 14, 1995. Although the Constitution provides for the priority of international obligations over domestic regulations and states that concluded international agreements have direct impact and do not require the adoption of additional implementing legislation,[2] the implementation of the Convention before 1997 was complicated by military conflicts and the partitioning of the Republic along ethnic lines.

The Constitution mentions the right to family life among major rights guaranteed to citizens of Bosnia and Herzegovina; however, it does not serve as a legislative basis for legislation in this field. Family law issues are included in the jurisdiction of two Bosnia and Herzegovina entities - the Bosniak-Croat Federation of Bosnia and Herzegovina and the Bosnian Serb-led Republika Srpska. Internationally supervised Brcko District is governed by the Sarajevo authorities and laws adopted by the national *Skupstina* are directly applied there. Each entity has its own Family Law. However, there are no major differences between them since all laws are modeled on the Family Law of the former Socialist Union Republic of Bosnia and Herzegovina. Bosnian family legislation regulates the rights and obligations of

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[1] SLUZHBENI LIST [Official gazette of Bosnia and Herzegovina], No. 45/91.

[2] CONSTITUTION OF BOSNIA AND HERZEGOVINA, signed Dec. 14, 1995, art. 14.

family members, marriage, and marital relations; relations between parents and children; adoption; guardianship; support; and "other forms of social and legal protection of the family." Both laws contain the identical broad definition of family, as a community of parents, children, and other relatives. Family Laws promote the equality of parents regardless of their nationality and protects the interests of all family members without any preferences. Under Family Laws, only civil marriages between two persons of different sexes registered according to the procedure established by the state are recognized. Individuals under 18 years of age are considered juveniles. Family laws of both entities are applicable legal instruments in all parental abduction cases.

Ratification instruments for the Convention on Civil Aspects of International Child Abduction assign the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina to be a Central Authority with the responsibilities prescribed in article 7 of the Convention. According to the implementing legislation, the Central Authority is obliged to provide general information to the applicant; however, it is not clear what kind of information and/or services are available. Also there is no information about further designation of authorities in territorial components forming the state of Bosnia and Herzegovina.

Another legal act related to aspects of parental abduction is the Law on Travel Documents.[3] This legislation is intended to serve as the deterrent to the potential abductor. The law states that the petition for the issuance of documents allowing travel abroad for a person under 18 years of age should be submitted by the minor's parent with written consent of the other parent or child's legal representative. The law enumerates exclusions from this rule, such as unknown residence of the other parent, impossibility to reach him by passport authorities, among others. As a rule, juveniles are listed in the parent's passport. Persons who are 16-18 years of age may have their own passport for individual travel.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Criminal Codes of all components of Bosnia and Herzegovina contain provisions punishing the abduction of minors regardless of the reasons and not applying measures for the protection of juveniles.[4] All three Codes say:

> Whoever takes or keeps a juvenile away from the parents, adoptive parents, guardian or person/institution to whom/which juvenile has been entrusted, who holds or prevents him from being with the person who is entitled to him, or who prevents the execution of a court decision entrusting the child to somebody should be punished by imprisonment.

The term of imprisonment varies from 1 to 2 years depending on the territory where this crime was committed. Stricter punishment is prescribed if the abduction was committed for the purpose of acquiring material gain or for other low motives, or has caused serious detriment of health, education, or schooling of the juvenile. In all cases of abduction the court is obliged to order the submission of the abducted juvenile to the person or institution designated to take care of him. The child's consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The voluntary surrender of the juvenile to a person or institution to which

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[3] SLUZBENI LIST, No. 4/97 & 1/99.

[4] *Id.*, No. 20/98, 6/00 & 31/00.

the juvenile had been entrusted may be a basis for acquittal. The legal protection of juveniles and enforcement of juvenile related court rulings is provided by criminal law also. Taking measures preventing educational and other measures pronounced by the court or other institution in charge of protecting juveniles is considered a crime and is punishable by imprisonment for up to 1 year.

Parental abduction is one of the categories of disappearance of children under Bosnian police classification. Although it is treated as a criminal offense of abduction of a juvenile, it is not included in the list of criminal offenses, which are recognized as felonies threatening child's health and safety, and therefore requires less urgent and intensive search and rescue activities. Existing criminal procedure does not provide for the possibility to announce a child abducted by a parent as a missing person publicly. Because Bosnian Central Authority under the provisions of the Convention is the Ministry for Civil Affairs dealing mostly with the issues of social security and public welfare, there is weak cooperation between the Central Authority and police in case of international parental abduction of children.

B. Parental Visitation

The major principle of Bosnian Family Law is that decisions relating to a minor should be based on his best interests. No specific act regulates issues related to parental visitation. Under Family Laws of Bosnian Constituent Components, both parents have equal rights and duties in regard to their children. In the case of divorce, however, the court will decide the issue of custody over children. Even in cases where spouses have reached an agreement over this issue, the court must in every case reconsider whether such an agreement is in the best interest of the child. To that end, the court will take into account the report of the social service competent to make suggestions on custody over children and to suggest certain evidence that could be necessary to reach a proper decision. In practice, however, it is very rare that the social service gets really involved in the way in which the Law anticipates it. A survey of 100 cases in one municipality in Sarajevo has shown that, only in five cases, the social service replied to the court request to get involved in the proceeding.[5]

It is up to the court to decide that one parent has custody over all children; that some children remain with the mother and others with the father; or that a third person or an institution gets custody over the children if that would be in their best interest. In deciding on the best interest, practice shows that most often the court takes into account the children's age and health status, family, economic and housing situation, moral qualities of parents and their ability to properly raise children, as well as the emotional attachment between a parent and children. The will of a child is taken into account if a child is capable of expressing it. In a recent case of regarding the incoming return application under the provisions of the Convention, Bosnian court on the basis of article 13 of the Convention refused the application citing the objections of a child under the age of 5. That was the only case in the Convention's application where the objections of a child under the age of 5 were considered.

A parent who does not have custody over a child does not exercise parental rights, but has a right to maintain contacts with a child, follow the development of a child, and influence that development. However, the details on these contacts are not part of the court's decision, which often creates problems in practice. It is not rare that parents use children in order to harm a former spouse by preventing contact and by excluding the former spouse from decisions over the child's development.[6]

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[5] South Eastern European Women's Legal Initiative. Family Law Report: Bosnia & Herzegovina, *available at:* www.seeline-project.net/FamilyLaw.htm.

[6] Women's Legal Services Network. Family Law Project. 2002 World Report: Bosnia & Herzegovina *at* www.naclc.org.au.

III. Court System and Structure - Courts Handling the Hague Convention

The structure of the judicial system in Bosnia and Herzegovina is determined by the Law on Court.[7] The judiciary is built upon the courts of general jurisdiction, which rule in all disputes except in those where the law explicitly determines jurisdiction of another court. There are no special family courts in Bosnia and Herzegovina. Family relations, as defined in the Family Law, fall under the jurisdiction of regular courts of the first instance, that is, municipal courts. There are 10 cantonal courts in the Federation, plus a number of municipal courts; the Republika Srpska has five municipal courts. Courts of general jurisdiction are organized hierarchically in three instances and are divided into entities. Lower courts are municipal courts, which serve as courts of first instance in civil and criminal cases. Most of the cases are tried by a single professional judge. Single judges, or panels of three judges, depending on the case administer cases in cantonal courts, which are almost exclusively second instance courts and courts of appeal. Each entity has a Supreme Court, which is the court of full jurisdiction with respect to court decisions and it can void, confirm, or revise them. The highest court in Bosnia and Herzegovina is the State Court, which consists of nine judges and three divisions - administrative, appellate, and criminal. This Court has jurisdiction over cases related to national level law and appellate jurisdiction over cases initiated in the entities.

IV. Law Enforcement System

Cases of parental child abduction rarely are brought to the courts. Bosnian courts have relatively little experience in dealing with the application of international legal norms and may have problems with their enforcement. It appears that courts favor those Bosnian nationals who reside in the territory of Bosnia and Herzegovina; however, the small number of cases is not enough to draw significant conclusions. During the first 10 months of 2003 (most recent data available), the responsible authorities of Bosnia and Herzegovina received three incoming return petitions under the Convention.[8] No incoming access or outgoing return applications were filed. In applications to Bosnia all the taking persons were male and had Bosnian nationality, which contradicted to the global trend. There was one voluntary return and two judicial refusals. Both applications were refused on the basis of article 13 of the Convention, which requires taking into consideration the consent and objections of the child in question. In one case, the opinion of a child who was under the age of 5 was used as a ground for refusal. Court rulings were not appealed. Although all three applications were resolved quickly in just over a 3 week period, this fact does not mean that the enforcement of the Convention is free from difficulties. The Ministry of Civil Affairs and Communications, which is designated to be the nation's Central Authority, lacks experience in dealing with the legal resolution of family related disputes and the cooperation with police and judicial authorities is almost nonexistent.[9]

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[7] *Supra* note 1, No. 24/02.

[8] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Convention Status Report, *at* http://www.hcch.net/e/conventions/menu28e.html, visited Nov. 24, 2003.

[9] *Id.*

V. Legal Assistance Programs

Legal assistance in Bosnia and Herzegovina could be received through private attorney offices or legal consulting firms. Fees for legal services are determined by mutual agreement. *Pro bono* work is not widely practiced by attorneys. The Sarajevo University and some other provincial law schools are in the process of organizing legal clinics. In 1993, Bosnia and Herzegovina ratified the Convention on International Access to Justice of 1980. Under this Convention, nationals of any contracting state are entitled to legal aid for court proceedings in civil and commercial matters in each contracting state on the same conditions, as if they themselves were nationals and habitually resident in that state. As a contracting state, Bosnia and Herzegovina is bound to carry out necessary administrative measures or to take such steps as are necessary to obtain the determination of applications for legal aid by a competent authority.

The Ministry of Civil Affairs and Communications remains, probably, the best source of assistance and information; however, the Ministry's assistance can be rather administrative. There is no webpage, brochure, or similar materials containing the information or advice on measures available to parents prepared by the Ministry.

VI. Conclusion

The Hague Convention on Civil Aspects of International Child Abduction prescribes basic principles of resolution to disputes in regard to the parental abduction of children. In Bosnia and Herzegovina principles of the Convention helped to amend national legislation and to reform the judiciary, although the Bosnian legal system has not yet elaborated national norms that correspond to the provisions of the Convention. The national judiciary continues to favor Bosnian citizens. The cooperation of Central Authorities in the Member States with the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina is not as effective as it could be expected, because of the lack of cooperation between this administrative agency, courts, and enforcement authorities, and the difficulties with the access to information on how to apply the Convention's provisions. At the same time, the Convention is of great significance for Bosnia and Herzegovina, whose citizens have the right and possibility of using an internationally recognized mechanism for the return of a child in the case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the countries that participates in the Convention.

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January 2004

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BRAZIL

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction was adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law.[1] Brazil[2] acceded to the Convention on October 19, 1999, effective January 1, 2000. Decree No. 3413/00[3] promulgated the Convention in Brazil on April 14, 2000. Other parties to the Convention have accepted the accession of Brazil, and the Convention has gone into force between Brazil and other 38 members.[4] The United States of America accepted the accession of Brazil to the Convention on September 29, 2003, effective December 1, 2003.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Brazil is the Secretariat of State on Human Rights (*Secretaria de Estado dos Direitos Humanos*) of the Ministry of Justice.[5] Decree No. 3951/01,[6] effective January 7, 2002, provides for the competence and powers of the Secretariat, and it also creates the National Program for Cooperation on the Return of Internationally Abducted Brazilian Children.[7]

A. Return Requested From Abroad

The Central Authority has only administrative and informational competence, as established by Decree 3951.[8] Brazilian Courts decide the cases of parental kidnapping and the return and visitation schedules for abducted children.

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[1] Brazil became a Member of the Hague Conference on Feb. 23, 2001, *available at* http://www.hcch.net/e/members/signrat_br.html.

[2] Decree-Law No. 79 of Sept. 15, 1999, *available at* http://convencaodehaia.com/juridico/decreto_79.htm.

[3] Decree No. 3413 of Apr. 14, 2000 *in D.O.U.* of Apr. 17, 2000. The instrument of accession contains a reservation provided for in art. 1 of the Decree: "(…) with a reservation as provided for in art. 24 of the said Convention (permitted under art. 42), to the effect that foreign documents appended to legal instruments must be accompanied by a translation into Portuguese done by a sworn translator," *available at* http://www.hcch.net/e/status/stat28e.html#br.

[4] Countries where the Agreement is in force with Brazil as of Feb. 2004: Argentina, Australia, Austria, Belarus, Canada, Colombia, Chile, China (Macao Special Administrative Region only), El Salvador, Estonia, Finland, Germany, Guatemala, Hungary, Ireland, Israel, Italy, Latvia, Luxembourg, Mexico, Moldova, Netherlands (for the Kingdom in Europe), New Zealand, Nicaragua, Norway, Panama, Peru, Poland, Portugal, Serbia and Montenegro, Slovak Republic, Spain, Sri Lanka, Sweden, Switzerland, Trinidad and Tobago, the United States of America, and Uzbekistan. This information is available at http://www.hcch.net/e/status/stat28e.html#br.

[5] Located at Esplanada dos Ministérios, Bloco T, 4º andar, sala 420, 70064-900, Brasilia. Tel.: + 55 (61) 429-3454/ 255-0906; Fax: + 55 (61) 223-2260; E-mail: direitoshumanos@mj.gov.br. This information is *available at* http://www.hcch.net/e/authorities/caabduct.html#br.

[6] Decree No. 3951 of Oct. 4, 2001 *in D.O.U.* of Oct. 5, 2001.

[7] *Id.* art. 4.

[8] *Id.* art. 2.

The application for the return of an abducted minor to Brazil must be directed to the Brazilian Central Authority, which will, upon receipt of the return application, analyze and verify all the information and decide whether it complies with the requirements provided for under the Convention. Because the activities of the Central Authority are informational and administrative only, a lawyer will be necessary for the judicial request, and the Central Authority must take the necessary measures in order to facilitate public funded assistance to those in a need of legal aid.[9]

The Central Authority must take the necessary precautions closely with the Federal Police of the Ministry of Justice, through the division of the International Criminal Police (Interpol), to assure the location and the return of a minor illegally taken to Brazil.[10]

B. Return Requested from Brazil

If the Central Authority receives an application, which meets all the requirements under the Convention, from a requester parent, it will send the return or visitation petition to the Central Authority of the requested country, which will act under its own procedural norms. Under the Convention, the courts of the requested country must order the immediate return of the minor to his country of origin.

According to Decree No. 3951/01, the Brazilian Central Authority must take the necessary precautions, jointly with the Ministry of the Foreign Affairs of Brazil and with the Federal Police, through Interpol, for the safe return of Brazilian minors illegally taken out of the country.[11]

There is no central police file to report cases of missing children in Brazil.[12] State Police (at the regional level) and Interpol (at the international level) are the responsible authorities to take actions in cases involving missing persons. If there is no substantial proof that a minor has been taken abroad from his residence, the abduction must first be reported at the regional level (State Police), and it will be reported internationally (to Interpol), only a year later. If such proof exists, the case is directly reported to Interpol.[13]

Brazil has also become a member to the Inter-American Convention on International Return of Children,[14] adopted in Montevideo, Uruguay, on July 15, 1989, and ratified by Brazil[15] on May 3, 1994. The purpose of this Convention is to secure the safe and prompt return of a child,[16] whose permanent

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[9] *Supra* note 6, art. 2.VII.

[10] *Supra* note 6, art. 2.V.g.

[11] *Supra* note 6, art. 2.IX.

[12] *In* Legislation of Interpol Member States on Missing Children – Brazil, Section III - Means of investigations, *available at* http://www.Interpol.com/Public/Children/Missing/NationalLaws/mcBrazil.asp.

[13] *Id.*

[14] Convenção Interamericana sobre Restituição Internacional de Menores. The full text of the Convention in English is *available at* http://www.oas.org/juridico/english/treaties/b-53.htm.

[15] Decree-Law No. 3 of Feb. 7, 1994, *available at* http://www.mp.rs.gov.br/hmpage/homepage2.nsf/pages/DLF03.

[16] *Supra* note 14, art. 2. Note that a child must be younger than 16 years of age under this Convention.

residence is in one of the Member countries[17] and who has been wrongfully removed from one Member country to another or who has been lawfully removed, but has been wrongfully retained. It also provides for the enforcement of visitation and custody rights.[18] In addition, article 34 of the Convention states that in cases involving Members of the Organization of American States (OAS) that are also Members to this Convention and to the Hague Convention on the Civil Aspects of International Child Abduction, this Convention must prevail, unless stated otherwise through bilateral agreements between the parties.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The Federal Constitution of Brazil[19] and Law No. 8069/90[20] (the Statute of Children and Adolescents (ECA)) are the main pieces of legislation regarding the protection of children's rights in Brazil. The Constitution provides that one of the purposes of the social assistance in the country is to protect underprivileged children and adolescents,[21] and it also sets forth that the protection of children must occur through government incentives, in accordance with the law.[22]

The ECA regularizes the constitutional rules on the guarantee of children's rights in the country, emphasizing the basic rights of children[23] and adolescents,[24] such as the right to be raised and educated among the child's family (and in some cases, in a substitute family)[25] and the right to have the support of both parents for the custody and education of their young child.[26]

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[17] Member countries to this Convention are: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay and Venezuela; http://www.oas.org/juridico/english/sigs/b-53.html.

[18] *Supra* note 14, art. 1.

[19] C.F., *Constituição Federal Anotada,* Ivo Dantas, *2ª ed. revista e aumentada, Editora Renovar*, Rio de Janeiro, Brasil, 2002, article 5.XXVII. For the official full text of the Federal Constitution of Brazil online, *at* https://www.planalto.gov.br. The English version of the Constitution is available at http://www.senado.gov.br/bdtextual/const88i.pdf.

[20] Law No. 8069 of July 13, 1990, as amended *in D.O.U.* of July 16, 1990. ECA - *Estatuto da Criança e do Adolescente Comentada,* Munir Cury, Antônio Fernando do Amaral e Silva e Emílio Garcia Mendez, ª ed. revista e atualizada, Malheiros Editores, Brazil, 2002. For the official full text of the ECA online, *at* https://www.planalto.gov.br. For the English version of the ECA, *see* http://www.mj.gov.br/sedh/ct/conanda/ecaingles.htm.

[21] *Supra* note 19, art. 203.II.

[22] *Id.* art. 227.3.VI.

[23] *Supra* note 20, art. 2. Note that under this Law, a child must be under 12 years of age.

[24] *Id.* Note that under this Law, an adolescent must be between 12 and 18 years old.

[25] *Id.* art. 19.

[26] *Id.* art. 22.

A. Child Abduction

Under the Brazilian Penal Code,[27] the punishment for any person who takes and keeps a minor[28] from the control of his parents or guardian, or from any other person in charge of him, is imprisonment from 2 months to 2 years.[29] Any parent who takes and keeps the child away of the control of the other parent, who has been judicially assigned the custody of the child, is also committing a crime.[30] The judge may, however, decide not to apply the penalties provided for in this article in case the child has been returned to his residence with no evidence of bad treatment during the period of abduction.[31]

Law No. 8242/91[32] created the Conselho Nacional dos Direitos da Criança e do Adolescente (CONANDA)[33] in an effort to increase the protection of children's rights and fight child abduction in Brazil. The ECA does not provide for a classification of missing children categories, and according to Interpol,[34] cases of parental abductions are considered in Brazil to be cases of missing children, and therefore, statistics are sometimes misleading, because other cases of missing children, such as abduction by unknown persons, may be included in the available data in Brazil. The Ministry of Justice[35] reports that although it is very difficult to predict the real number of missing persons[36] in Brazil, it estimates that there are 10,000 cases annually involving missing children and adolescents.

B. Parental Visitation

The Brazilian Civil Code[37] and the ECA[38] establishes that minors are under the supervision of their families (paternal power),[39] and that both the father and mother may exercise such power under equal conditions. Usually a custody agreement is reached at the time of the separation of the parents. However, in case of disagreement between the parents, both the father and mother may turn to the proper judicial

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[27] C.P., *Código Penal,* 8ª *Ed. atualizada até 01.01.2003, Ed. Revista dos Tribunais - RT*, São Paulo, Brazil, 2003. For the updated and official full text on-line of the Brazilian Criminal Code, see https://www.planalto.gov.br.

[28] *Id.* Also note that a minor under the C.P. is considered to be a person who is less than 18 years old.

[29] *Id.* art. 249.

[30] *Id.* art. 249.1.

[31] *Id.* art. 249.2.

[32] Law No. 8242 of Oct. 12, 1991 *in D.O.U.* of Oct. 12, 1991.

[33] CONANDA, more information is *available at* http://www.mj.gov.br/sedh/ct/conanda/abert_conanda.asp.

[34] *Supra* note 12, § I.

[35] *Infra* note 61.

[36] *Id.* Note that, although there are some specificities on the categories of missing children *available at* http://www2.mj.gov.br/desaparecidos/frmMenu.aspx, no specific data for cases of parental abduction alone have been found.

[37] C.C., *Código Civil Anotado e Legislação Extravagante*, Nelson Nery Junior and Rosa Maria de Andrade Nery, *2ª ed. Revista e ampliada*, atualizado até 02.05.2003, Ed. REVISTA DOS TRIBUNAIS – RT, Sao Paulo, S.P., Brazil, 2003. For the official full text of the Civil Code of Brazil online, *at* https://www.planalto.gov.br.

[38] *Supra* note 20, art. 21.

[39] *Supra* note 37, art. 1630.

authority to solve the disagreement,[40] in which case the best interest of the child must prevail, and the physical custody of the minor, assigned to one or both parents, may be determined by the competent judge.[41]

The Civil Code, in article 1584, states that if no agreement was reached with regard to the custody of the minor, the judge must determine the custody rights, taking into consideration the person who will be able to provide for the best environment and conditions for the development of the child. The visitation rights may be modified at any time by the competent judge, as long as there is a well-founded judicial act, and the Office of the Attorney General has been heard.[42] Such a modification must represent the best interest of the child,[43] and it must account for the best environment for the social and physical development of the minor as well.[44]

III. Court System and Structure – Courts Handling the Hague Convention

Brazil is a federated republic, with a civil law system, and according to article 92 of the Constitution, its judicial powers are vested in the Federal Supreme Court (*Supremo Tribunal Federal* – (*STF*)), in the Superior Court of Justice (*Superior Tribunal de Justiça* (*STJ*)), in the Federal Regional Courts of second and first instance, as well as in the Special Courts (Labor, Electoral and Military) of second and first instance. The sole paragraph of this same article states that the STF and the STJ have their seat in Brasilia (Federal Capital) and their jurisdictions over the entire Brazilian territory.

The Constitution defines the competency of the Federal Courts in articles 106 - 110. In the first instance, the federal judges act in the Judicial Sections (*Seções Judiciárias*), with seats in the capital of each state of Brazil, as well as in some states, the Federal Courts of first instance (*Varas Federais*), with jurisdiction over specific municipalities. The second instance, with 5 Federal Regional Tribunals (*Tribunais Regionais Federais* (*TRFs*)), located in Brasilia, DF; Rio de Janeiro, RJ; Sao Paulo, SP; Porto Alegre, RS; and Recife, PE, oversees the first instance.

When Brazil is the requested country under the Convention, and there is no voluntary return of the minor, the competent courts for the return proceedings are the Federal Regional Courts of first and second instance.[45] Before Brazil became a party to the Convention,[46] judicial petitions were decided by the ordinary State Courts (Family Courts) in Brazil.[47]

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[40] *Supra* note 37, arts. 1631 – 1634.

[41] *Id.* at 717, *Joint Custody, Superior Tribunal de Justiça* - STJ 101, and STJ 102.

[42] *Supra* note 20, art. 35.

[43] *Supra* note 41, and RT 685/139.

[44] *TJSP* – 1ª Cam. Cível, Emb. Infr. No. 59912 – Sao Caetano do Sul, Relator: Des. Rangel Dinamarco, j. 09.09.1986. Also *available at* http://www.pailegal.net/textoimprime.asp?rvTextoId= -236521748.

[45] *Supra* note 19, arts. 108.II and 109.V. Also, additional information is *available at* http://www.cjf.gov.br/Institucional/Inst_JF.asp.

[46] Effective in Brazil on Jan. 1, 2000.

[47] In STJ, CC 63/PR No. 1989/0007159-9, Rel. Min. Jesus Costa Lima, DJ of Sept. 11, 1989, where it was decided that under conflict of court competence, if Brazil had not yet signed the Hague Convention on the Civil Aspects of International Child Abduction, the State Court was the competent court in Brazil to decide the case of international child trafficking and abduction. Decision *available at* http://www.oabsp.org.br/lexonline/default_fr.html.

In 2001, the judge of the Federal Court of Santos granted the first court decision[48] in Brazil under the Convention that called for the return of a child to his habitual residence in Sweden, making it a leading case in the matter in the country.[49] The parents of the child lived in Brazil until January of 1996, and the child was born in September 1991 in the city of Santos, Brazil. The couple separated in 1999 under the laws of Sweden, their country of residence at the time. The alternate custody rights of the child were granted to both parents under the Swedish legislation. In 2000, mother and the 9-year old child traveled to Brazil with authorization from the father. However, the mother retained the child in Brazil after the expiration of the authorized travel period, ignoring the custody decision already established by the Swedish court. The father of the child filed a judicial return petition before the Brazilian court on the grounds of the Convention, informing the Brazilian judge of the custody decision determined by the competent court in Sweden.

The Brazilian federal judge granted a verdict favorable to the return of the child to the country of his habitual residence (at the time of his removal), and the decision considered that the retention of the child in Brazil by his mother was illegal, applying articles 3 and 4 of the Convention. The child returned to Sweden on the same day that the federal judge issued the court order to return the child (June 23, 2001). No records of appellate remedies have been found in this case, and no records of other cases in the appellate level have been found at this time.

IV. Law Enforcement System

To locate children and to secure and enforce orders, the Central Authority, as well as the Judicial Courts, have requested the assistance of the local police[50] and Interpol. Both play an important role in the prevention of child abduction and the protection of children's rights.

In an effort to prevent international child abduction, the Brazilian government requires valid documentation to identify the minors and the persons who are accompanying them in and out of the country, as well as judicial authorization under special circumstances.

The ECA emphasizes that only when the minor is accompanied by both parents, or by the guardian,[51] or if traveling with one of the parents, with the express authorization of the other (stated in a document that holds the official signature of the absent parent),[52] the authorization to travel abroad may be granted. Also, a minor that was born in the national territory of Brazil may only leave the country with express judicial authorization, if in company of a foreign resident or a person domiciled abroad.[53]

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[48] Decision *available at* http://convencaodehaia.com/juridico/retornoasuecia.htm and at http://www.conjur.com.br, *in Retorno à Suécia – Direito de guarda paterna não deve ser violado, Revista Consultor Jurídico,* of July 17, 2001.

[49] For more information on this subject, see http://www.convencaodehaia.com/juridico/haia_01.htm.

[50] *Supra* note 12, "Some Brazilian States have police departments responsible for missing people which includes children, adolescents, and adults. Others have specialized service in locating missing children. An example of it is the Parana State Police Department's service called SICRIDE "Serviço de Investigação de Crianças Desaparecidas" (missing children investigation service), which acts exclusively on missing children's case from newly born to 12 years old." Additional information on this issue may be found in the same document.

[51] *Supra* note 20, art. 84.I.

[52] *Id.* art. 84.II.

[53] *Id.* art. 85.

If Brazilian judicial courts issue a prohibition for the child or adolescent to leave the country, all cross-border authorities are advised of such a determination.

V. Legal Assistance Programs

The Constitution of Brazil establishes that "the state shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds"[54] and that "the Public Legal Defense is an essential institution to the jurisdictional function of the state and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV."[55] Also, according to the ECA, article 206 states that "full and gratuitous judicial assistance will be rendered to all in need of it," and article 111.IV states that the adolescents are ensured, among other things, "gratuitous and full legal assistance to those in need, according to the terms of the law."

Law No. 1060/50[56] establishes rules for the concession of judicial assistance to those in need in Brazil. The Law determines in article 4 that legal assistance must be provided for the person who demonstrates the need for legal aid simply through an assertion in the initial petition that he cannot afford to pay for the legal expenses and lawyer's fees without affecting the financial ability to support his own family. Under the Law, those who affirm such a condition, until it is proven contrary, are considered to be under this needy status.[57] Article 5 establishes that the judge must decide the legal aid request within a period of 72 hours, and if the state does not have judicial assistance available, the Brazilian Bar Association (through its regional sections) will be responsible and designated by the judge to provide for such legal aid.

The Federal Court Council (*Conselho da Justiça Federal - CJF*) designated the gratuitous legal assistance in the Federal Courts of first instance through Approval No. 210/81.[58] The Approval determines that the Direction of each Judicial Section (*Seção Judiciária*) of the Federal Courts organizes the lists of lawyers annually for each respective section of the Brazilian Bar Association to provide pro bono services to needy persons.

The Brazilian Bar Association and the State of Brazil provide for gratuitous legal assistance to those in need of it, and such aid may be provided for any type of legal question or judicial battle, as long as proof of financial necessity is demonstrated. For instance, the Brazilian Bar Association, Sao Paulo Section, has a Legal Assistance Committee[59] that may be reached through assistencia.judiciaria@oabsp.org.br, and has a comprehensive set of information on the issue, including legislation, and other assistance programs available through it.

It appears that there is no current partnership or agreement available between the Central Authority and any other institution in Brazil with regard to legal assistance programs at this time. However, under

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[54] *Supra* note 19, art. 5.LXXIV.

[55] *Id.* art. 134.

[56] Law No. 1060 of Feb. 5, 1950 in D.O.U. of Feb. 13, 1950, as amended, *available at* https://www.planalto.gov.br.

[57] *Id.* art. 4.1

[58] CJF Approval No. 210 of May 28, 1981; *available at* http://www.cjf.gov.br.

[59] *See* http://www.oabsp.org.br/comissoes/comissoes.asp?id_comissao= 15&opcao= 3.

its administrative and informative roles, the Central Authority may promptly direct interested persons to the available legal assistance sources in the country.

A. Information Resources

There is no national system[60] in Brazil that supports parents in their search for their missing children. There are, however, visible government and private-oriented efforts on the matter.

There is a Federal Government website,[61] where official placement information of missing children is possible, which is later submitted to the Specialized State Police Departments in the country. The Sector of Missing Kids (*Setor de Crianças e Adolescentes Desaparecidos*),[62] a service of the State Secretariat of Social Assistance and Development of the State of Sao Paulo,[63] in partnership with *Computer Associates do Brasil (CA)*, focuses on family reintegration of missing children, as well as provides for information and parental orientation through specialized professionals to prevent child abduction. The Sector is also structured to provide parents of missing children with digitally enhanced photos that show how their child would physically age, in order to assist in the search. The website works on an integrated basis with Missing Kids websites in more than 10 countries, and it receives, on a daily basis, more than 2 million visits.[64]

The State Secretariat of the Social Action (*Secretaria do Estado de Ação Social* (*SEAS*)) of the Government of the Federal District of Brazil maintains a service called *SOS Criança*,[65] which functions 24 hours a day, 7 days a week through a hot line (61) 346-1407 that receives information on alleged cases of children's rights violations in the Federal District. The *SOS Criança* receives around 800 calls per month, including around 5 missing children calls per month.[66]

Non-profit organizations also play an important role as a complementary source in the fight against violation of children's rights. NGOs, such as *Mmes. da Sé*,[67] located in the city of Sao Paulo, have been dedicated to fighting child abduction for many years, and there is comprehensive information available in their website for parents of missing children.

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[60] With the support of the Ministry of Justice, the Special Secretariat of the Human Rights, through its Sub-secretariat of Promotion of the Children's Rights and Adolescents, is implementing the National System of Identification of Missing Children and Adolescents (*Rede Nacional de Identificação e Localização de Crianças e Adolescentes Desaparecidos*), *available at* http://www2.mj.gov.br/desaparecidos/.

[61] This website www2.mj.gov.br/desaparecidos was created in Dec. 2002.

[62] *See* http://www.missingkids.com.br.

[63] The SEADS is located at Rua Guaianazes, 1.385 – Térreo – Campos Elíseos, São Paulo, S.P., Brazil.

[64] Information *available at* http://www2.uol.com.br/JC/_1998/2609/if2309z9.htm. Also, *in Cresce o número de sites para encontrar desaparecidos*, Jan. 7, 2003, *availabel at* http://idgnow.terra.com.br/idgnow/internet/2003/01/0009.

[65] Located at *Via L2 Sul, SGAS 614, lote 104, Brasília.*

[66] *Supra* note 62.

[67] *See* http://www.maesdase.org.br.

Specifically, there is the Hague Convention Center for Brazil (*Centro da Convenção de Haia – Brasil*),[68] a website that examines the application and enforcement of the Hague Convention on the Civil Aspects of International Child Abduction in the country. There is substantial material on this issue, including cases and studies, as well as local and international legislation on the subject that are available in Portuguese and, in some cases, in English as well.

There is also an international peace organization called Children in Brazil (*Crianças no Brasil*),[69] with offices in Brazil and in the United States, created to assist parents of American abducted children taken from their habitual residence to Brazil. All the materials on their website are available in Portuguese and English, and it discloses pictures of missing children to the public. Upon special request, it may also provide assistance to parents of non-American children abducted to Brazil

VI. Conclusion

Local legislation, judicial, and administrative authorities, as well as government and private-funded organizations, are demonstrating visible support of the terms of the Convention, which is surely an example of international protection of children's welfare. Brazil appears to be implementing the Convention correctly; it is, however, a fairly new member to the Convention, and it might be, perhaps, too soon to draw any further conclusions on the outcome of the application of the Convention in the country.

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March 2004

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[68] *See* http://www.convencaodehaia.com/index.htm.

[69] *See* http://www.criancasnobrasil.com/PHomex.html.

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HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The problem of international child abduction has received considerable attention in Canada. One reason for this was stated by the Chief Delegate to the 1980 Hague Conference in the following terms:

> [This problem is] serious for a country like Canada, blessed in many ways by its pluralistic ethnic mix, but in the present context afflicted by the fact that one or both spouses may retain recent and substantial connections with their country of origin. This fact makes it attractive and possible to spirit the children away in the hope of achieving a more friendly familial and judicial climate in which to assert custody rights in their favor when their marriages turn sour.[1]

The concern has been demonstrated in Canada's leading role in the encouragement of international legal reform.

I. Domestic Law and Regulations Implementing the Hague Convention

Although Canada helped initiate and was one of the first countries to sign the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention), the subject matter of that treaty falls under provincial jurisdiction. Consequently, rather than attempting to legislate for the entire country through one Federal act that might well have been found to be unconstitutional, Parliament deferred to the provincial Legislative Assemblies. All ten of these bodies responded by enacting implementing laws that came into force between 1983 and 1987. The exact dates of entry are as follows:

Alberta	February 1, 1987
British Columbia	December 1, 1983
Manitoba	December 1, 1983
New Brunswick	December 1, 1983
Newfoundland	October 1, 1984
Nova Scotia	May 1, 1984
Ontario	December 1, 1983
Prince Edward Island	May 1, 1986
Quebec	January 1, 1985
Saskatchewan	November 1, 1986

As for the territories, the Yukon brought the Convention into force on February 1,1985, and the Northwest Territories followed suit on April 1, 1988.[2]

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[1] *See* H. ALLAN LEAL, INTERNATIONAL CHILD ABDUCTION IN CHILDREN'S RIGHTS IN THE PRACTICE OF FAMILY LAW 211 (Toronto, 1986).

[2] Ann Wilton and Judy Miyauchi, ENFORCEMENT OF FAMILY LAW ORDERS AND AGREEMENTS: LAW AND PRACTICE 2-34.17 (2001).

In implementing an international convention, Canadian legislatures usually enact legislation that incorporates its major features in a more or less paraphrased and sometimes expanded fashion. This common practice was not generally followed in the case of the Convention. Instead, all of the provinces, except Quebec, passed new laws or amended extant legislation to refer to the Convention and include it as an appendix. Thus, a situation in which each province would have different laws, as is generally the case with other areas of family law, was avoided. The specific provincial and territorial laws that directly adopted the Convention in this manner are as follows:

Alberta	International Child Abduction Act[3]
British Columbia	Family Relations Act[4]
Manitoba	Child Custody Enforcement Act[5]
New Brunswick	International Child Abduction Act[6]
Newfoundland	Act Respecting the Law of Children[7]
Northwest Territory	An Act to Adopt the Convention on the Civil Aspects of Child Abduction[8]
Nova Scotia	An Act to Implement the Hague Convention on the Civil Aspects of International Child Abduction[9]
Ontario	Children's Law Reform Act[10]
Prince Edward Island	Custody Jurisdiction and Enforcement Act[11]
Saskatchewan	Act Respecting the Application to Saskatchewan of the Convention on the Civil Aspects of Child Abduction[12]
Yukon	Children's Act[13]

[3] 1986 S.A., ch. I-6.5.

[4] R.S.B.C. ch. 128 (1996). Now R.S.B.C. ch. 128 (1996).

[5] C.C.S.M. ch. 360 (1999).

[6] 1982 N.B. Acts, ch. I-12.1.

[7] R.S.N. ch. C-13 (1990).

[8] 1987 S.N.W.T. ch. 20.

[9] R.S.N.S. ch. 67 (1989).

[10] R.S.O. ch. C-12 (1990).

[11] R.S.P.E.I. ch. 33 (1988).

[12] 1986 S.S. ch. I-10.1. Now R.S.C ch. I-10.01 (1995).

[13] R.S.Y. ch. 82 (1986).

Unlike the other provinces, Quebec enacted the Convention by restating its major provisions in a provincial statute.[14] In the event of any inconsistency between the provincial law and the Convention, the former would prevail. However, Quebec's law appears to be substantially the same as that of the other provinces. It did not simply adopt the Convention, because it tries to conduct a separate, but not always different, foreign policy.

The Convention was created to discourage parents from taking children away from their established homes by providing that disputes over custody and access should be resolved by the courts of a child's habitual residence. The courts of the member countries are generally bound to return an abducted child for that purpose or to enforce an extant order. However, there are exceptions to this rule.

Canada has a Central Authority for the Federal Government and for each of the provinces.[15] The Federal Central Authority generally serves as a liaison between foreign Central Authorities and the provincial Central Authorities. The Federal Central Authority can help locate children whose province of residence is unknown.

Foreign Central Authorities can deal directly with provincial Central Authorities. The provincial Central Authorities are all Ministers of Justice, Departments of Justice, or Attorneys General. These offices attempt to secure the voluntary return of abducted children as is required by the Convention.

Assistance in locating an abducted child can be sought through a number of channels. The Child Find organization is a non-profit group that has offices in a number of provinces. Le Reseau Enfants Retour, or the Missing Children's Network Canada, is this organization's Quebec counterpart. Since this Quebec organization receives minimal government funding, it mostly relies on donations from the private sector.[16] Another non-profit group, the International Social Service, has an office in the capital city of Ottawa.

On the Federal level, Canada has a program called "Our Missing Children." Under this program, the Royal Canadian Mounted Police, Revenue Canada, Citizenship, and Immigration, and Foreign Affairs and International Trade cooperate in locating and returning missing children. The Royal Canadian Mounted Police also maintain a Missing Children's Registry. Canada Customs former Project Return program was amalgamated with the Missing Children's Registry at the Royal Canadian Mounted Police's headquarters. The Registry's services include a photo-aging service, investigative research, international networking, and the development and distribution of information related to missing persons.[17] Addresses and phone numbers for assistance in locating abducted children have been published.[18]

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[14] An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction. R.S.Q. ch. A-23.01.

[15] Department of Foreign Affairs (JDS); Lester B. Pearson Building, Tower C; 7th Floor, 125 Sussex Drive; Ottawa, Ontario; K1A 0G2; (613) 992-6486

[16] http://www.nosenfantsdisparu.ca/en/index.html.

[17] *Id.*

[18] Ann Wilton and Judy Miyauchi, ENFORCEMENT OF FAMILY LAW ORDERS AND AGREEMENTS: LAW AND PRACTICE, 2-4.4 to –2-6 (1999).

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Canada has general child abduction laws that pertain to persons who are not the subject's parents or guardians and specific laws that apply to a subject's parents and guardians. Under the former, abduction of a person under 16 and abduction of a person under 14 are indictable offenses punishable with imprisonment of up to 5 and 10 years, respectively.[19] These sections have been in force for many years. Because they prescribe penalties that were often thought to be too severe in a family context, parents were not often charged with these crimes. To address this situation, more flexible provisions respecting parents and guardians were created in 1982.

Abduction by a parent, guardian, or person having the lawful care or charge of a person under the age of 14, in contravention of a custody order made in Canada with intent to deprive a parent or guardian of the possession of that person is an offense that can be prosecuted by way of an indictment or in summary proceedings.[20] In the former case, the maximum sentence is 10 years imprisonment, but in the latter case, it is only 6 months.

A parallel provision states that any parent or guardian who "takes, entices away, conceals, detains, receives or harbors" a person under the age of 14 "with intent to deprive a parent or guardian … of the possession of that person" is also guilty of an offense that can be prosecuted by way of an indictment or in summary proceedings. In these cases, the existence of a valid custody order is not required, but no prosecution can be commenced without the consent of the Attorney General of Canada.

The Criminal Code creates one major exception to the abduction offenses. No person who takes, entices, conceals, or detains a young person to protect him from imminent harm can be found to be guilty of an abduction offense. The onus of proving that an abduction was necessary to protect a young person is on the accused.[21] An honest but mistaken belief will bring the accused within the exception if the circumstances thought to have existed would have posed a real danger.[22]

It is not a defense to the abduction provisions to prove that the young person consented to the conduct of the accused.[23]

The Criminal Code contains general provisions that make it an offense to forge a Canadian passport or to make false statements in order to obtain a Canadian passport for another person. This offense is punishable by 2 years imprisonment, if prosecuted by way of an indictment, and 6 months imprisonment, if prosecuted in summary proceedings. Being in possession of a forged passport or a passport that was obtained through false statements is punishable with a sentence of 5 years imprisonment.[24]

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[19] Criminal Code, R.S.C. ch. C-46, ss. 280-281 (1985).

[20] *Id.* § 282(1).

[21] *Id.* § 285.

[22] R. v. Adams, 12 O.R. (3d) 248 (Ont.C.A. 1993).

[23] *Supra* note 16, ch. C-46, § 286 (1985).

[24] *Id.* § 57.

The Criminal Code is a Federal statute that applies throughout Canada. Sanctions that are sometimes referred to as "civil" or "quasi-criminal" in nature can also be imposed under provincial legislation. For example, under the Children's Law Reform Act, the Ontario Court (Provincial Division) can impose sentences of up to Can$5,000 (US$3,750) and imprisonment for up to 90 days for "any wilful contempt of or resistance to its process or orders in respect of custody or access to a child."[25] An order for imprisonment under that section can be made to be conditional upon default, so as to put a party on notice as to the consequences of his actions in contempt of court.[26] Similar penalties are available for violations of a restraining order.[27] Ontario's legislation also provides that a police officer can arrest a person he believes, on reasonable and probable grounds, to have contravened a restraining order without first obtaining a warrant.[28]

B. Parental Visitation

Custody and access are normally governed by provincial legislation. In British Columbia, the Family Relations Act provides that if the mother and father of a child live apart, the parent with whom the child usually resides may normally exercise custody over him.[29] However, if custody rights exist under a written agreement or under a court order, those rights prevail.[30] There is no presumption in favor of joint custody, but joint custody can be awarded. The Provincial Courts and the Supreme Court have jurisdiction to award custody on application of one of the parties. An order for access may be made whether or not a custody order is made.[31]

Throughout Canada, the general rule is that a parent who has been denied custody is granted access unless access might endanger a child's upbringing.[32] It is generally accepted that it is normally in the best interests of a child to have contact with both parents. The courts can order supervised or unsupervised visits. However, the right of access usually includes the right to take a child to a parent's normal living accommodations.

Orders as to custody and access can be made ancillary to the granting of a divorce under the Divorce Act. The Divorce Act is a Federal law, and orders made under it supercede orders made under provincial family laws.[33] However, after a custody or access order has been made under the Divorce Act, an application to have the issue re-examined under provincial legislation can be filed in an appropriate provincial court. Such an application may be struck out as an abuse of process if the court believes that it has been brought prematurely, but otherwise it will be heard in a similar manner to a request to revise a custody or access order under provincial legislation. The most common standard that must be met in

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[25] *Supra* note 10, ch. C.12, § 38(1) (1990).

[26] *Id.* § 38(2).

[27] *Id.* § 35(2).

[28] *Id.* § 35(3).

[29] *Supra* note 4, ch. 128, § 34(b), (1996).

[30] *Id.* § 34(c) and 34(d).

[31] *Id.* § 35(2).

[32] Roy v. Roy, 19 Man. R. (2d) 278 (C.A. 1983).

[33] 1986 S.C. ch. 4, as amended.

applying to have a custody or access order varied is that there has been a "material change in circumstances that affects or is likely to affect the best interests of [a] child."[34]

The courts generally have broad discretionary powers in deciding applications for custody or access. They are also empowered to appoint trained persons to assess the needs of a child and the ability or willingness of the parents to satisfy those needs.[35]

III. Court System and Structure–Courts Handling the Hague Convention

Canada does not have parallel systems of Federal and provincial courts. Instead, it has several levels of provincial courts, a national Supreme Court that has jurisdiction to hear appeals from provincial courts, and several specialized Federal courts. Applications to enforce the provisions of the Hague Convention are filed in the superior provincial courts listed in the various provincial laws adopting that Convention. Such applications will be heard by a provincial trial judge. In some provinces, the judge may be a designated family court judge. In all cases, the decision of this judge may be appealed to the Court of Appeal with the leave of the judge or the Court itself. As the highest provincial courts, the Courts of Appeal normally decide cases in panels of three justices. Decisions of the Courts of Appeal may, themselves, be appealed with leave to the Supreme Court of Canada. There are nine judges on Canada's highest court. Appeals accepted by the Supreme Court are almost always heard by all nine judges.

IV. Law Enforcement System

The heart of the Hague Convention is the general requirement that abducted children under the age of 16 be returned to their habitual residence in compliance with a custody order from that jurisdiction, or for a determination of a custody issue by a court of that jurisdiction. However, this general requirement is subject to exceptions. Even if an application is filed within a year, a court of a Member State can refuse to order a child's return if it would expose him to physical or psychological harm or would otherwise place him in an intolerable situation. These safeguards were needed to secure the agreement of many member states, but they clearly create potential problems. A court that approaches the issue in bad faith defeats the purpose of the Convention by interpreting the exceptions very broadly.

A review of the available Canadian case law[36] indicates that Canada's courts are generally well aware that in order to be effective, the Convention requires not only good faith, but a willingness to approach questions differently than is often the case in domestic disputes. In the leading case of *Thomson v. Thomson*, the Supreme Court held that in weighing Hague Convention applications, judges are not to employ the usual standard of determining what is in the best interests of a child. They must, instead, follow the language of the Convention.[37] In *Thomson v. Thomson*, the Supreme Court held that only rarely will the risk of separation from a current environment raise the level of risk envisioned by the Convention. In that case, an order to return a child to his father in Scotland was issued to a mother who had wrongfully removed him to Manitoba, notwithstanding the fact that the child may have already "settled into" his Canadian environment.

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[34] Children's Law Reform Act, *supra* note 10, ch. C.12, § 29 (1990).

[35] *Id.* § 30(1).

[36] For summaries for the extensive Canadian cases law respecting international child abductions, see *supra* note 2.

[37] [1994] 3 S.C.R. 551.

Aside from the decision in *Thomson v. Thomson*, the Supreme Court of Canada has considered the Hague Convention on only a few occasions. One notable case that was decided by the Court in 1995 involved the removal to Quebec of a child who had been born in Maryland. After the removal, the mother obtained a custody order in Maryland and applied for the child's return under the Convention. The Supreme Court held that there had not been a wrongful removal of the child, because while the mother had access rights, she did not have custody of the child at the time he was brought to Canada. There was no application for a change in custody pending at the time of the removal. Thus, the Convention was found to be inapplicable.

As opposed to the small number of relevant Supreme Court cases, there are a number of reported decisions involving Hague Convention applications from the highest provincial courts. In one notable case involving a wrongful removal from the United Kingdom, a young girl suffering from a debilitating disease was allowed to stay with her Canadian mother. However, the girl's sister was ordered to be returned, as the court found that the two cases had to be weighed independently of one another.[38] The onus of showing that the grave risk of harm that would justify an exception is on the defendant. This means that evidence supporting allegations of potential harm will normally be required.

The issue of whether evidence of spousal abuse may be sufficient to justify a court refusing to order the return of a child on the grounds that such an order would subject him to a grave risk of physical or psychological harm was addressed by the Ontario Court of Appeal in 1999. In the case of *Pollastro v. Pollastro*, the Court found that ordering the return of a child to a violent environment places a child in an intolerable situation that does expose him to a serious risk of psychological and physical harm. The Court also held that as a child's interests may be inextricably intertwined with one parent's psychological and physical security, it is relevant to consider evidence of spousal abuse, even when there is no evidence of child abuse.[39]

In arguing against the position ultimately taken by the Ontario Court of Appeals in *Pollastro v. Pollastro*, the Government suggested that allowing parties to oppose applications for a return of an abducted child on the grounds that return would be potentially dangerous to the abductor would create a defense that could easily be abused. Although this remains a possibility, there have not been a large number of post-1999 cases in which evidence of spousal abuse has been offered in support of the abductors' claims that their cases fall under the exceptions to the Hague Convention. In one reported case in which an abductor tried to claim that she feared that she would be in danger of being harmed by her ex-husband if she had to return to the United States, the Superior Court of Justice in Ontario considered her evidence with great skepticism. One fact that the Court found against her was that she had filed a motion to dismiss an application for an injunction relating to domestic violence. For this and related reasons, the Court held that the alleged fear of spousal abuse had not been proven and that the applicant's children should be returned to the United States. In conclusion, the Court also found that "there [was] no suggestion in the material that the authorities in Florida would not be able to provide security to the respondent and her children."[40]

Another safeguard built into the Convention states that a court may refuse to order the return of a child who objects and who has attained a sufficient degree of maturity. In one reported case, the court

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[38] Chalkley v. Chalkley, [1995] 3 W.W.R. 589 (Man. C.A.).

[39] Pollastro v. Pollastro, [1999] 43 O.R. (3rd) (Ont. C.A.).

[40] Sierra v. Sierra, 2001 O.T.C. LEXIS 427, ¶ 19.

found that a 10 year-old had reached the required degree of maturity, but did not respect her stated wish because it believed the child had been pressured by her mother.[41]

An application made more than 1 year after a child's removal may be rejected if the child is found to be well settled in his new environment. In one reported case, the Quebec court of Appeal held that determining whether a child is well settled requires an examination not only of activities and outward signs, but also of a state of mind.[42]

V. Legal Assistance Programs

On signing the Hague Convention, Canada made a reservation respecting the cost of legal proceedings. Canada apparently took this view in agreement with the United States that "legal aid should be made available [to a] foreign applicant but on terms that would not bestow on foreign nationals a more advantageous grant in aid than is available to … nationals under the local legal aid plan."[43] Due to its reservation, Canada's provinces are not obliged to assume the cost of legal proceedings to enforce the Hague Convention except to the extent that their legal aid systems provide for financial support. Thus, anyone filing an application in Canada can apply for financial assistance from a provincial legal aid fund. The Central Authorities assist in directing parties to the appropriate offices. A number of variables determine whether a party may be eligible for legal aid and the amount of the support that may be provided. Each province has its own plan.

VI. Conclusion

It is difficult to determine from the reported cases whether Canadian courts have tended to show a bias in favor of persons who have abducted children to Canada. Most judges have been careful to give compelling reasons for their decisions that are based on factual determinations that cannot be independently assessed. One notable development that does stand out in the reported cases is that a majority of the Hague Convention applications filed in Canada have been filed by fathers. In 2001, the Missing Children Society in the city of Calgary reported that of the 179 cases worked on over the previous 15 years, 112 concerned abductions by mothers and 67 concerned abductions by fathers.[44]At the time the Convention was being considered, most of the cases that had attracted media attention involved fathers abducting children to foreign countries. This points to the fact that the problem of child abductions to Canada appears to typically be of a different nature.

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November 2003

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[41] Thorne v. Drydenhall, 148 D.L.R. 4th 508 (B.C.C.A. 1997).

[42] 58 Q.A.C. 168.

[43] *Supra* note 1, at 232.

[44] Patricia Chisholm, Missing, McLean's, June 4, 2001 at 16..

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CAYMAN ISLANDS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Cayman Islands are a series of small islands located in the Carribean Sea south of Cuba. They are an overseas territory of the United Kingdom, with the British government retaining control over the foreign matters of the Islands.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction[1] was extended to the Cayman Islands by the British government on May 8, 1998, and entered into force on August 1, 1998, through the application of the United Kingdom's Child Abduction and Custody Act 1985[2] to the national law of the Cayman Islands.[3]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

When a child has been abducted and taken to the Cayman Islands, the Child Abduction and Custody (Cayman Islands) Order 1997 applies. As the Order incorporates legislation from the United Kingdom into the national law of the Cayman Islands, the procedures under the Order are virtually identical to those in place in the United Kingdom. The Order allows the Grand Court to give interim directions after an application has been made under the Convention to prevent a change in the circumstances of the case that are relevant to the determination of the application, or to secure the welfare of the child concerned.[4] If the Grand Court is satisfied that the removal of a child from, or their retention outside of, the Cayman Islands is wrongful within the meaning of the Convention, they may make a declaration stating this.

B. Parental Visitation

The Guardianship and Custody of Children Law[5] governs custody of and access to children in the Cayman Islands. This law defines a child as a person under 21 years of age, unless they are, or have

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[1] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter "the Convention"].

[2] Child Abduction and Custody Act 1985, c. 60 (Eng.).

[3] The Child Abduction and Custody (Cayman Islands) Order 1997, SI 1997/2574.

[4] *Id.* ¶ 5.

[5] The Guardianship and Custody of Children Law, 1957, c.65 (rev. 1977 and 1996). The law referred to in this report is in accordance with the 1977 revision.

been, married.[6] The criteria that the courts use when determining custody and access rights are the welfare of the child, the conduct of the parents, and the wishes of both parents.[7]

When considering custody and access rights to children, case law has determined that consideration of the child's welfare is not limited to home surroundings and education. The courts can also consider the child's opportunities for "love and security, personal growth, access to wider family connections, physical care, and any other relevant matters."[8]

In a case in 2000, the Grand Court of the Cayman Islands considered an application for sole custody by a wife in the process of divorcing her American husband. The wife had returned to the Cayman Islands with her daughter after her marriage began to fail and commenced divorce proceedings in the United States. Her husband sought an order for joint custody, which was not granted as there was not a "reasonable prospect that the parents would cooperate with each other … the problem of their residing in different countries was [born] in mind in this context."[9]

In another case in 2001, the Grand Court held that it was wrong to require a parent that wished to move overseas to remain in the Cayman Islands to retain custody of a child if sole custody would otherwise be unopposed.[10] In making this decision, the court took into account the support that the wife would receive from extended family in the overseas location, and that the standard of medical care and educational facilities available to the child was comparable, or higher than was available in the Cayman Islands.[11]

III. Court System and Structure – Courts Handling the Hague Convention

A. Family Proceedings Generally

It appears that the Grand Court of the Cayman Islands has jurisdiction generally in family cases. The Cayman Islands also has a Summary Court that deals with civil claims below $2,000 and the majority of criminal cases.[12]

B. Under the Convention

The court in the Cayman Islands that has authority to hear applications under the Convention is the Grand Court.[13] The Grand Court is a court of general jurisdiction and as such does not specialize in family cases. The court has the authority to give interim directions to secure the welfare of the child

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[6] *Id.* § 2.

[7] *Id.* § 7.

[8] Mercer v Hermans (C.A.), 2002 CILR *N* 29.

[9] Re: Carlson, (Grand Court), 2000 CILR 138.

[10] H-P v P. 2001 CILR 108.

[11] *Id.* at 110, ¶ 8(D).

[12] PIERS HILL, CRIMINAL PROCEDURE IN THE CAYMAN ISLANDS (1992).

[13] *Supra* note 3, at 4.

concerned, or to prevent a change in circumstances that are relevant to the case. These directions can be given at any time after an application under the Convention has been made, but before a determination has been made.[14] For the purposes of article 15 of the Convention, upon application, the Court can make a declaration that the removal of any child from, or their retention outside, the Cayman Islands is wrongful within the meaning of article 3 of the Convention.[15]

IV. Law Enforcement System

The Attorney-General of the Cayman Islands[16] is the Central Authority.[17] In 1999, the Central Authority of the Cayman Islands reported that they received one incoming return and one incoming access application, both originating from and concerning nationals of the United States.[18] The return application was judicially granted after 24 days.

A contested application under the Convention was received in the Cayman Islands from Germany in 2001. This application concerned a Cuban woman, German man, and their child, who was also a German national. The marriage between the husband and wife deteriorated, resulting in the wife leaving for Cuba with their infant child in January 2001. The husband contacted his wife stating that he accepted that she would live in Cuba with their child and that divorce was inevitable.

While in Cuba the wife obtained a divorce, allegedly under false pretenses, with no notice of the proceedings provided to the husband and no mention made of the child. In August of 2001, the wife went to the Cayman Islands with the child to marry a national from the United Kingdom, and the husband filed his application under the Convention with the Cayman Islands a month later. The husband argued that the child was habitually resident in Germany, and as such, should be returned. The wife successfully argued that the husband had consented to their residency in Cuba, a non-contracting party to the Convention. As such, the child was considered habitually resident there, not in Germany; therefore, the case was not subject to article 3 of the Convention upon the child's removal to the Cayman Islands. The application was dismissed.

The court stated that under the above application, it was not for the Cayman court to decide the merits of custody or access to the child. However, upon the dismissal of the application, because the child was considered a ward of the court, it considered him being habitually resident in the Cayman Islands, and the court invoked its inherent jurisdiction to "give detailed directions as to the hearing for the custody and possible access to [the child]."[19]

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[14] *Id.* at 5.

[15] *Id.* at 8.

[16] The Attorney-General, Government Administration Building, Grand Cayman, Cayman Islands.

[17] *Supra* note 3, at 3.

[18] The Special Commission to Review the Hague Convention on the Civil Aspects of International Child Abduction, Statistical Analysis of Applications Made in 1999 Under the 1980 Convention (Revised Version of Nov. 2001) UK-Cayman Islands, *available at* ftp://ftp.hcch.net/doc/stats_cay.doc.

[19] H-P v P. 2001 CILR 108 at 438, ¶ 28.

V. Legal Assistance Programs

The reservation made by the United Kingdom has been extended to the Cayman Islands that the costs mentioned in article 26 will not be born by the Governor or any other authority in the Cayman Islands. However, provisions are made for individuals to obtain a grant of legal aid or legal advice and assistance under the Poor Persons (Legal Aid) Law 1975.[20] This Act provides that a limited form of financial assistance may be provided to individuals seeking legal aid for criminal and civil cases. Lawyers are listed on a roster and then provided to successful applicants on a rotational basis.

VI. Conclusion

The Cayman Islands has successfully implemented the Convention into its national laws, and has addressed several cases dealing with this issue. The case mentioned above demonstrates the court's willingness to follow the spirit of the Convention. However, in this case, where it appears that a strict interpretation of the Convention may cause an injustice, the courts were willing to use their inherent jurisdiction to provide a custody and access hearing for the child in question under its national laws.

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January 2004

[20] The Poor Persons (Legal Aid) Law, Law 17 of 1975.

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CHILE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention), adopted on October 25, 1980, was ratified by Chile[1] on February 23, 1994. Chile made a special declaration stating that article 3 of the Convention will be interpreted in accordance to its domestic legislation regarding child custody, which applies until a child reaches 18 years of age.[2] This means that, if an 18 year old with permanent residence in Chile, is wrongfully taken abroad, the Central Authority or courts of that country will have to interpret such an action as illegal, under the Convention, despite the child being older than 16 years of age.[3]

Chile acceded to the Convention in accordance with article 38; the accession has effect only with regard to the relations between Chile and other countries that have e declared their acceptance of the accession.[4]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Chile is the *Corporacion de Asistencia Judicial de la Región Metropolitana* of the Ministry of Justice.[5] The Convention became effective in Chile in June of 1994, and the *Auto Acordado*[6] of the Supreme Court, which provides for the domestic procedural rules applicable for the implementation of the Convention, was issued on November 3, 1998. Between June 1994 and November 1998, the rules applicable to summary procedures provided in the Law on Minors[7] were applied to implement the Convention.

According to Supreme Court[8] decisions rendered during that period of time, article 11 of the Convention should be interpreted as being for the courts of each member country, where the child is

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[1] Decree 386 of Mar. 30, 1994 in Diario Oficial (D.O.) June 17, 1994.

[2] *Id.* Introduction. The Convention applies only to children under the age of 16.

[3] L Astorga Ibarra and M.J. Ávila Rivera, *"Efectos Civiles del Secuestro Internacional de Menores*," Memoria de Título para optar al grado de Licenciado en Ciencias Jurídicas de la Escuela de Derecho de la Universidad Central de Chile, at 97.

[4] http://www.hcch.net/e/authorities/caabduct.html.

[5] Address: Calle Agustinas 1419;
Santiago de Chile, Chile;
telephone: 56(2) 782-7914/ 7911/ 7900
e-mail:internacional@emol.com

[6] AUTO ACORDADO SOBRE PROCEDIMIENTO APLICABLE AL CONVENIO DE LA HAYA RELATIVO A LOS EFECTOS CIVILES DEL SECUESTRO INTERNACIONAL DE MENORES, CORTE SUPREMA DE JUSTICIA, in D.O. Nov. 3, 1998 as amended by AUTO ACORDADO of May 7, 2002, *available at* http://www.pjud.cl/0.8/noticias/venot.php?id= 251.

[7] LEY DE MENORES, 16618 of Feb. 3, 1967 in D.O. Mar. 8, 1967, arts. 34-37.

[8] Poder Judicial de Chile, Excelentísima Corte Suprema, Oct. 24, 1997 in Rol de Corte No. 33097.

located, to provide an "urgent" procedural treatment under their domestic law. The Convention does not determine which procedures to apply; instead, the Convention allows each country to determine what summary or urgent procedure will be applicable within their jurisdiction. A Chilean Supreme Court decision stated that article 11 of the Convention requires that the domestic court apply an expedited procedure to solve return cases under the Convention, but not to grant the petition without hearing the side of the abducting parent or without considering any evidence. This would constitute a clear violation of the due process of law guaranteed under the Chilean Constitution,[9] which provides that any court decision should be based on a prior due process.[10]

A. Return Requested from Abroad

The Central Authority has only administrative and informational functions, as the judiciary will always decide on the return of the child. Once an application for return has been received, the procedure before the Central Authority is governed by the Convention's provisions. Compliance with all the requirements provided for under the Convention will be verified by the Central Authority.

If a child's return is not possible during the preliminary stage, the petition must be submitted to the competent court. The Central Authority will provide the competent court with a general background on the petition and will also offer its assistance to the court during the proceedings.

Once the judicial stage has been established, the Central Authority will assist the Court and will be at the parties' disposal to provide any information necessary for the implementation or application of the Convention in order to secure the best interest of the child.

The implementing provisions issued by the Supreme Court in November 1998 and amended in 2002[11] provide specific rules for the application of the Convention in Chile. The procedure begins with a petition before the Minors' court of the alleged domicile of the minor.[12] The Minors' court will take all the measures necessary to locate the child.[13] The court should not request any additional formality or certification of documents, except for an official translation of the documents submitted with the petition if they are not in Spanish and all the require documents set forth in article 8, such as identification documents for the child, the petitioner, and the person allegedly retaining the child.[14] As soon as the petition is entered, the court should secure that the minor be located and once located not be moved.[15]

Action on the petition needs to be taken within 24 hours of its submission, setting up a hearing for the individual retaining the child and the petitioner and his attorney within 5 days of the notice being served by the *Carabineros* (Chilean Police) or a Court officer. The child must also be present and heard

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[9] Constitución Política de la República de Chile, Editorial Conosur, Santiago, 2001, art. 19.3.

[10] *Id.*

[11] *Supra* note 6.

[12] *Id.* art. 1.

[13] *Id.* art. 2.

[14] *Id.* art. 3.

[15] *Id.* art. 4.

at the hearing.[16] If the service of notice is not successfully performed through this procedure, the petition must be assigned to the Public Defender, who will then assume the representation of the absentee party.[17]

The objective of the hearing is to determine if the child is in the country and if there are any grounds, based on those listed in the Convention, for rejecting the release of the child.[18] Evidence should be produced during the hearing. However, the court may order further investigation for more evidence, and this must be submitted within 15 days otherwise the petition will be rejected.[19] The evidence so produced will be interpreted by the court according to *conciencia* (according to common sense based on the capacity to distinguish right and wrong.)[20]

A final decision must be rendered within 5 days of the hearing or the completion of the evidence period.[21] This decision may only be appealed within 5 days of its notice.[22] The Court of Appeals will make a decision, without hearing arguments, within 5 days. All other court resolutions may not be appealed.[23]

When the minor's residence has not been located, the Chilean Central Authority will inform Interpol, the agency in charge of locating the minor in question.

B. Return Requested from Chile

The petitioner must submit a completed application of return to the Central Authority. These forms include all the information necessary to locate the child, such as identification information concerning the child and the person who has taken the child, the child's date of birth, the reasons for claiming the return, and information on the probable location of the child. A copy of the judicial decision or agreement on the custody of the child may also be attached. Seeking legal counsel is recommended in order to complete the form, although this is not required. In case the petition is addressed to a non-Spanish speaking country, the forms must be submitted in English and Spanish.

The Central Authority will evaluate the viability of the petition, once all the required documents have been submitted. If the case is admitted, the Central Authority will send the return and visitation petition to the Central Authority of the requested country. The proceedings abroad will depend on the domestic regulations of the other country's Central Authority, together with the procedural norms applied by the competent courts. In many cases the petitioner will have to hire a private attorney in the requested country. If the petitioner cannot afford to hire a private attorney, he may qualify under Chilean law to receive free legal advice and also become eligible for such assistance abroad.)

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[16] *Id.* art. 5

[17] *Id.* art. 6.

[18] *Id.* art. 7, as amended by Auto Acordado of May 7, 2002.

[19] *Id.*

[20] R. Quijada, DICCIONARIO JURÍDICO, Editorial Consur, Santiago, 1994, at 117.

[21] *Supra* note 6, art. 8, as amended by Auto Acordado of May 7, 2002.

[22] *Id.*

[23] *Id.*

The petitioner will be kept informed by the Chilean Central Authority about the status of his case, since both Central Authorities will contact each other on a continuing basis to follow up on the case.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Under the Civil Code,[24] the parent who does not have the custody of his or her child may not be deprived of the right, nor exempt of the obligation, of having direct and regular contact with the child. Parental visitation rights will be exercised according to a schedule agreed upon by the parent who has custody or according to a court established visitation schedule convenient to the child.[25] This right may only be suspended or restricted when a court has established that it is in the best interest of the child.[26]

Once custody has been judicially assigned, the parent who has taken the child must surrender his or her custody. If he refuses to do so within the judicially determined time frame, or if he infringes on the other parent's visitation rights, judicially established under article 229 of the Civil Code, he may be arrested for up to 15 days or be subject to a proportional fine.[27] The arrest may be extended for up to 30 days in case of recidivism.[28]

The Law on Minors[29] also provides specific requirements for a minor to leave the country. If the custody of the child was not judicially assigned to one of the parents or a third person, then, the minor may not leave the country without both parents' authorization, or the authorization of the parent who recognized the child.[30]

If the custody of the child was judicially assigned to one of the parents or a third person, the child may not leave the country without his authorization.[31] If visitation rights were judicially determined under article 229 of the Civil Code, the parent whose visitation rights were so determined will also have to authorize the child's travel.[32]

The authorization required will have to be instrumented in a public instrument or a private document duly notarized.[33]

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[24] CÓDIGO CIVIL, Anotado y Concordado, Editorial Jurídica Conosur, Santiago, 2001.

[25] *Id.* art. 229.

[26] *Id.*

[27] CÓDIGO DE PROCEDIMIENTO CIVIL, Anotado y Concordado, Editorial Jurídica Conosur, Santiago, 2001, art. 543 and *Infra* note 27, art. 66, last ¶.

[28] *Id.*

[29] LAW 16618 LEY DE MENORES, Feb. 3, 1967 in D.O. Mar. 8, 1967.

[30] *Id.* art. 49, ¶¶ 1 and 2.

[31] *Id.* art. 49, ¶ 3, and *supra* note 24.

[32] *Id.* art. 49, ¶ 4.

[33] *Id.* art. 49, ¶ 5.

III. Court System and Structure – Courts Handling the Hague Convention

When the return request originates outside of Chile and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be the Minors' court with jurisdiction in the presumed child's residence.[34] Only the final decision may be appealed to the respective Court of Appeals and, if admissible, to the Supreme Court.[35]

The Chilean courts have applied the Convention in a number of cases. But they reached the Supreme Court in only a few cases. One such case[36] involved two girls born in 1998 and 1999, daughters of Chilean nationals living in Sweden. While divorce proceedings were underway in a Swedish court and the children were in both parents' custody, according to Swedish law, the mother requested court authorization to travel with the girls to Chile. The father opposed the authorization, requesting at the same time exclusive custody of the children. However, without any authorization and without the court's decision on the matter, the mother traveled with the girls to Chile. Immediately thereafter, the Swedish court granted the exclusive custody to the father.[37]

The Minors' court concluded that the purpose of the procedure set forth in the Convention is not to assign legal custody of children, but to determine if the children were illegally taken from Sweden by the mother and if there were any grounds under article 13 of the Convention that prevented the children from returning to their permanent residence. The return of the children was ordered, because it was concluded they had been taken from Sweden to Chile by the mother without any authorization from the court and with the opposition of the father and pending a court's decision on custody. The mother appealed before the Supreme Court, which reversed[38] the lower court's decision and refused to grant the return of the children. The decision stated that it was in the best interest of the children to remain in Chile with their mother, because of their very young age and their psychological and social connection with their maternal grandparents, as well as the cultural environment. It concluded that the children's return to Sweden would "expose them to psychological and physical risks" under article 13 of the Convention.

According to some scholars, this decision does not provide a correct interpretation of the purpose of the Convention, which is, the immediate return of the child to his permanent residence, whose courts are competent to decide on the custody of the children when they have been illegally taken abroad by one of the parents.[39] The decision rejects the children's return by granting custody of the children to the mother, which is clearly not the purpose of the Convention.[40]

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[34] *Supra* note 12.

[35] *Supra* note 23.

[36] Fallo de 1a Instancia, 80 Juzgado de Menores de Santiago, ZULOAGA HORMAZÁBAL, RAUL c/ ESCOBAR ORELLANA, XIMENA ANDREA s/ restitución de menores, of Oct. 8, 2001.

[37] *Supra* note 3, at 150.

[38] *Id.* at 152.

[39] *Id.* at 158.

[40] *Id.*

In another decision,[41] the Minors' court of Santiago, confirmed by the Court of Appeals of Santiago,[42] ordered the return of a minor who was taken by his mother to Chile from Argentina, where he was a permanent resident. His mother violated an Argentine court order prohibiting his removal from the country. This court order was issued in a domestic violence proceeding involving both parents.[43] Both the lower court and the court of Appeals agreed to grant the return request based on the mother's clear violation of the visitation rights and the judicial order prohibiting the removal of the minor from Argentina.[44]

The same lower court, in another case, refused to order the return of children to France, where they were residing with the mother after her divorce. Although the divorce decree decided that the custody of the children was to be shared by both parents, they agreed that the children would reside with the mother with a specific visitation schedule for the father. However, the court also decided that in the event the mother decided to reside in Chile, she should request the court's authorization. She did so, and although this authorization was rejected, she moved to live permanently in Chile with her children.[45] Taking into account the "best interest of the children" and their refusal to return to France, the lower court decided that, despite the children being illegally taken from France to Chile, it was in their best interest to remain in Chile, where they were already well-adjusted to their family and social environment.[46]

IV. Law Enforcement System

According to the Chilean Central Authority, from November 1994 to December 2003, the following requests were handled:

Return requests (outgoing)		**Return requests (incoming)**	
Pending:	12	Pending:	12
Closed:	33	Closed:	105
TOTAL:	45	TOTAL:	117

[41] *Entrega Inmediata del Menor Juan Virgili Ovalle*, 8 JUZGADO de Menores de Santiago, Feb. 27, 2001, in *supra* note 3, at 161.

[42] *Id.* Corte de Apelaciones de Santiago, Apr. 24, 2001 in *supra* note 3, at 162.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 164.

[46] *Id.* at 167.

Visitation requests (outgoing)		**Visitation requests (incoming)**	
Pending:	1	Pending:	6
Closed:	1	Closed:	6
TOTAL:	2	TOTAL:	12

On June 11, 2003,[47] a National Registry of Information about Missing Minors was created under the National Program for the Prevention of the Abduction and Trafficking of Minors and Crimes Against Their Identity, created by Resolution 284/02, within the Ministry of Justice, Security, and Human Rights. The Registry will establish a database that will collect all information related to cases of children that have been abducted or missing. The database will be available on the Internet and will include all the information needed to locate them and to check on the status of the search.[48]

Both parents are required under the law not only to authorize the minor's travel abroad, but also to authorize the issuance of a passport to a minor. The withdrawal of a passport, as well as the denial or restriction on the issuance of visas, may only be ordered by a court. Therefore, in order for a minor who is not traveling with both parents to leave the country, he will have to present his valid passport, as well as the absent parent's authorization to travel, to the border authorities. Administrative measures and court orders may become ineffective if the border controls in the country are not duly carried out. This is true in the case of land boundaries, because of their length. However, border controls are highly effective with regard to air carriers and ferries.

When a court issues an order prohibiting travel outside the country, the order is given to border authorities, including the Federal Police, Immigration, Interpol, and Aeronautic Police.

V. Legal Assistance Programs

The Chilean Central Authority provides free legal assistance to the public at large, without considering their financial status. The Ministry of Justice , through their *Corporaciones de Asistencia Judicial*[49], also provides legal assistance to low income individuals.

The *Corporaciones* have a website[50] providing contact information. In addition, some non-governmental organizations, such as the Chilean chapter of Missing Children,[51] are operated in Chile by the *Policía de Investigaciones de Chile*, which has a webpage to provide assistance to parents whose children are missing. The webpage provides a comprehensive multilingual database, which also includes the picture of the missing children, as well as their progressive age picture, which because of new technology shows how a child could have aged or changed his physical appearance, based on the latest

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[47] Law 25746 of July 1, 2003 in B.O. July 2, 2003 regulated by Decree1005/2003 of Oct. 30, 2003 in B.O. Oct. 31, 2003.

[48] *Id.* arts. 1 and 2.

[49] Law 17995 in D.O. May 8, 1981. These are: *Corporación de Asistencia Judicial del Norte, Corporación de Asistencia Judicial de la región de Valparaíso (* www.cajval.cl), *Corporación de Asistencia Judicial de la Region Metropolitana* (www.cajmetro.cl *-under construction) and Corporación de Asistencia Judicial de la región del BíoBio.*

[50] http://www.cajval.cl and http://www.cajmetro.cl (under construction).

[51] http://cl.missingkids.com/.

available picture. It also provides the identification and physical descriptions of the missing children.[52] There are other local Non-Governmental Organizations, such as *Corporación Ayúdame,* which also provide information and support to parents of missing children.

VI. Conclusion

In spite of the criticism of the Convention, especially regarding its applicability in visitation rights cases, it appears to be a huge advancement for international cooperation in the protection of children, particularly in expediting the return of minors. The main asset of the Convention has been the standardization of procedures in countries around the world to address the same problem. One of the major challenges of the application of the Convention in Chile has been the interpretation of the exceptions to the return under article 13 b) of the Convention, which provides that the return of the child may be rejected if there is serious risk for the child's physical or psychological well-being in doing so. It is contrary to the essence of the Convention for the domestic courts to engage in the decision as to which parent should be assigned custody of the child, since this is clearly a decision to be taken by the court in the jurisdiction of the child's permanent residence. By making this decision, the requested country would be intruding on the jurisdiction of another country, in clear violation of the reciprocity principle, which has been the base for the application of any international agreement.

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[52] *Id.*

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COLOMBIA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction, adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Colombia[1] on December 22, 1994 and came into force on March 1996, after the deposit of Colombia's adhesion instrument[2] in The Netherlands. The Convention was promulgated by Presidential Decree 517/1996.[3]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Colombia is the Instituto Colombiano de Bienestar Familiar (ICBF)-Subdirección de Intervenciones Directas (Colombian Institute of Family Welfare).[4] According to the ICBF website:

> The ICBF is a public administrative agency, with legal and administrative autonomy and autonomous resources, affiliated to the Ministry of Health.
>
> The ICBF main objective is to promote and to strengthen the integration and harmonious development of the family, to protect the children and to guarantee their rights.
>
> The ICBF is led and managed by a Board of Directors and a General Director who heads, organizes, and carries out the welfare service. The decentralized ICBF structure is made up of the National Headquarters, 28 Regional Offices, 5 additional State Agencies, and 199 Zonal Centers at city levels. …
>
> Each Regional Office has Zone Centers currently located in 199 cities. There, professionals from different disciplines (law, social work, sociology, psychology, nutrition, pedagogy and others) permanently advise children, youth and parents applying for service and whose situation demands social, psychological, legal and nutritional assistance and counseling.[5]

The Hague Convention is a self-executing treaty. After its promulgation by the President, it has been applied in Colombia without any specific implementing legislation. However, the Central Authority

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[1] LAW 173 of Dec. 22, 1994 in DIARIO OFICIAL (D.O.) Dec. 22, 1994.

[2] Dec. 13, 1995.

[3] Decree 517 of March 14, 1996 in D.O. Mar. 18, 1996. In Colombia, an international treaty does not become effective until its promulgation by the Executive.

[4] DECREE 2041 of Nov. 27, 1995 in D.O. Nov. 27, 1995.

[5] Instituto Colombiano de Bienestar Familiar, http://www.bienestarfamiliar.gov.co/ingles/home.asp.

legal counsel[6] reported that the ICBF is preparing an amendment to the Minors Code[7] to include specific provisions for the judicial procedure applicable if the return cases under the Hague Convention need the court's intervention. This is a much needed reform since the lack of these regulatory provisions has caused a number of problems, ranging from uncertainty as to which is the competent court to undesirable delays in the processes.

With respect to the administrative procedure, the Central Authority has issued a resolution[8] that provides for the rules that will apply to internal return procedure before the Central Authority. According to these rules, the petition so submitted will have to include all the documentation required under the Convention with the pertinent translation into English or French, as appropriate, as well as a form that the Colombian Central Authority will provide.[9] In case the petition is not complete, it will be returned to the petitioner with instructions as to what needs to be amended or completed.[10]

A. Return Requested from Abroad

In the absence of any specific norm, as to the competent court for Hague Convention return cases, the Code of Civil Procedure[11] assigns "residual" competence to the *jueces de circuito en primera instancia* in cases where no specific assignment of competence has been made. Return proceedings under the Hague Convention have not been assigned any specific judicial venue, therefore art. 16.9 of the Code of Civil Procedure becomes applicable. The *jueces de circuito* have decided these cases since the Hague Convention became effective in Colombia.

Under the provisions of the Hague Convention, the Central Authority has to take all necessary measures to locate the child. To this end the *Departamento Administrativo de Seguridad* (DAS), Interpol Colombia, or of any other public authority is called to assist in locating the child in Colombia.[12]

Once the child is located, the regional director of the Central Authority where the child has been located will designate a *defensor de familia (* public defender in matters of domestic relations) to guarantee that the rights of the child are protected according the Minors Code.[13] The public defender is required to direct an immediate investigation of the situation of the child, will promote a voluntary return, attempt a reconciliation between the parties, and in the event the child is at risk, to adopt precautionary protective measures as applicable under the Minors Code.[14]

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[6] Dra. Lorena Padron

[7] CÓDIGO DEL MENOR, Cooperativa Editorial Magisterio, Bogota, 2000.

[8] RESOLUTION 1399 OF THE MINISTRY OF HEALTH, INSTITUTO COLOMBIANO DE BIENESTAR FAMILIAR, SUBDIRECCIÓN DE INTERVENCIONES DIRECTAS, May 18, 1998.

[9] *Id.* art. 3.

[10] *Id.* art. 4.

[11] CÓDIGO DE PROCEDIMIENTO CIVIL, Señal Editora, Medellín, 2003, art. 16.9.

[12] *Supra* note 8, art. 5.

[13] *Supra* note 7, arts. 57.1, 57.2 and 57.3.

[14] *Supra* note 8, art. 7.

In case there is no voluntary return or a reconciliation is not reached, the public defender will seek the return through judicial proceedings[15] and provide legal counsel throughout the judicial process without charge.[16]

Under the applicable verbal procedure,[17] parties are interrogated at a hearing,[18] after which they will have 10 days to provide evidence. The court will render its decision after all evidence has been produced and parties interrogated. Since in most cases, the petitioner will be abroad, he may be exempted from attending the hearing and may act through his attorney.[19] This decision may be appealed.[20]

Once the return has been ordered by the court, the Central Authority will notify its counterpart abroad and provide all necessary means for the child's travel if the parties cannot afford it.[21] However, the abductor might be obligated to pay for the travel expenses derived from the illegal retention of the child.[22]

The Hague Convention is not applicable when the child reaches 16 years of age. However, if the child turns 16 during the return procedure, the process will continue until it is completed.[23]

A child, 16 years of age, who has been taken into Colombia in exercise of visitation rights that have been illegally prolonged may request, by himself or through his legal representative, that the Central Authority in Colombia assist in his return to his permanent residence.[24]

B. Return Requested from Colombia

When the Colombian Central Authority is the requesting party, once the return or visitation petition is received with regard to a child who has been taken to a country party to the Hague Convention, the documentation is translated as appropriate and is sent to the competent Central Authority abroad.[25]

The petition must include all the information available to locate the child, including identity information concerning the child and the person who has taken the child; the child's date of birth; the

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[15] *Id.*

[16] *Supra* note 8, arts. 10.h. & 12.

[17] *Supra* note 11, art. 435, ¶ 1.5.

[18] *Id.* art. 439, ¶ 2.

[19] *Supra* note 8, art. 11.

[20] *Supra* note 11, art. 439, ¶ 5.

[21] *Supra* note 8, arts. 14 and 17.

[22] *Id.*

[23] *Supra* note 8, art. 15.

[24] *Id.* art. 16.

[25] H.A. Torrado, CÓDIGO DE FAMILIA, 1st Edition, Ediciones Librería del Profesional, Bogotá, 2000, at 752.

reasons for claiming the return; and information on the presumptive domicile of the child.[26] Once all documents have been submitted, the Central Authority will seek to locate the child with the assistance of the competent authorities and try, if possible, to find a friendly solution to the case. If this is not possible, judicial proceedings will be instituted to restitute the child back to Colombia or to reinstate the effective visitation schedule.[27]

The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority and the procedural norms applied by the competent courts. This procedure is generally available free of cost. However, since some countries require the intervention of a private attorney, the petitioner may provide evidence of qualifying for free legal advice and become eligible for such assistance abroad.[28]

The Colombian Central Authority, as the requesting authority, will follow up on the proceedings abroad and will keep the petitioner informed at all times about the case.[29]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The National Constitution[30] provides for the fundamental rights of children including the right to a family and not to be separated from it.[31] This provision was the main legal basis for the Constitutional Court's assertion that the Hague Convention was compatible with Colombian constitutional principles, especially art. 44.[32]

The Civil Code[33] also provides that the parent who is deprived of the custody of a child will still have the right to visit him with the frequency and flexibility determined as appropriate by the court.[34] In addition, the Minors Code[35] provides for rules for permission for children to leave the country when their parents or a guardian so requests it.

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] CONSTITUCIÓN POLÍTICA DE COLOMBIA, Biblioteca Jurídica Dike, Medellin, 2002.

[31] *Id.* art. 44.

[32] Sentencia N0. C-402/95 Tribunal Constitucional, *at* http://www.secretariasenado.gov.co/leyes/SC402_95.HTM.

[33] G.Contreras Restrepo, A. Tafur Gonzalez and A. Castro Guerrero, CÓDIGO CIVIL COLOMBIANOCOMENTADO, Leyer, 9th Edition, 2001, art. 256.

[34] *Id.*

[35] *Supra* note 7, arts. 337-348.

In order to guarantee the protection of the child's rights, when the child needs to leave the country with one of the parents, a written and notarized authorization from the parent not traveling needs to be submitted before the child may leave the country.[36] According to the ICBF website:

> If the parents do not agree (or in case an agreement is not reached among the people with the custody and personal care of the child), the Family Judge, the Family Comprehensive Judge or the Municipal Judges will allow the child to leave the country.[37]
>
> The ICBF Family Defender at the ZONAL CENTER from the area where the child lives, will provide the child permission to leave the country in certain cases. These are when the child does not have legal representatives, if nobody can attest to the location of his representatives, if they are not in conditions to provide the permission, or in case they suffer mental illness or severe psychiatric anomaly (certified by Legal Medicine or by the office of mental health of the Secretary of Health in the respective territorial entity).[38]

III. Court System and Structure – Courts Handling the Hague Convention

Cases under the Hague Convention are handled by *jueces de circuito en primera instancia* (judges from the court of first instance) according to the provisions of the Code of Civil Procedure.[39]

The application of the Hague Convention in Colombia has been quite successful, although difficulties have been encountered from the lack of domestic regulation of the applicable procedure. Extremely lengthy processes have occurred, such as a case that took 5 years to be decided.[40]

In another case, decided by the Constitutional Court,[41] a 4-year old child who was residing with his parents in the United States was taken into Colombia after the parents were separated. An agreement on the custody and visits was reached by the parents, who were granted joint custody of the minor. However, the father took the child for his annual vacation to Colombia and once there, he communicated to the mother that he was not returning. The mother filed a return petition under the Hague Convention, and after more than 2 years, the Constitutional Court decision confirmed the lower courts, Court of Appeals, and Supreme Court decisions, ordering the immediate return of the child to his permanent place of residence, as the removal by the father was illegal.[42]

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[36] *Id.* art. 338.

[37] *Id.* art. 348.

[38] *Id.* art. 340.

[39] *Supra* note 10, art 4.

[40] ESTADO ACTUAL DE LA APLICACIÓN DE TRATADOS O CONVENIOS INTERNACIONALES EN MATERIA DE NIÑEZ Y FAMILIA EN EL ICBF, Case of Melissa Bustamante. *Supra* note 6.

[41] SENTENCIA T-412/00 *at* http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/2000/Tutela/T-412-00.htm.

[42] *Id.*

IV. Law Enforcement System

Both the Central Authority and the courts have requested assistance from the DAS and Interpol to locate children and secure the enforcement of authorities' orders. According to the Colombian Central Authority, since the Convention came into force on May 1, 1996, Colombia has received the following number of Hague Convention petitions:[43]

1996: 4	2000: 20
1997: 11	2001: 31
1998: 21	2002: 31
1999: 15	2003: 43
Total	177

From this total, 162 petitions were for return of children, and 15 of the petitions were for visitation.

The number of petitions have increased remarkably. For example, in 2001, petitions increased 45% from 2000 and 45% in 2003 from prior years.[44] According to the director of the ICBF, mothers are responsible for 80% of these cases. Even when in Colombia there is no crime of child abduction by a parent as such, the wrongdoers may be subject to a number of other criminal penalties under other provisions of the Criminal Code.[45]

Currently, Colombia is a requesting country in 115 cases principally with the United States, Venezuela, Spain, and Argentina. It is a requested country in 62 cases mainly from the United States, Argentina, Italy, and Spain.[46] Statistics on the number of completed cases are as follows:[47]

- judicial decisions: 14
- voluntary agreements: 37
- withdrawals: 44

Statistics on open cases as of December 31, 2003 are as follows:[48]

- return requests: 74

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[43] *Supra* note 40.

[44] *Id.*

[45] VEINTICINCO CASOS DE SECUESTRO INTERNACIONAL DE MENORES EN 2003 EN COLOMBIA, July 1, 2003, *at* http://mundial2002.terra.cl/actualidad/articulo/html/act157375.htm.

[46] *Id.*

[47] *Id.*

[48] *Id.*

- visitation requests: 8
- administrative phase: 57
- judicial phase: 25

V. Legal Assistance Programs

According to the ICBF website, the public defenders of the ICBF "renders assistance to children and family in situations that require specialized support for their rights to be warranted by judges and the corresponding authorities. (sic) (i.e. alimony, custody, and personal care, visiting rights, recognition and paternity impunity, loss or suspension of parents' rights, etc.)"[49] This includes the Hague Convention return administrative and judicial proceedings.

The Central Authority provides current information on its assistance programs on its webpages as follows:

Central Authority:

Instituto Colombiano de Bienestar Familiar
Subdirección de Intervenciones Directas
Avda. 68 No. 64-01
Bogota
Colombia
PBX 4 377630 Ext. 2135/2107
http://www.bienestarfamiliar.gov.co/ingles/accionesint.asp

VI. Conclusion

The increase in the number of return cases in Colombia may be the result of an increasing number of Colombian families who have left the country because of the political situation. Overall, the application of the Convention in Colombia has shown a considerable improvement, even though the lack of internal procedural rules at the domestic level have deprived the return process of one of its main objectives: the rapid return of children illegally taken from their place of residence. The missing legislative measures are to be submitted before the Legislature soon and are expected to become effective in the near future.

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[49] http://www.bienestarfamiliar.gov.co/ingles/accionesint3.asp.

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REPUBLIC OF CROATIA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Croatia, which is one of the former Yugoslavia successor states, declared its independence from Yugoslavia in 1991. Croatia became a party to the Hague Convention on the Civil Aspects of International Child Abduction on December 1, 1991, after ratification of the Convention by the Croatian legislature *Sabor* on September 27, 1991.[1] Through a letter received by the depositary on April 5, 1993, Croatia declared itself bound by the Convention. Croatia is a non-Member State of the Convention on the Civil Aspects of International Child Abduction, because it did not participate in the Hague Conference on Private International Law at the time of the 14th Session, as required by article 37 of the Convention. Because no objections were received from the contracting states, it appears that Croatian accession has been accepted by all parties to the Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Republic of Croatia acceded to the Hague Convention with the purpose of international recognition and improvement of its image on the international arena. Croatia's accession to the Convention affected the development of the national legal system, because the necessity to bring domestic legislation in accordance with the Convention's requirements influenced amendments to civil and criminal legislation and invigorated the judiciary to cooperate with foreign institutions. As in other newly independent states of the former Yugoslavia, the Constitution of Croatia provides for the priority of international obligations over domestic regulations and concluded international agreements have direct impact and do not require the adoption of additional implementing legislation.[2]

The basic principles of Croatian legislation in regard to family relations and child protection are determined by the Constitution of the Republic, which puts the family under special protection of the state. The Constitution provides for legal regulation of marriage, legal relations in marriage, common-law marriage, and families. It declares state protection of maternity, children, and young people and makes the parental duty to bring up, support, and educate children a constitutional principle. This principle is implemented through the recognition by the state of its special mission to interfere into family relations and defend children and parents when they need the support of government authorities.[3]

These principles are detailed in the Family Law of the Republic of Croatia of 1999, which is the applicable law in all parental abduction cases.[4] The Family Law regulates entrance into marriage, personal rights and duties of the spouses, relationships between children and their parents, rights and duties within those relationships, adoption, fostering, financial support between children and parents, and the court procedures in cases of marriage related disputes. The Family Law promotes the principle of

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[1] NARODNE NOVINE [Croatian official gazette], 1991, No. 121, Item 4496.

[2] CONSTITUTION OF THE REPUBLIC OF CROATIA, adopted December 19, 1990, art. 141.

[3] *Id.* arts. 61 & 63.

[4] NARODNE NOVINE, 1999, No. 74, Item 3142.

equality between parents and protects the interests of all family members on equal footing. The Law on Foreigners, which entered into force on January 1, 2004, guarantees foreign citizens the same treatment in the field of family relations and dispute settlement as to Croatian citizens. That brought Croatian family legislation in accordance with European standards. Amendments to the Family Law adopted in September 2003, expanded the definition of the family and parenthood. Under these amendments, a woman who was an egg donor received the right to contest the motherhood of the woman who gave birth to the child and request parental rights in regard to the child. Family rights were extended to unmarried couples if they lived together for at least 3 years and had a child together. Simultaneously, adopted Same-Sex Marriage Law gives full set of family rights, including the right of guardianship over children to members of same-sex unions if they live together for a period of 3 years or more.

The problem of parental child abduction, especially international abductions, became a regional problem for Croatia, because of the break up of the former Yugoslavia, ethnic migration, and numerous interethnic marriages during the socialist period. Croatia has concluded a number of agreements on related issues with the neighboring states; however, the lack of resources for enforcement of already passed laws and procedural underdevelopment make the resolution of this problem a lengthy process. As of November 2003 (latest data available), Croatia had no open abduction cases and received no incoming return applications under the Convention. Also, the Permanent Bureau on the Guide to Good Practice of the Convention reported that it did not receive any submission or comment in regard to Croatia's participation in the Hague Convention.[5]

The Law of the Republic of Croatia on Acceding to the Convention on Civil Aspects of International Child Abduction, adopted simultaneously with the instruments of ratification, assigns the Ministry of Labor and Social Welfare of Croatia to be a Central Authority, with the responsibilities prescribed in article 7 of the Convention.[6] According to the implementing legislation, the Central Authority is obliged to provide general information to the applicant; however, it is not clear what kind of information and/or services are available. The Ministry focuses its work on preventive measures in protecting children from illegal removal and retention and promoting public awareness. Croatia is a unitary state and the Ministry of Labor and Social Welfare has jurisdiction all over the country, including all administrative districts and localities; therefore, the Convention extends to all Croatian territory as required by article 40. Being, in an organizational sense, a Central Authority of all the subordinated national centers for social welfare in administrative districts of Croatia, the Ministry coordinated their work and focused on training the local staff in 2003. Several 2-day workshops were organized for family legal protection team leaders of staff workers from local centers for social welfare.[7] District centers are responsible for the execution of the Ministry's instructions and conducting all practical work aimed at the implementation of the Convention's provisions. It appears that cooperation between the Ministry of Labor and Social Welfare and justice authorities is not efficient enough, and Croatian judges lack experience in dealing with international proceedings.[8]

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[5] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Convention Status Report, *available at* http://www.hcch.net/e/conventions/menu28e.html, visited Nov. 24, 2003.

[6] *Id.*

[7] *See* news reports at the Ministry's website, *at* www.mrss.hr.

[8] ANSWERS TO THE QUESTIONNAIRE ON PREVENTIVE MEASURES prepared by the Ministry of Labor and Social Welfare of the Republic of Croatia for the Hague Conference on International Private Rights, May 15, 2003, *available at* www.hcch.net.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Croatian regulations regarding the issuance of documents for travel abroad serves as a deterrent to a potential abductor. In order to obtain travel documents for a minor, both parents are required to provide their written consent. If one parent does not give a permission, the decision on the travel document for the child is made by the center for social welfare where the child permanently resides. The law requires that the well-being of the child be taken into consideration. Despite the fact that Croatian citizens may enter the Republic of Slovenia, Italy, and some parts of Bosnia and Herzegovina without passports, although passing the border control, children are always required to have their own passports.

The custodial parent who learns about an attempt to abduct his child or has suspicion that the non-custodial parent is attempting to leave the country with the child, has the right to approach the police in order to prevent it from happening. According to the prescribed procedure, the police must alert the border control whose duty is to stop that parent. This action is based on situations where there is a suspicion of someone committing the punishable act of child abduction. However, these measures are not effective since the border control is not as strict, corruption of the authorities issuing travel documents is notorious, and the other parent has minimal possibilities to react in a timely manner.

Croatian legislation provides for preventive measures in protecting children from illegal removal and retention, but they are not unified in order to be applicable to the Convention. Kidnapping of a child regardless of the reason is recognized as a crime in Croatia; however, there is no proscribed division of missing children into various categories, according to the reasons for disappearance. According to the Criminal Code of the Republic of Croatia adopted in 1997, child abduction or abduction of a dependent, as well as the failure to take the measures to protect the child or the dependent, is punishable by a fine or imprisonment for a period of up to 3 years. Commentaries on the Criminal Code issued by the Ministry of Justice of the Republic of Croatia specify that the jurisdiction of this article extends to a non-custodial parent abducting the child from a custodial parent or from another custodial person or an institution to which care and protection of the child has been given. The abduction may be open or hidden, and be a result of deceit, misuse of trust, or of restraining the child.[9] Under the Law, a child is any person under 14 years of age, and an individual in the age of 14 - 18 years is a minor. The child's consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The Criminal Code provides for another special offence, violation of family obligations. Violators of custody rules can be accused of committing this crime also.

In cases of abduction of a child or a minor by one of the parents and in cases of kidnapping of a child by unknown persons, the police consider such cases in the same manner as all other missing children cases and undertake all measures and actions for the quick and successful discovery of a child or a minor. Statistics of such cases are gathered and kept by the Ministry of Internal Affairs. The handling of cases of missing children is regulated by the Law on Bodies of Internal Affairs and subordinate acts of legislation which regulate the work of law enforcement authorities. There is no coordination between the Central Authority and Ministry of Internal Affairs, which does not receive information concerning abduction of children by parents. This approach together with the responsibility divided between several government agencies limits the ability of Croatian authorities to find an abducted child. There is no specific database on abducted children, and all information about missing children is stored in the

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[9] *Criminal Code of the Republic of Croatia*, ch. 6, Narodue Novine, Nov. 27, 1968, with amendments published in Narodue Novine, 2002, No. 12.

centralized database of the Ministry of Internal Affairs on missing persons. Croatia does not participate in the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of May 20, 1980, which regulates the enforcement of judicial and administrative decisions on custody and access. In case of abduction, the level of search (local, national, international) depends on information gathered during the search. For example, if there is relevant information that a missing child is abroad, the Ministry of Internal Affairs can issue an international search warrant. If one of the parents abducted the child, a court ruling on who is given custody over the child is required for issuance of a search warrant.

B. Parental Visitation

Family legislation in Croatia is based on the 1999 Family Law of the Republic of Croatia. The major principle of Croatian family law is that decisions relating to a minor should be based on his best interests; however, no specific act regulates issues related to parental visitation. Under Croatian law, both parents have equal rights and duties in regard to their children even after divorce. However, in case of a dispute, the Law allows the center for social welfare, which is the district office of the Ministry of Labor and Social Welfare and serves as a guardianship agency, and the court to award custody to one of the parents. The center for social welfare has an exclusive custody in cases when the child is born to a single parent or in the de-facto relationships, and in the intervening situations in cases set for the divorce proceeding. In this case a temporary decision on the custody of the child is made, pending the legal judgement of the court in the divorce proceeding when the custody of the dependent child is decided. If the parents are absent, the issue of custody for minors will be resolved by the center for social welfare also. Centers for social welfare decide disputes about the exercise of family rights; have the power to deprive access to parents living at a distance depending on the interests of the child; are party to custody suits; and may commence actions that would deprive a parent or parents of their parental rights.

The decision made by the center for social welfare regarding the custody of a child serves as an enforcement enabling the custodial parent to gain an immediate custody of the child. Since such decisions are made by the center for social welfare, courts do not issue temporary decisions on the custody of a child while the divorce proceedings are still under way. The enforcement of this decision largely prevents the removal or retention of a child since a non-compliance with this decision is a punishable criminal act. Parents may recover custody of their children unless the court decides that this would harm the child.

III. Court System and Structure – Courts Handling the Hague Convention

The structure of the judicial system in Croatia is determined by the Law on the Courts and is based on the idea of independent courts. In Croatia, the judiciary is built upon the courts of general jurisdiction, which judge in all disputes, except in those where law explicitly determines jurisdiction of another court. These special courts are police, administrative, and commercial courts, which have no jurisdiction over family and/or criminal matters.

Courts of general jurisdiction are organized hierarchically in three instances and are divided into regions. Lower courts are municipal courts, which serve as courts of first instance in civil and criminal cases. Most of the cases are tried by a single professional judge. A panel of three judges or jurors administer cases in county courts, which are almost exclusively second instance courts and courts of appeal. The Supreme Court is the court of full jurisdiction with respect to court decisions, and it can void them, confirm them, or revise them. The Supreme Court is the highest court in Croatia, and as the last instance it decides on extraordinary legal remedies against valid court decisions of the lower courts. The Supreme Court is also the appellate court in all cases where municipal court was the first instance. All

Croatian judges are appointed for life by the State Judiciary Council, an independent state institution formed of Parliament members, representatives of judicial authorities, prominent public figures, and members of Croatian Bar Association. Minister of Justice names the presidents of the courts from the appointed judges and the Chief Justice of the Supreme Court is elected by the Parliament according to the proposition of the Cabinet.

Cases of domestic child abduction rarely are brought to the courts. No pending cases of international child abduction or application of the Convention on the Civil Aspects of International Child Abduction have been reported.

IV. Law Enforcement System

The small number of international parental abduction cases in Croatia may be attributed in large part to the influence of cultural traditions that have determined the features of Croatian society, bureaucratic difficulties related to acquiring a valid travel document for children, and the ignorance of the general population of the issue. The Ministry of Labor and Social Welfare of the Republic of Croatia is promoting a number of public awareness campaigns popularizing its involvement and assistance in the fight against parental abduction of children.

International observers conclude that the enforcement of the Convention might be difficult, because of the lack of experience of the Ministry of Labor and Social Welfare in dealing with legal resolutions of family related disputes and almost absent cooperation with judicial authorities.[10] Because both the Ministry of Justice and the Ministry of Labor and Social Welfare, which supervise local custodianship and whose personnel are more familiar with the related work, are empowered with the administrative authority to order the return of an abducted child, close interagency cooperation may be required.

Croatian courts have relatively little experience in dealing with the application of international legal norms and may have problems with their enforcement. National authorities recognize inconsistency in the courts' practice of handling international legal proceedings due to professional unpreparedness of judges.[11] As a rule, Croatian courts reject requests for the return of a child from abroad if a parent of the child residing in Croatia did not participate in person or via a representative in court proceedings in the country in which the application has been made. Because Croatian legislation does not envision the possibility of issuing court orders in civil and family cases out-of-hours or *ex-parte*, there is a problem with timely enforcement of custody related decrees. The Family Law allows the application of urgent actions in passing down decisions in child support cases only, and there is no time limit for passing a decision by a municipal court, which makes parental abduction cases last long and contradict the requirements of the Convention.

V. Legal Assistance Programs

Legal assistance in Croatia could be received through the attorneys licensed to practice law in this country. *Pro bono* work is practiced by attorneys, although not very widely. In 2003, the Ministry of Labor and Social Welfare together with the Faculty of Law of the University of Zagreb conducted a short term seminar for law students on application of the Convention and child abduction prevention measures.

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[10] Human Rights Watch, WORLD REPORT 2003: CROATIA, *available at* www.hrw.org.

[11] *Supra* note 8.

The Ministry of Labor and Social Welfare remains, probably, the best source of assistance and information; however, there is no webpage, brochure, or similar material containing the information or advice on measures available to parents. Within their authority, officers of the Ministry of Labor and Social Welfare warn the parents against unlawful removal or retention of a child, quoting existing regulations which give the right of mutual support of their children to both parents. The same information is given to the parents when they approach the police.

VI. Conclusion

The Hague Convention on Civil Aspects of International Child Abduction prescribes basic principles of resolution of disputes in regard to the parental abduction of children. Unlike in other participating states, in Croatia these principles did not become the basis for national legislation, and the Croatian legal system has not yet elaborated national norms that correspond to the provisions of the Convention. The national judiciary continues to reject foreign decisions in favor of traditional domestic laws. The cooperation of Central Authorities in the Member States with the Ministry Labor and Social Welfare of the Republic of Croatia is not as effective as it could be expected, because of the lack of cooperation between this administrative agency, the courts, and the enforcement authorities. Also, information about the possibility of applying the Convention's provisions available to Croatian citizens is minimal. At the same time, the Convention is of great significance for Croatia, whose citizens have the right and possibility of using an internationally recognized mechanism for the return of a child in cases of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the countries that participates in the Convention.

Prepared by Peter Roudik
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January 2004

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CYPRUS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Convention on the Civil Aspects of International Child Abduction (hereafter the Convention) was adopted on October 24,1980, by the 14th Session of the Hague Conference on Private International Law and was signed on October 25,1980.[1]

The Convention's key objective, as reflected in its Preamble and article 1, is the protection of the best interests of children under the age of 16 who have been wrongfully removed or retained in any contracting state and to ensure their prompt return. It also seeks to ensure that rights of custody and access under the national laws of a contracting state are effectively respected in other contracting states.

The Convention requires that contracting states designate Central Authorities to discharge the duties imposed upon them, such as discovering the whereabouts of a child who has been wrongfully retained or removed, securing his return, and exchanging information related to the social background of the child and others. It also requires that Central Authorities closely cooperate with each other to achieve the goals of the Convention.

Cyprus, as a non-Member of the Hague Conference, acceded to the Convention by virtue of Decision No. 39284 of the Council of Ministers, issued on May 12, 1993, and ratified the Convention in 1994, as discussed below. Cyprus's accession to the Convention is effective only between Cyprus and those contracting states which have declared, or will declare, their acceptance of the accession.[2] The Convention entered into force in Cyprus on February 1, 1995, and between the United States and Cyprus on March 1, 1995.

I. Domestic Laws and Regulations Implementing the Hague Convention

Cyprus ratified the Convention by Law No. 11(III) of 1994.[3] Law No. 11 is cited as 1994 Ratification Law of the Convention on the Civil Aspects of International Child Abduction. The Law includes the text of the Convention in English and Greek. Pursuant to article 169.3 of the Cyprus Constitution, the Convention has acquired superior force to any domestic law since its publication in the Official Gazette.

Cyprus, as required by article 6 of the Convention, designated the Ministry of Justice and Public Order as the Central Authority to exercise the duties and rights arising from the Convention.

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[1] TIAS 11670.

[2] http://www.hcch.net/e/status/stat28e.htm.

[3] EPISEME EPHEMERIDA TES KYPRIAKES DEMOKRATIAS (EEKD) [Official Gazette of the Republic of Cyprus], Part I, at 181 (1994).

II. Domestic Law Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Criminal Code of Cyprus contains several articles that may be applicable to cases involving child abduction and retention.[4] Article 185 applies to cases that involve taking a child, whereas article 246 deals specifically, as its title indicates, with kidnapping from a lawful guardian. Both articles apply to children under the age of 14. However, article 246 raises the cut-off age for female children to the age of 16. Article 185 on child stealing reads as follows:

> Any person who, with intent to deprive any parent, guardian, or other person who has the lawful care or charge of a child under the age of 14 years, of the possession of such a child:
>
> (a) forcibly or fraudulently takes or entices away, or detains a child
>
> (b) receives or harbors the child, knowing him to have been taken or enticed away or detained

is guilty of a felony, and is liable to imprisonment for 7 years. It is a defense if the accused person claims in good faith a right to the possession of the child, or in the case of an illegitimate child is his mother or claims to be his father. Article 246 reads as follows:

> Any person who takes or entices any minor under 14 years of age if a male, or under 16 years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such a minor or person from lawful guardianship.

Article 248 deals with punishment of kidnapping:

> Any person who kidnaps any person from the Republic or from lawful guardianship is guilty of a felony, and is liable to imprisonment for 7 years, and is also liable to a fine.

Article 250 deals with secret and wrongful confinement of a person and reads as follows:

> Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, is guilty of a felony and is liable to imprisonment for 7 years.

B. Parental Visitation

The relations of parents and children are regulated by Law No. 216, the Parents and Children Relations Law of 1990 and 1995,[5] as amended.[6] Parental care is a right and a duty of both parents, who

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[4] The Criminal Code, ch. 154 as amended.

[5] EEKD, *supra* note 3, Part I, at 2030 (1994).

[6] Law No. 2, 1997 and Law No. 21(I) , 1998.

can exercise it jointly.[7] Parental care includes the right to name a child, care for him, administer his property, and represent the child in every transaction related to his person or property.[8] Care of a child is defined as including, the bringing up of the child, supervision, education, and training, including the designation of the child's place of residence.[9] All parental decision must be in the interests of the child. The Family Court of the district where the child resides, which is the court that has jurisdiction in cases involving relations between parents and children, must also apply the same standard when the decision of custody and parental care are at issue.[10] The court may also ask the opinion of the child, depending on the child's maturity, prior to rendering a ruling pertaining to parental care. Every court decision on parental care must respect the equality of the parents and must not discriminate on the basis of sex, language, religion, beliefs, citizenship, and national or social origin or property.

The court regulates the exercise of parental care in cases of divorce, separation, annulment of the marriage, or void marriage.[11] The court, based on an application by the parents, may also decide on the exercise of parental care, if the parents disagree and if the interest of the child requires that a decision be made.[12] Exercise of parental care may be assigned to one of the two parents, or both jointly. In the latter case, parents must come to an agreement as to the place of residence of the child. The court has the power to assign the exercise of parental care to a third person. In this respect, prior to reaching a decision, the court will take into consideration the child's relationship with his parents, with siblings, if any, and of any agreement between the parents that relates to this issue. In such cases, "the main criterion shall always be the interest of the child."[13]

The Law clearly provides for the right of personal communication between a non-residential parent and a child.[14] The court decides on how the right to personal communication will be exercised in case the parents cannot reach an agreement. The standard of care that the parents are required to show during the exercise of parental care is the same care that they show for their own affairs.[15]

III. Court System and Structure - Courts Handling the Hague Convention

A. Right to Seek Return

If the custody rights of a person have been violated by the wrongful removal and retention of a child by another, that person is entitled to the return of the child based on the Hague Convention. One of the ways to achieve this is to file an application through the designated Central Authority. In the case

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[7] *Id.* at art. 5 (1)(a).

[8] *Id.* at art. 5(1)(b).

[9] *Id.* at art. 9(1).

[10] *Id.* at art. 6(2)(b).

[11] *Id.* at art. 14(1).

[12] *Id.* at art. 7.

[13] *Id.* at art. 14(3).

[14] *Id.* at art. 17(1).

[15] *Id.* at art. 13(1).

of Cyprus, the designated Central Authority, as required by article 6 of the Convention, is the Minister of Justice and Public Order. The Minister is empowered to exercise any authority vested under the Convention. The second way is for the agreed person to proceed through the court system. These two ways are not mutually exclusive. The Ratification Law states that "any judicial process pursuant to the provisions of the Convention commences with the filing of an application by summons supported by an affidavit as provided by the Rules on Civil Procedure, *mutatis mutandis.*"[16]

Cyprus has a two-level system of courts, first instance courts and the Supreme Court. The main first instance courts are the District courts, which are made up of district judges, senior district judges, and presidents. The Supreme Court stands as the court of last resort in issues involving constitutional and administrative law.

The judicial system of Cyprus also provides for four Family Courts as first instance courts.[17] For this purpose, Cyprus is divided into four provinces, and each Family Court is located in a province. Issues related to Family Courts are regulated by Law No. 23/1990 on NOMOS YOU PRONOEI GIA TEN IDRYSE, SYNTHESE, DIKAIODOSIA KAI TIS EKSOUSIES TON OIKOGENEIAKON DIKASTERION [Law Providing for the Establishment, Composition, Jurisdiction, and the Authorities Vested in the Family Courts],[18] as amended. In any dispute, except in case of divorce, a Family Court is composed of a single secular judge of the family court. Decisions of the first instance Family Courts are subject to appeal before the second instance Family Courts. The latter are composed of three judges of the Supreme Court, who are appointed by the Supreme Court for a period of 2 years.

Pursuant to the above Law, Family Courts, in general, may exercise all the duties assigned to them, based on article 111 of the Constitution, on this Law and on any other law. Family Courts also have territorial jurisdiction to hear cases if one of the parties has his residence or his business within the province where the Family Court is located and the dispute concerns a minor and the minor resides in the province of the Family Court.

In 1998, Law No. 23/1990 was amended by Law No. 26(I) of 1998. Article 2 of the Law uses very explicit language as to the jurisdiction of Family Courts. It states that Family Courts have subject matter jurisdiction especially in "issues involving marital relations which are initiated in judicial proceedings arising from bilateral or multilateral conventions to which Cyprus has adhered" and also in "issues related to parental care, maintenance, recognition of a child, adoption, property issues between the spouses and any other marital or family dispute provided that the parties or one of them is a resident of the Republic." Residence is defined as a uninterrupted stay of more than 3 months.

B. Case Law

In 1996, the District Court of Nicosia decided a case involving the wrongful removal of a minor, whose father was a citizen of Cyprus and whose mother was a citizen of the United States.[19] Both parents were awarded temporary custody by a New York court order. The child lived with the mother, while the

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[16] *Supra* note 3.

[17] Other first instance courts are the Assize courts, military courts, industrial disputes courts, and the Rent Control Tribunals.

[18] *Supra* note 3, Part I, No. 2485 (1994).

[19] District Court of Nicosia, Appl. No. 405/96 (Dec. 18, 1996), *available at* http://www.hiltonhouse.com/cases/Cy-cyprus.txt (unofficial text).

father had visitation rights. In April 1996, the father brought the child to Cyprus in violation of custody orders.

In examining the facts of the case and in evaluating the evidence, the District Court first analyzed the inquiry as to whether there was a wrongful removal of the minor from the United States to Cyprus, pursuant to article 3 of the Convention. Upon examination of certain factual and legal elements, the Court held that the removal of the minor was in breach of custody assigned to the mother based on a judgment issued by the Family Court in New York. It also held that the mother was indeed exercising custody over the child prior to her being removed. Subsequently, the Court examined whether the prerequisite of article 12 of the Convention had been met, that is, whether a period of less than a year had elapsed from the date the child was wrongfully removed. Again, it answered the question in the affirmative.

Furthermore, the Court inquired whether it should use its discretion to refuse to order that the child be returned. In this respect, the Court noted that the child did not possess the necessary maturity because of her young age (7 years of age) to allow her views to be taken into account. It also noted that the child did not refuse to return to the United States, but she merely "expressed her desire to stay in Cyprus." Moreover, the Court in examining the question as to whether or not the mother had acquiesced to her daughter's staying in Cyprus held that the mother had not.

Finally, the Court dealt with a jurisdictional issue. The advocate of the respondent had raised the argument that the Nicosia District Court lacked jurisdiction because the Ratification Law clearly states that the Family Court has jurisdiction on the basis of article 111 of the Cyprus Constitution and laws 23/90 and 88/94.

The Nicosia District Court rejected the claim that the Family Courts had jurisdiction over the case. The court made a distinction between the subject matter that falls within the jurisdiction of the Family Court and the case under consideration. It clearly pointed out that this case involved the wrongful removal and retention of the minor from the United States to Cyprus and that it was called upon to decide whether or not it should order that the child be returned to the United States. Therefore, the court continued, based on article 16 of the Convention, which prohibits judicial authorities from deciding on the merits of rights of custody, and article 19, which states that any decision made "shall not be taken as a determination on the merits of any custody issue," that it, not the Family Courts, had jurisdiction to deal with the case. [20]

Subsequently, the court ordered that the child be returned to her mother in New York and that the father pay transportation expenses.

III. Law Enforcement System

In Cyprus, orders issued by the Family Courts on whether a child should be returned or not are immediately enforceable after being served to the respondent. Their execution is effected by the Central Authority, that is, the Minister of Justice and Public Order, as stated above. The latter is assisted either by the police or another government agency, such as the Welfare Department.

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[20] It has not been possible to ascertain whether the case was appealed because of lack of jurisdiction. However, the recently enacted Law No. 21, 1998 leaves no ambiguity that the Family Courts have subject matter jurisdiction in cases involving international abduction and retention of children.

IV. Legal Assistance Programs

No legal assistance is provided in civil cases under the judicial system of Cyprus. However, in cases arising under the Hague Convention, petitioners who opt to proceed through the Central Authority do not pay any legal fees because the filing of the application is undertaken by the Ministry of Justice and Public Order.

V. Conclusion

Since Cyprus became a contracting state of the Hague Convention in 1994, it has designated the Ministry of Justice and Public Order as the Central Authority to handle cases involving international abduction of children. Cyprus's well-developed judicial system and especially its law related to children, which is based on best interest of the child principle, provide the requisite foundation for effective application of the provisions of the Hague Convention.

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CZECH REPUBLIC

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction was signed by the Czech Republic on December 28, 1992. It was approved by Parliament and ratified, and the instrument of ratification was deposited with the government of the Kingdom of the Netherlands on December 15, 1997, with the reservation according to article 42 of the Convention, that the Czech Republic will not be bound to assume any costs referred to in article 26, paragraph 2, of the Convention, resulting from the participation of legal counsel or advisers or from Czech court proceedings, except insofar as those costs may be covered by its legal system of legal aid and advice. The Convention entered in force for the Czech Republic on March 1, 1998.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

In accordance with article 6, paragraph 1, the Czech Republic has designated as the Central Authority the Central Agency for International Legal Protection of Youth, Benesova 22, 602 00 Brno, Czech Republic. The Agency will represent the applicant under a power of attorney in proceedings under the Convention before Czech courts. The proceedings are exempt from the payment of court fees.

According to the Constitution of the Czech Republic,[2] the Convention became part of the legal order of the Republic upon its approval by Parliament, its ratification and publication, and the courts will apply it whenever called upon.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

For a decision relating to the wrongful removal and retention of a child, the competent court will be the District Court of the place where the child resides by parental agreement, decision of the court, or any other reason.[3] This court will also be competent in proceedings under the Hague Convention. The proceedings are governed by the provisions of the Code of Civil Procedure.

Child abduction may be prosecuted under article 216 (abduction) of the Criminal Code,[4] which provides that whosoever takes a child (a person under 18 years of age) away from the care of the person who has the duty under the law or under an official decision to care for the child will be punished by a

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[1] Announcement of the Ministry of Foreign Affairs of Mar. 5, 1998, No. 34, COLLECTION OF LAWS.

[2] Constitution of the Czech Republic of Dec. 16, 1992, No. 1 of 1993, as amended by Constitutional Law of Oct. 18, 2001, No. 39, COLLECTION OF LAWS, arts. 49 (a) and 52.

[3] Code of Civil Procedure, Law of Dec. 4, 1963, No. 99, COLLECTION OF LAWS, CONSOLIDATED TEXT OF FEB. 22, 2001, NO.69, COLLECTION OF LAWS, as amended, arts. 9, 88a and c. 176-177.

[4] Criminal Code, Law of Nov. 29, 1961, No. 140, COLLECTION OF LAWS, CONSOLIDATED TEXT OF SEPT. 18, 2002, No.412, COLLECTION OF LAWS, as amended.

fine or imprisonment for up to 3 years. A parent who, for example, takes a child abroad against the will of the other parent, claiming that it is only a temporary excursion, may be prosecuted under article 209 (abuse of the rights of others) of the Criminal Code.[5] The punishment is a fine or imprisonment of up to 2 years.

B. Parental Visitation

For a decision relating to parental visitation, the competent court will be the District Court where the child resides by parental agreement, decision of the court, or any other reason.[6] This court will also be competent in proceedings under the Hague Convention. The proceedings are governed by provisions of the Code of Civil Procedure.

III. Court System and Structure - Courts Handling the Hague Convention

General trial courts in civil matters are the District Courts; one is located in each territorial district. Appeal against their decisions goes to the Regional Courts, which also have specified trial jurisdiction. Appeal against decisions of the Regional Courts in their trial jurisdiction goes to the Courts of Appeal. A further appeal against decisions of the Regional Courts as Courts of Appeal and against decisions of the Courts of Appeal goes to the Supreme Court. Trial courts in child return proceedings, visitation, and enforcement of related orders under domestic Czech law, as well as under the Hague Convention, are the District Courts.[7]

In criminal matters, the structure is identical; however, because the Supreme Court deals only with petitions alleging violations of law by lower courts and prosecutors, the Courts of Appeal are the final courts of criminal appeal.[8]

IV. Law Enforcement System

The District Courts enforce their decisions. They are immediately enforceable. With regard to decisions relating to child return, visitation, and related matters, the court may first request the obligated party to carry out the court decision voluntarily and call upon the pertinent municipal or district office of Legal Protection of Children for its assistance. If there is no result, the court may impose successive fines of 2000 crowns each (US$1= 28 crowns) on the obligated party. It may, however, acting in cooperation with the above referred to offices, order the immediate enforcement of its decision by the proper state organs (court bailiffs and the police). The court acts appropriately according to the circumstances of the case.[9] In Hague Convention proceedings requiring the return of the child or visitation by the left behind parent, the court will proceed as above. For determinations as to the custody of the child, the court will apply articles 15-20 of the Hague Convention.

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[5] *Id.*

[6] *Supra* note 3.

[7] *Supra* note 3, arts. 7-12.

[8] Code of Criminal Procedure, Law of Nov. 29, 1961, No. 141, COLLECTION OF LAWS, CONSOLIDATED TEXT OF FEB. 8,2002, No. 43, COLLECTION OF LAWS, as amended, arts. 13, 252, 266.

[9] *Supra* note 3, arts. 171, 272-273a.

V. Legal Assistance Programs

General care and protection of children, both socially and legally, are regulated by chapter 2 of the Family Code and are entrusted to the Office of Legal Protection of Children within the district and municipal administration created by social security legislation.[10] The Office supervises the healthy development of children and their education and protects their legitimate interests, including property interests. Any person may contact the office in these matters and request assistance.

VI. Conclusion

The Czech Republic is in full compliance with the Hague Convention. The compliance is insured by the Central Authority of the Czech Republic, the Central Agency for International Legal Protection of Youth, which holds the power of implementation and which exercises its legal powers on behalf of the Ministry of Justice in matters pertaining to the Convention.

Prepared by George E. Glos
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November 2003

[10] Family Code of Dec. 4, 1963, No. 94, COLLECTION OF LAWS, CONSOLIDATED TEXT OF SEPT. 11, 1998, No. 210, COLLECTION OF LAWS, as amended, arts. 27(4), 41-50. Law on the Jurisdiction of Offices of Social Security of the Czech Republic of June 27, 1988, No. 114, COLLECTION OF LAWS, as amended by Law of Mar. 26, 1991, No. 144, AND LAW OF NOV. 14, 2002, NO. 518, COLLECTION OF LAWS, arts. 15 and 19.

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DENMARK

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The provisions concerning the implementation of the 1980 Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention) are contained in the Danish Law, known as "the International Child Abduction Act" (hereinafter the Act).[1] In conformity with the relevant provisions of the Convention, the Act does not apply to children who have reached the age of sixteen.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority is the Civil Law Directorate of the Danish Ministry of Justice, which discharges its duties in accordance with the rules set out in the Convention.

Section 10 of the Act prescribes rules on the return of a child to the person who has the legal custody of the child. Section 11 of the Act contains provisions on the denial of a request for the return of the child. Accordingly, a request for the return of a child, who has been unlawfully removed or retained may be denied if:

- at the time of the application for proceedings one year has passed since the child was removed or retained and the child has already settled in his new environment;
- there is a serious risk that the return of the child harms the child's psychological or physical health or otherwise the child will be subjected to a situation which cannot be acceptable;
- the child himself opposes the return and he has reached such age and maturity that his wishes should be respected; and
- the return of the child is incompatible with the fundamental principles regarding the protection of human rights and freedom as cherished in Denmark.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Chapter 23 of the Danish Penal Code prescribes rules concerning the crime against family. According to the provisions of Chapter 23:215, the removal of a child under eighteen years of age by one parent from the jurisdiction of a person who has the custody of the child is punishable by the penalties prescribed in section 261 of the Penal Code. The penalty according to section 261 is imprisonment of up to four years. In minor offenses, a milder punishment will be imposed. However, in certain aggravated cases the punishment may be from one year to as much as twelve years imprisonment.

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[1] Law Nr. 793, November 27, 1990. (*see* Karnovs Lovsamling, 1995, vol. 3, pp. 4911 ff.).

B. Parental Visitation

The answers to questions relating to a child's custody and the right to visitation are contained in the Danish Law on Parental Custody and Visitation.[2] Accordingly, a child born to a married couple enjoys the custody of both parents. The custody continues until the child is eighteen years old. The mother of an illegitimate child is the sole custodian of the child, unless an agreement has been reached by the parents to the effect that both parents should have the custody of the child. Parents who are separating or divorcing may conclude a similar agreement for the custody of the child. When the custody is disputed, the district court makes the decision on questions of custody and visitation. Under all circumstances, such decisions must be made with due consideration to what is in the best interest of the child. If a child has reached the age of twelve, he must be heard before a decision on the custody or visitation is made. However, if the circumstances indicate that questioning the child would be harmful to the child's mental health, the child does not need to be interviewed.

III. Court System and Structure – Courts Handling the Hague Convention

The matters concerning the custody of a child are handled by the district court, which in principle is the district in the area where the parties reside. The matters regarding the return of a child are dealt within *fogderetten* (a bailiff's court which enforces the judgements, both domestic and foreign) in the place where the child has been retained. The decisions of both courts can be appealed to the regional court of appeals. The highest instance is the Danish Supreme Court.

IV. Law Enforcement System

As was stated above, the questions relating to the enforcement of the Convention rules are dealt with by *fogderetten*. The court must handle the matter of a child's return as quickly as possible. If a case has not been resolved within six weeks, the applicant is entitled to question the court as to the reason for the delay (the Act, sections 12-15). However, if appropriate, the court may arrange a meeting with the abductor to negotiate voluntary return of the child before making a decision. Moreover, the court must obtain information about the child's wishes before making a final decision in the case if the child has reached the age and maturity where due consideration should be given to his wishes (the Act, section 16).

Upon application to it, the court may decide that the child should temporarily stay with one of the parents or, if there is a possibility that the child will be removed, the court may issue an interim order to place the child in the temporary custody of social services (the Act, section 17).

According to section 19:1 of the Act, if an application for the enforcement of the Convention has been made, no decision on the question of custody can be made in Denmark before the matter of the return of the child is decided by the *fogderetten*. Moreover, if the Central Authority informs the court dealing with a custody case that the child concerned has been unlawfully brought to or retained in the country, the court shall not make a decision in the custody case even if no application has yet been submitted to the *fogderetten* for the return of the child. In such cases, a reasonable time must be given for the filing an application in the "fogderetten" for the return of the child (section 19:2).

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[2] Law No. 387, June 14, 1995. (*see* Karnovs Lovsamling, 1995, vol.3, pp. 4870 ff.).

V. Legal Assistant Programs

The Danish rules on legal assistance are contained in the 1997 Ordinance on Legal Aid.[3] A person covered by the 1980 Convention can obtain legal aid in Denmark. However, it should be noted, firstly, that the grant of legal aid is subject to a means test. Secondly, Denmark has made a reservation to article 26 of the Convention to the effect that except for the legal aid that covers the court and attorney expenses, no other expenses involved in the process of the return of a child is compensated.

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May 1999

[3] Ordinance No. 866, November 25, 1997. (see Karnovs Lovsamling, 1997, vol. 7, pp. 10544-10545).

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ECUADOR

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (Convention) adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Ecuador on September 12, 1994.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Ecuador is the *Direccion Nacional de Proteccion de Menores* (DNPM) of the Ministry of Social Welfare under a temporary appointment until the *Consejo Nacional de la Ninez y Adolescencia* (CNNA) provides for a definite Central Authority.[2] The *Codigo de la Ninez y la Adolescencia* (CNA)[3] provides that the state must protect children and adolescents against their illegal abduction within the country or abroad.[4] However, there is no specific national implementing legislation of the Convention; therefore, the Code of Civil Procedure[5] (CPC) will apply for Convention related return or visitation petitions. The *Juzgados de Ninez y Adolescencia* (JNA) (Minors Court) with jurisdiction where the child is located will have competence to decide cases under the Convention.[6]

A. Return Requested from Abroad

Under the provisions of the CNA,[7] the competent judge to provide for the return of a child or to enforce visitation rights under the Convention, is the JNA where the child is located or where the child is being retained.[8]

This request will be applied as a summary procedure which guarantees due process and the right to the effective judicial protection.[9]

The National Police will be assisted by a police body specialized in the protection of minors will

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[1] REGISTRO OFICIAL (R.O.) Sept. 22, 1994.

[2] NORMAS DE APLICACION DEL CNA, Executive Decree 1187, in R.O. Dec. 24, 2003, art. 14 and *infra* 3, art. 195.i.

[3] CODIGO DEL A NINEZ Y LA ADOLESCENCIA, LAW 2002-100 in R.O. Jan. 3, 2003.

[4] *Id.* art. 74.3.

[5] CODIGO DE PROCEDIMIENTO CIVIL, Editorial Juridica del Ecuador, Quito, 2000.

[6] *Supra* note 3, art. 259.

[7] *Id.* art. 266.

[8] *Id.*

[9] *Id.* art. 267.

provide assistance thereto.[10] The specialized police has professionals specialized in children's and adolescents' issues.[11] The CNA provides for the specific procedures to carry out the judicial investigation to locate a child.[12]

If an agreement between the parties is not reached at the administrative level with the intervention of the Central Authority, a public defender,[13] will be appointed to intervene in the judicial proceedings.

The *Ministerio Publico* (state attorney) will always be a part of the proceedings and must report monthly on the actions taken and the advance in the investigation.[14]

B) Return Requested from Ecuador

When the Ecuadoran Central Authority is the requesting party, once the return or visitation petition is received, with regard to a child who has been taken to a country party to the Hague Convention, the documentation may be translated as appropriate. However, since Ecuador has not made any declaration as to the need to have documents translated, the provisions of the Convention will apply, and the documents will be sent to the competent Central Authority abroad.

The Ecuadoran Central Authority is required under the Convention to provide guidance and assistance to the petitioners. Once all of the documents have been submitted, the Central Authority will follow up on the petition abroad and try to reach to a friendly resolution of the case. If this is not possible, judicial proceedings will be instituted to return the child back to Ecuador or to reinstate the effective visitation schedule.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The CNA provides that taking or retaining children or adolescents in violation of custody rights, visitation rights, or the requirements for authorization to leave the country is forbidden.[15]

Children and adolescents who have been illegally taken or retained, have the right to be returned to their family and enjoy visits from their parents and other relatives according to law. In these cases, the state will take all measures necessary to return and reinsert the child in his family environment.[16]

In all cases, where the custody or parental authority of a minor is judicially assigned to one of the parents, the court will have to set up a visitation schedule.[17]

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[10] *Id.* art. 208.

[11] *Id.*

[12] *Id.* art. 268.

[13] *Supra* note 6.

[14] *Supra* note 3, art. 269.

[15] *Id.* art. 77.

[16] *Id.*

[17] *Id.* arts. 122-123.

The non-custodial parent, or anyone else who unduly retains a child whose parent authority or custody has been assigned to someone else, or if the visitation schedule is not complied with, may be judicially called to immediately return the child to the appropriate person and will be liable for any damages incurred by the illegal retention, including the request and return expenses.[18]

If, after being judicially requested, the individual in questions does not comply with the court's order, he or she may be arrested and the search, without any prior resolution, of his dwelling or the one where the child is suppose to be located, in order to secure the child's return.[19]

III. Court System and Structure – Courts Handling the Hague Convention

When Ecuador is the requested country and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be the JNA with jurisdiction where the child is located.[20] The JNA are assisted by an Office of Professionals, which includes physicians, psychologists, social workers, and other professionals who specialize in children's issues.[21]

The JNA are required to perform their duties based on the rule of law prioritizing the principles of fairness, legality, gratuity, morality, quickness, and efficiency over procedural rituals.[22] The superior interest of the child will always govern these procedures with the guarantee that the child's opinion will be heard in his parents presence or without it, if the court decides that it does not affect the interest of the child.[23]

While it does not suspend the enforcement of the decision, a case may be appealed to the respective Court of Appeals, and it must be decided within five days after a hearing of the parties.[24] The Court of Appeals decision may be reviewed by the Supreme Court only for legality control (*recurso de casacion)*.[25]

The courts, public defenders, lawyers, experts, or any court related official who, without justification, unduly delays the judicial proceedings provided in the CNA, may be penalized with a fine of US$100 to 500.[26]

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[18] *Id.* art. 125.

[19] *Id.*

[20] *Supra* note 6.

[21] *Supra* note 3, art. 260.

[22] *Id.* art. 256.

[23] *Id.* art. 258.

[24] *Id.* arts. 279-280.

[25] *Id.* art. 281.

[26] *Id.* art. 253.7.

According to the Ecuadoran Central Authority,[27] since the appointment of the CNA had taken place only 3 months ago and then the prior Central Authority (Court of Minors) was dissolved, there are no available records or statistics on the number of cases at this time.[28]

IV. Law Enforcement System

The National Police and police who deal with minors (DINAPEN), as well as other technical units of the police, will be part of the investigation to assist in the location of children and to secure the enforcement of authorities' orders.[29]

The Ecuadoran Central Authority could not provide any statistics on return or visitation at this time, because of the reasons above stated.[30]

V. Legal Assistance Programs

The Ecuadoran Central Authority provides legal assistance during Convention proceedings before the courts in Ecuador.[31]

There is no information available on the Internet about legal assistance programs. However, the following is the current contact information:

Direccion Nacional de Proteccion de Menores
Av. Orellana 1725 y 9 de Octubre
Quito
Ecuador
Carlos Iglesias
Tel: (5932) 2505-883 or 2544-339
e-mail: dnpm@niniezmbs.gov.ec

Ministerio de Relaciones Exteriores
Dr. Christian Cruz
Tel: (5932) 299-3220
Fax: (5932) 299-3221

VII. Conclusion

The application of the Convention in Ecuador is relatively recent. Since no records or statistics could be obtained at this time, it is difficult to arrive to any conclusion. However, it seems that there is a set of rules ready to be used in the application of the Convention. It also appears that Ecuador is

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[27] Dr. Carlos Iglesias and Dr. Christian Cruz.

[28] *Id.*

[29] *Supra* note 3, arts. 268-270.

[30] *Supra* note 28.

[31] *Supra* note 3, arts. 211.h and 211.i.

working towards a more organized Central Authority in the near future.[32]

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March 2004

[32] *Supra* note 14.

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FALKLAND ISLANDS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Falkland Islands, located in the South Atlantic, are an Overseas Territory of the United Kingdom, although the Islands are still claimed by Argentina.[1] The Queen has supreme authority over the Islands, which is exercised by a Governor on her behalf, upon the advice and assistance of the Legislative and Executive Councils.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Islands are internally governed, with the exception of defense and foreign affairs, which remain the responsibility of the United Kingdom. As such, the United Kingdom extends international treaties to the Falkland Islands, as it did with the Hague Convention on the Civil Aspects of International Child Abduction on March 26, 1998. The Convention entered into force in the Falkland Islands on June 1, 1998. When the United Kingdom extended the Convention to the Falkland Islands, the Embassy of the Argentine Republic responded with a declaration stating that it rejected the extension to the Falkland Islands.[2]

Legislation implementing the Convention is the Child Abduction and Custody (Falkland Islands) Order 1996.[3]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The common law of England, as of 1989, was imposed in the Falkland Islands by the Crimes Ordinance 1989.[4] This has resulted in the English common law offense of kidnapping being a crime in the Falkland Islands. Certain provisions of the United Kingdom's Child Abduction Act 1984 were also applied to the Falkland Islands by the Crimes Ordinance 1989.[5] This has resulted in the abduction, sale, or trafficking of children under the age of 16 in the Falkland Islands being an offense.

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[1] Argentina invaded the Falkland Islands on Apr. 2, 1982. See the resulting United Nations Resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21 and 41/40.

[2] Argentina refers to the Falkland Islands as the Islas Malvinas. Hague Convention on Private International Law, Full Status Report Convention #28, *available at* http://www.hcch.net/E/status/status.html.

[3] Child Abduction and Custody (Falkland Islands) Order 1996, SI. 1996/3156. This served to implement certain provisions of the law implementing the Convention into the national law of the United Kingdom (the Child Abduction and Custody Act 1985, c. 60 (Eng.).) into the national law of the Falkland Islands.

[4] Crimes Ordinance (Title 23.1), §3, refer to The Revised Laws of the Falkland Islands, vers. 2.

[5] Child Abduction Act 1985, c. 37 (Eng.). applied to the Falkland Islands by the Crimes Ordinance (Title 23.1), §7, with the exceptions of §§6 - 10, 11(1-2, 4-5), 12, & 13(2-3).

B. Parental Visitation

The Supreme Court and Magistrates Court of the Falkland Islands appear to be the designated courts that deal with cases of guardianship of children.[6] In child custody cases, the court making the decision is required to "regard the welfare of the minor as the first and paramount consideration, and will not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."[7] In cases of custody disputes, the court can grant an order regarding to whom the custody of the child should go to and provide rights of access for the remaining parent.[8]

III. Court System and Structure – Courts Handling Hague Convention

The Supreme Court of the Falkland Islands is the only court with jurisdiction to handle applications under the Convention.[9] Any appeals from the Supreme Court, at its discretion, go to the Judicial Committee of the Privy Council in the United Kingdom.[10]

A. Family Proceedings Generally

In all cases involving children, the laws of the Falkland Island and the policy of the government require that the best interests of the child be a primary consideration. In private law proceedings, the courts usually require a report from a court appointed welfare officer that considers what the best interests of the child are. In cases where the court decides on the upbringing of a child, the child's wishes and feelings are required to be heard.[11] However, due to the small and close-knit population of the Falkland Islands, "the removal of a child from its family environment will rarely be justified in principle of what is in the best interests of the child."[12]

Parents that are married at the birth of the child, or at any point since the conception of the child, have shared parental responsibility. The shared responsibility of both parents does not dissolve or move to a sole parent in the occurrence of separation or divorce. It can only be absolved upon the adoption of the child or an order of the court. Unmarried fathers do not have parental responsibility, but this can be granted through an agreement with the mother, or a court order.[13]

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[6] The Guardianship of Minors Ordinance (Title 38(1).2), §1.

[7] *Id.* §3.

[8] *Id.* §12.

[9] *Supra* note 3, ¶ 4.

[10] JERRY DUPONT, THE COMMON LAW ABROAD, 2001

[11] United Nations, Convention on the Rights of the Child, Committee on the Rights of the Child, addendum, Overseas Dependent Territories and Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland, CRC/C/41/Add.9 Feb. 2000, at 45.

[12] *Id.* at 44.

[13] *Id.*, referring to the Children Ordinance 1994.

B. Under the Convention

Once an application has been made the Supreme Court has the authority to give interim directions as it sees fit to "secure the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application."[14] The court has the authority to make a declaration in respect of an application under article 15 of the Convention that the removal of the child from the Falkland Islands, or retention outside of the Falkland Islands is wrong within the meaning of article 3 of the Convention.[15]

IV. Law Enforcement System

The Central Authority responsible for administering the Convention is the Governor of the Falkland Islands, who is appointed by the Queen of the United Kingdom.[16]

IV. Legal Assistance Programs

The reservation made by the United Kingdom extends to the Falkland Islands to the extent that the Governor of the Falkland Islands, or any authority in the Falkland Islands, is not responsible for the costs of applications under the Convention. However, assistance can be provided through "a grant of legal aid or legal assistance from funds appropriated from the Consolidated Fund of the Falkland Islands."[17]

VI. Conclusion

In the Falkland Islands, the overriding principles in dealing with cases affecting children is that the best interests of the child will prevail. The islands small, close knit population has resulted in decisions affecting children being taken with the traditional family model in mind. However, there do not appear to be any reported applications under the Convention in the Falkland Islands.

Prepared by Clare Feikert
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January 2004

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[14] *Supra* note 3, ¶ 5.

[15] *Id.* ¶ 8.

[16] The Governor, Government House, Stanley, Falkland Islands.

[17] *Supra* note 3, ¶ 11.

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FRANCE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Convention] was adopted on October 25, 1980.[1] Its objectives are to combat international parental abduction and wrongful retention of children under 16 years of age and to ensure the effective exercise of visitation rights across international borders. The Convention sets forth a procedure designed to restore the *status quo ante* existing prior to a child's wrongful removal or retention. Once it has been established that the removal or retention was wrongful within the meaning of the Convention,[2] the court, hearing a petition for return, is obliged to return the child to his country of residence where disputes about custody rights will be heard. The duty to return is absolute unless the defendant establishes one of the exceptions provided for in the Convention.[3]

Some 1500 children are abducted by a parent in France every year. The Convention offers only a partial solution to this difficult issue, as a great number of abductions are outside its scope. For example, many of the partners in binational couples living in France comes from the Maghreb countries (Algeria, Tunisia, and Morocco) which have not ratified the Convention.[4] Even in instances where the Convention applies, there are still difficulties and obstacles to overcome, such as locating the abducted children, the length of the proceedings, and the bias of some national courts.[5] The top five contracting states which filed applications with France under the Convention are Germany, Italy, Great Britain, the United States, and Canada. The United States has approximately 21 cases pending before the French authorities. Of these 21 cases the United States is seeking the return of children in 10 of them, the other 11 deal with access rights.[6]

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[1] *See* http://www.hcch.net/e/conventions/menu28e.html.

[2] In accordance with art. 3, the court will verify that the removal or retention of the child is in breach of custody rights attributed to the applicant, rights arising by operation of the law of the state in which the child was habitually resident immediately before the removal, or by reason of an agreement having legal effect under the law of that state, or by reason of a judicial or administrative decision.

[3] Art. 12 provides that the court is not obligated to return the child when return proceedings are commenced a year or more after the removal or retention, and it is demonstrated that the child is settled in his new environment.

Art. 13 provides three exceptions: (13a) the person claiming the breach of custody rights was not exercising his custody rights or had subsequently acquiesced to the removal or retention; (13b) return of the child would expose him to physical or psychological harm or would place him in an intolerable situation; and (13c) a mature child objects being returned.

Art. 20 allows a court to refuse to order the return of a child if such return "would not be permitted by the fundamental principles of the requested states relating to the protection of human rights and fundamental freedoms."

[4] Council of Europe, Parliamentary Assembly, *International abduction of Children by one of the parents*, Doc. 9476 of June 3, 2002, *available at* http://assembly.coe.int/Documents/workingDocs/doc02/EDOC9476.htm.

[5] *Id.* France, for example has often accused Germany of failing to apply the Convention. A special binational mediation parliamentary commission was created in Oct. 1999 to help resolving the conflicts.

[6] *See* http://travel.state.gov/2003_June_Hague_Attach.html.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Convention was published by Decree No. 83-1021 of November 29, 1983, and became effective on December 1, 1983, at first only between France, Portugal, and Canada.[7] Under French law, treaties have an authority superior to that of ordinary laws and are automatically incorporated into domestic law, provided that they have been correctly ratified and published and that each agreement is applied reciprocally.[8] The Convention came into force between the United States and France on July 1, 1988, following the enactment of the International Child Abduction Remedies Act by the United States.

The Ministry of Justice, and more specifically, the *Bureau de l'entraide judiciaire en matière civile et commerciale*, has been designated as the Central Authority for France to carry out the duties imposed by the Convention.[9] Upon receipt of an application for return, the Central Authority will check that it satisfies Convention criteria and is accompanied by the proper documentation. This authority will consider only those applications which are drawn up in French or are accompanied by a translation into French.[10]

The file is then forwarded to the *Procureur de la République* (public prosecutor) attached to the civil court of general jurisdiction in the jurisdiction where the defendant resides. This court, known as the *tribunal de grande instance*, has exclusive jurisdiction over family matters. Initially, the parties are systematically encouraged by the Central Authority to reach an agreement; if necessary, an experienced mediator will be involved.[11] An International Mediation Mission for Families was created at the Ministry of Justice in April 2001. It provides mediation services either at the request of the parents or of the competent authorities. The mediation will address issues, such as the exercise of parental authority, the residency of the child, and the effective visitation rights of the non custodial parent. The Mission is comprised of judges, social workers, and a psychologist. Since its creation, the Mission has been involved in about 100 cases.[12]

All necessary measures will be taken to locate a child, protect his well-being, and prevent the child from being abducted or concealed before the final disposition of the case (interdiction to leave the French territory, inscription of the child name in the missing children registry).[13] If mediation fails, the petition for return will be heard before a specialized judge, the *juge aux affaires familiales* (family affairs judge). However, the judge may decide to remand the case to a panel of three judges. Such remand is mandatory if it is requested by one of the parties.[14] The decision rendered by the judge or the court is appealable.

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[7] Journal Officiel [hereinafter J.O.], Dec. 1, 1983, at 3466.

[8] 1958 CONST. art. 55.

[9] Ministère de la Justice, Direction Des Affaires civiles et du Sceau, Bureau de l'entraide Judiciaire, en matière civile et commerciale 13, Place Vendôme 75042 Paris Cedex 01 Téléphone: 33 1 44 86 14 66, Fax: 33 1 44 86 14 06.

[10] This is in accordance with the provisions of art. 42 and pursuant to art. 24, ¶ 2 of the Convention.

[11] Letter 002630 of Apr. 8, 1999, from the French Central Authority in response to an inquiry from the Law Library of Congress.

[12] *See* http://www.diplomatie.gouv.fr/francais/familles/enlevements/mots_utiles03.html.

[13] *Supra* note 11.

[14] Code Civil (C. CIV.) art. 247, (Ed. Dalloz 2003) & Code de l'organisation judiciaire (C. ORG. JUD.) art. L.312-1 (Ed. Dalloz 2003).

Provisional enforcement pending the appeal may be granted, but the court is not compelled to do so.

Alternatively, the petitioning parent may choose to bypass the Central Authority and instead proceed directly to the *tribunal de grande instance*. This option was confirmed by the *Cour de Cassation* (the highest judicial court in France) in 1995.[15] The petitioning parent's attorney will use an emergency procedure known as *référé*. The opposing party is informed of it. Application for a *référé* is made by an *assignation en référé*, which is similar to an emergency writ of summons. Special sessions for the hearing of *référé* applications are usually held once a week(sometimes more often in the larger cities), or in cases of extreme urgency, immediately at a fixed time, in court or at the residence of the judge, even on public holidays. Bypassing the Central Authority may save time, but the public prosecutor services will not be available, and a local attorney experienced in dealing with the Convention will be required. In addition, when the child's whereabouts are unknown, the prosecutor can ask the police to investigate further. Such help will not be so easily obtainable if the parent goes directly to court.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Penal Code contains several provisions covering parental child abduction and withholding access rights from a person entitled to such rights. The offenses are listed in the Code under the heading "Encroachment on the exercise of parental authority." They are as follows:

- Withholding access rights from a person entitled to these rights is punishable by a 1 year prison term and a €15,000 fine (approximately US$ 16,500);[16]
- Failure by the person with whom the child habitually resides to give notice within one month of any change in the child's residence to whoever has access rights to the child resulting from a judicial decision or an agreement approved by a court is punishable by a 6 month prison term and a €7,500 fine (approximately US$ 8,250);[17]
- Abduction of a minor by a legitimate, natural or adoptive parent either from a person with parental authority or from a person he was placed with, or from a person with whom he habitually resides, is punishable by a 1 year prison term and a €15,000 fine (approximately US$ 16,500);[18]
- Abduction of a minor without fraud or violence by a person other than the persons mentioned in the previous article from a person with parental authority, from a person he was placed with, or from a person he habitually resides with, is punishable by a 5 year prison term and a €75,000 fine (approximately US$ 83,000).[19]

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[15] Cass. 1ere., June 7 1995, Bull.civ. I, No. 234.

[16] CODE PÉNAL (C. PEN.), art. 227-5 (ed. Dalloz, 2003).

[17] *Id*. art. 227-6.

[18] *Id*. art. 227-7.

[19] *Id.* art. 227-8.

The penalties imposed by articles 227-5 and 227-7 will be increased to a 3 year prison term and a € 45,000 fine when either one of the following occurs :(1) the child is retained for more than 5 days and information with regard to the child's whereabouts is withheld; (2) the child is taken out of the territory of the French Republic;[20] (3) the guilty party has lost parental authority.[21]

Criminal prosecution may result in a formal judicial investigation conducted by an investigating judge. This judge has broader investigatory powers than a civil judge. Prosecution may also be used as a negotiating tool with the abductor, and in some cases has a dissuasive effect. However, in other cases, prosecution may impede any chance of reconciliation, as it tends to exacerbate the situation. Therefore, recourse to criminal prosecution is decided on a case-by-case basis.[22]

B. Parental Visitation

Parental rights and duties referred to as *authorité parentale* [23] are vested jointly in parents at the birth of the child.[24] Divorce or separation of the parents do not in principle affect the relationship of rights and duties of former spouses in relation to their children.[25] It is customary for joint parental authority to continue while one parent is awarded custody, unless this is deemed to be contrary to the child's interests. Parents should continue to decide together which school the child will attend, matters relating to health, and relationships with third parties. Therefore, a non-custodial parent will retain access rights and the right to influence major decisions affecting the child.

In case of disagreement, the *juge aux affaires familiales* has full authority to take any measure guaranteeing the continuity and effectiveness of the relationship between a child and each of his parents. He may, for example, order an entry on the parents' passports stating that the child cannot be taken out of the French territory without the authorization of both parents.[26] To determine how parental authority will be exercised, the judge may take into account any agreement between the spouses, reports prepared by social workers, and wishes of the child (provided that the child has a sufficient degree of understanding).[27] Parents are free to seek the modification of an order if a change in circumstance has occurred.

Article 16 of the Convention prohibits a court from making substantive custody decisions during the proceedings. Therefore, only provisional measures in the best interests of the child will be taken by the judge. When return of the child to the country of habitual residence is denied, parental authority will be decided according to the rules stated above.

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[20] *Id.* art. 227-9.

[21] *Id.* art. 227-10.

[22] LES PETITES AFFICHES, Françoise Thomas-Sassier, *La soustraction internationale d'enfants*, Oct 1, 1997. (Ms. Thomas-Sassier was one of the judges in charge of the application of the Convention at the French Central Authority).

[23] *Supra* note 14, art. 371-1.

[24] *Id.* art. 372.

[25] *Id.* art. 373-2.

[26] *Id.* art. 373-2-6.

[27] *Id.* art. 373-2-11.

III. Court System and Structure – Courts Handling the Hague Convention

France has a dual system of courts: judicial and administrative courts. Judicial courts have two functions, civil and criminal. They carry distinct names depending on which function they exercise. This report discusses only the judicial courts which may be involved in handling Hague Convention child return proceedings.

As seen above, *the tribunal de grande instance* is the court of first instance which will hear the application for return. Such courts are located in each *département*,[28] though some larger departments have more than one. They are competent to hear all civil disputes, apart from disputes which are expressly attributed to another court by reason of their nature or the amount involved. The *tribunaux de grande instance* are the ordinary courts for family matters (marriage, divorce, affiliation, and nationality), as well as for property, patent matters, and civil liability.[29] They usually sit as a three-judge panel,[30] although specialized judges, sitting alone, such as the *juge aux affaires familiales,* adjudicate ordinary cases.[31] In principle, the *tribunal de grande instance* of the defendant's residence has territorial competence.[32] When exercising its criminal jurisdiction, the *tribunal de grande instance* is referred to as the *tribunal correctionnel.* Offenses regarding parental abduction listed above in Part II would be heard before the *tribunal correctionel.*

Appeals of both civil and criminal decisions of the *Tribunaux de grande instance* go to the *Cour d'appel* (court of appeals). Their territorial jurisdiction generally covers three *départements.* The court of appeals sits in panels with a minimum of three members. They re-examine the facts and the legal points of a case. The courts review the files as presented by the lower courts and order additional investigations if necessary.[33]

The supreme judicial court is the *Cour de Cassation.* The court currently has six chambers: three *chambres civiles*, a *chambre commerciale et financière*, a *chambre sociale*, and a *chambre criminelle.* The Court is referred to as the guardian of the law. It decides whether the rule of law has been correctly interpreted and applied by the lower courts. Usually, it does not substitute its own decision for a lower court's judgment with which it disagrees, but merely quashes the judgment and remits the case for rehearing by another court of the same rank. This lower court is not bound to accept the *Cour de Cassation's* view of the law, but will ordinarily do so. If it refuses to do so, and its decision is in turn appealed to the *Cour de Cassation* on the same grounds as before, the court will sit as an *assemblée plénière* (full court). If the court again quashes the lower court decision, it will either remit the case to a third lower court which will this time be bound by the *Cour de Cassation's* interpretation of the law, or it may decide the case itself.[34]

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[28] France is divided into 22 regions and there are 96 *départements* within these regions.

[29] C. ORG. JUD. art. L 311-2.

[30] *Id.* art. L311-18.

[31] *Id.* art. L312-1.

[32] NOUVEAU CODE DE PROCÉDURE CIVILE (N.C.PR.C.), art. 42.

[33] C. ORG. JUD., arts. L212-1 and R211-1.

[34] *Id.* arts. L111-2 and R121-3.

In most cases it appears that the French courts have ordered the return of the children.[35] The two defenses most often raised are (a) the lack of custodial rights of the petitioner, or (b) a grave risk of harm /intolerable situation. As to the first defense, the Court of Appeal of Aix en Provence and the *Cour de Cassation* on two occasions have concluded that a person having visitation rights, the legal right to be consulted, and the right to consent to any change in the child's residence, had rights of custody within the meaning of the Convention.[36]

For a grave risk/intolerable situation defense to be successfully raised, the *Cour de Cassation* requires that the grave risk of harm or the intolerable situation be evaluated in regard to the conditions that the child will find upon his return and not in regard to past facts.[37] The Court, for example, denied the return of a child who had been kidnapped by his mother when he was 6 months old, and, at the time of the court decision, she was the only person he had ever known. The court held that such a return would subject him to a grave risk of psychological harm. The doctor who conducted the mental examination of the child had concluded that returning the child to his father would expose him to a psychological danger, not because bringing him closer to his father, but because of his young age, the separation from his mother, with whom he had lived alone would be for him the equivalent of a bereavement. [38]

Under the same line of reasoning, the court denied the return of two children to the United States 4 years after their kidnapping by their mother. She had taken them to France when they were respectively 2 years old and 3 months old.[39] Finally in a 1999 case, the court ruled that separating a 3 years old child from her mother and from her brother would result in an imminent psychological danger for both children. It denied their return to the United States.[40]

Over the past 3 years there have been a number of cases where the parents who kidnapped their children from Israel to France raised the issue before the French courts that Israel was a war zone and therefore the return to Israel would expose them to physical and mental harm or otherwise place them in an intolerable situation. In each instance, the court rejected the argument, and the children were returned.[41] In a recent case, for example, the family law judge of the Marseilles *tribunal de grande instance* found that the situation in Israel has been tense since the creation of the state in 1948, and that this climate did not dissuade the defendant and his wife from taking their residence there with their six children. As to the crisis known as the second Intifada, which began in September 2000, it did not prevent the defendant from waiting until April 2002 to remove five of his daughters, thereby separating the

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[35] *See* Hubert Bosse-platière, *l'application par les tribunaux Français des Conventions visant à lutter contre les déplacements illicites d'enfants, l'enfant et les conventions internationales*, at 413 (Presse Universitaire de Lyon, 1997), and Jacqueline Rubellin-Devichi, DROIT DE LA FAMILLE, at 659, (Ed. Dalloz, 1999). The authors state that only three decisions have denied the return of the children. Since the publication of these books, the *Cour de Cassation* rendered one additional decision in 1999 denying the return of the children. The 1999 decision is reviewed above in the report.

[36] Hubert Bosse-Platière-platiere, *l'application par les tribunaux Francais des Conventions visant a lutter contre les déplacements illicites d'enfants, l'enfant et les conventions internationales,* at 417.

[37] *Id.* at 420, 421.

[38] Cass. 1ere., July 12, 1994, Bull.civ. I, n° 248.

[39] Cass. 1ere., Nov. 21 1995, Bull.civ. I, n° 415.

[40] Cass. 1ere., June 22, 1999, Bull.civ. I, n° 206.

[41] E-mail dated Nov. 26, 2003 from the Office of the State Attorney, Ministry of Justice of Israel, in response to an inquiry from the Law Library of Congress.

siblings. The judge further held that although it is indisputable that random and unpredictable suicide attacks are perpetrated in this country, risk must be strictly assessed.[42]

The courts will consider the wishes of the children who have reached the "age of understanding" (generally from the age of 10 or 11 years old). These children may be assisted by their own attorney (who will be always appointed on legal aid). The judge will hear the child separately with only the child's attorney present.[43]

IV. Law Enforcement System

Judgments are enforceable only after they have been given *force de chose jugée*, i.e., where they are not subject to appeals suspending their enforcement, or where appeals have not been made within the time limits.[44] In principle, judgments cannot be enforced until an *expédition* (first authentic copy of the judgment which contains the *formule exécutoire* (enforcement formula)) is delivered to the successful party. This enforcement formula specifically requires all *huissiers de justice*,[45] public prosecutors and commanders and officers of the police force, to lend their assistance when it is requested. The judgment must be then served on the defendant unless provided otherwise.[46]

French law possesses no law of contempt of court for the enforcement of civil judgments and other court orders. Therefore, in the absence of voluntary compliance with a judgment or court order, there is no other option than the *exécution forcée* (forced compliance).[47] Orders requiring the return of a child under the Hague Convention or orders concerning visitation rights will be enforced with the assistance of the public authorities as specified in the enforcement formula contained in the judgment.

French courts have also developed the technique of *astreintes* designed to induce compliance with court orders. An *astreinte* is a specified amount of money that the court orders to be paid for every day, week, or month during which a person fails to perform its order.[48]

V. Legal Assistance Programs

France made the following reservation to article 26 of the Convention:

> In accordance with the provision of article 42 and pursuant to article 26, paragraph 3, the Government declares that it will assume the costs referred to in paragraph 2 of article 26

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[42] *See* http://www.hiltonhouse.com/cases/BenSaid_France.txt.

[43] C. CIV. art. 388-1.

[44] N.C.PR.C., arts. 500 & 501, (Ed. Dalloz, 2003).

[45] The *huissiers de justice* have the exclusive right to notify all procedural acts in relation to legal proceedings and they are responsible for the enforcement of court orders and judgments.

[46] N.C.PR.C., art. 502.

[47] *Supra* note 11.

[48] Law 91-650 of July 9, 1991, art. 33, N.C.PR.C, Voies d'exécution at 1145.

only insofar as those costs are covered by the French system of legal aid.[49]

When the person seeking the return of the child uses the services of the Central Authority and of the public prosecutor, no fee will be incurred. The public prosecutor is a civil servant, and he appears in court on behalf of the state. His service is justified on the ground that compliance with international conventions on judicial cooperation is in the public interest. However, a person bypassing the Central Authority will incur costs(although civil litigation is considerably less expensive in France than in the United States) unless he qualifies for legal aid.

Subject to a means test, legal aid is available in France either for legal advice or for litigation. It is available in all civil, criminal, and administrative litigation to plaintiffs, as well as defendants. An application must be filed with specially constituted bodies, known as *bureaux d'aide jurisdictionelle*, which are composed of judges, lawyers, public officials, and "consumers." These bureaus are found in each *tribunal de grande instance* and the *Cour de Cassation.* They may grant partial or full legal aid, depending on the means of the applicant. Legal aid is available to French citizens, nationals of the Member States of the European Community, foreign nationals residing habitually in France, minors whatever their status may be, and, exceptionally, to a person who "does not fit into any of these categories but whose situation is of a particular interest due to the subject of the litigation or the foreseeable cost of the trial."[50]

It may be also possible for the winning party to recover some of the costs. French law addresses the recovery of costs incurred in civil litigation as follows:

> The Code of Civil Procedure provides for a list of expenditures known as *dépens,* which include expenses incurred by witnesses, remuneration of experts, court fees, emoluments of *officiers publics*,[51] and attorneys fees where recourse to an attorney before the court in question is compulsory.[52] In principle, the loser of a case pays the *dépens* of the other side, as well as his own, but the court has discretion to place all or part of them on another party to the litigation.[53]

The costs which are not counted as *dépens* (for example, attorney fees when resorting to an attorney is not compulsory), may be also recovered by the winning party. In principle, the person who is ordered to pay the *dépens* is also ordered to pay any other costs. However, taking into account what is equitable, the court may in its discretion decline to make such an order or make only a reduced one. In addition, if the losing party has been unfair or vexatious, then he may be liable for the loss this causes any other party to the litigation.[54]

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[49] *See* http://www.hcch.net/e/status/stat28e.htm

[50] Law 91-647 of July 10, 1991 as amended, N.C.PR.C., Appendice at 1323.

[51] This expression covers various categories of practitioners (such as, for example, the *huissiers de justice* as seen above) who have obtained from the administration the exclusive right to perform certain legal acts and/or execute certain legal instruments.

[52] N.C.PR.C., art. 695.

[53] *Id.* art. 696.

[54] *Id.* arts. 32-1 (dilatory or abusive suit); 559 (dilatory or abusive appeal); 628 (abusive pourvoi en cassation).

VI. Conclusion

Based upon the available information and the reported cases, it appears that France has been in compliance with the Convention, and French courts have applied the Convention strictly and without national bias. The Convention has been viewed as a major breakthrough and as an effective tool when applied in good faith.[55] French authorities, however, have expressed concerns that the national reflexes and protectionism of some foreign courts have undermined its effectiveness and resulted in an increase in the number of kidnappings.[56] They argue that only true political will to comply with the terms of the Convention by the Central Authorities of such countries will change the courts' attitude.

To complement and reinforce the system created by the Convention, at least within the EU, France made the adoption of a regulation ensuring that decisions on access rights be directly enforceable in another Member State and ensuring the prompt return of the child one of its priorities. The EU Council of Ministers approved such a Regulation on October 3, 2003. It will be applicable in March of 2005.[57] All decisions on parental authority rendered in a Member State will be directly enforceable in another Member State without the need for an intermediate procedure (exequatur procedure). The regulation will make mandatory the hearing of the victim parent by the judge of the state where the child has been unlawfully taken. This judge will have 6 weeks to render a decision as to the return of the child. The only judge competent to decide on the issues concerning the child, such as custody, visitation rights, and administration of the child's property will be the judge of the habitual residence of the child.

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November 2003

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[55] *Supra* note 22.

[56] *Id.* Ms. Thomas-Sassier notes that abductions by German parents have increased because of the unwillingness of German courts to return children to France.

[57] News Press, Adoption d'un reglement concernant le droit de la famille et les enlevements d'enfants, Oct. 3, 2003, Lexis/ Presse.

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REPUBLIC OF GEORGIA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Georgia, which became independent from the Soviet Union in 1991, is a non-Member State to the Convention on the Civil Aspects of International Child Abduction. The Republic of Georgia cannot become a Member of the Convention, because it did not participate in the Hague Conference on Private International Law at the time of its 14th Session as required by article 37 of the Convention. Georgia acceded to the Convention in 1997. The Parliament of Georgia ratified the Convention on July 24, 1997, and the act of ratification entered into force in Georgia on October 1, 1997. The accession of Georgia has been accepted by the following countries: Argentina, Australia, Austria, Bosnia and Herzegovina, Canada, Chile, China (Macao Special Administrative Region), Czech Republic, Finland, Germany, Greece, Hong Kong, Hungary, Ireland, Israel, Italy, Kingdom of Netherlands, New Zealand, Norway, Poland, Portugal, Serbia and Montenegro, Slovak Republic, Spain, Switzerland, and the United Kingdom.

In accordance with article 38 of the Convention, Georgian accession to the Convention is effective only in the relationship between Georgia and those contracting states that have declared their acceptance of the accession. Additionally, on January 1, 2000, the Convention entered in force between the Republic of Georgia and two former Soviet states, Belarus and Turkmenistan. The United States has not recognized participation of the Republic of Georgia in the Hague Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

Georgia acceded to the Hague Convention at the time of its international recognition and admission to European and international organizations and institutions. Georgia's accession to the Convention, however, did not influence the development of the Georgian legal system. The issue of international child abduction is not an acute problem for Georgia because of its long years of international isolation, the domination of conservative Soviet traditions in family relations, internal armed conflicts, absence of new legislation, and lack of resources for enforcement of already passed laws. As of January 2003 (latest data available), Georgia had no open abduction cases and received no incoming return applications. Also, the Permanent Bureau on the Guide to Good Practice of the Convention reported that it did not receive any submission or comment in regard to Georgia's participation in the Hague Convention.[1]

After the Convention was ratified by the Georgian Parliament, the Minister of Justice of the Republic of Georgia issued an executive instruction assigning the International Law Department of the Ministry of Justice to be the Central Authority, with the responsibilities prescribed in article 7 of the Convention.[2] According to domestic legislation, the Central Authority is obliged to provide general information to the applicant; however, it is not clear what kind of information and/or services are available. It appears that there is no cooperation between Ministry of Justice and child welfare services. Because Georgia is a federal state with two autonomous provinces, the Ministry of Justice has nominal

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[1] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Convention Status Report, *available at* http://www.hcch.net/e/conventions/menu28e.html, visited Nov. 24, 2003.

[2] LEGAL ACTS OF GEORGIA, 1998, No. 2-3, at 37.

jurisdiction over all the country; therefore, the Convention formally extends to all Georgian territories as required by article 40. However, because of strong separatist movements in both provinces and ongoing civil war in Abkhazia, acts of federal authorities are recognized in autonomous provinces selectively, and the enforcement of legal acts is almost non-existent.

In an attempt to join European and international institutions, the Parliament of Georgia ratified 171 international agreements and conventions during 1995-1998. The Convention on the Civil Aspects of International Child Abduction is among them. Most of these documents will be implemented in accordance with the Law on International Private Law of 2001,[3] which establishes the priority of concluded international legal agreements over domestic legislation and provides for the resolution of arising conflicts according to the norms provided by an international treaty. However, the enforcement of the concluded agreements remains weak. Georgian President Eduard Shewardnadze who was ousted by a mob from the office on November 23, 2003, stated in one of his addresses to the nation that the implementation of laws and court decisions is the weakest point in the activities of the Georgian government.[4]

Even though the legislation of the Republic has been significantly amended during the last 3 years, and such important documents as amendments to the Family and Marriage Code and new Criminal Code were adopted, it appears that these documents have little effect in regard to enforcement of the Convention on the Civil Aspects of International Child Abduction.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Criminal Code of Georgia adopted on July 22, 1999, does not recognize parental abduction as a crime. The Law considers as an abduction, the kidnapping of a child by a person who is not child's parent or legal guardian without the consent of the parents or legal guardians, regardless of the purpose of this action. In order to be prosecuted under to the Criminal Code, the abduction of a child should be committed for mercenary purposes or for other base motives. In such cases, the abduction will be punishable by 5 years in prison. The same action committed for other purposes or motives is punishable by 1 year in prison or by corrective labor for the same term. The abduction may be open or hidden and may be a result of deceit, misuse of trust, or restraint of the child. Under the Law, a child is any person under 14 years of age. The child's consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The Law determines "mercenary purposes" as intending to receive material profits from the abduction, i.e., ransom or taking a child's clothes. Base motives are those that contradict moral principles, for example, taking revenge on a child's parents. If a childless woman abducts a child with the purpose of educating him and creating a good family environment for him, such an abduction does not qualify as an abduction from base motives.[5] However, the Criminal Code states that such action will be considered as an abduction committed under softening circumstances.[6]

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[3] SAKARTVELOS-RESPUBLIKA [Georgian Government published daily newspaper, official gazette], 2001, No. 13, at 7.

[4] *Shevardnadze's State of Nation Address*. SAKARTVELOS - RESPUBLIKA, Feb. 17, 1999, at 1, translated by the FBIS, electronic version, document ID: FTS19990301000810.

[5] BULLETIN OF THE USSR SUPREME COURT, No. 2 (1974) at 10.

[6] CRIMINAL CODE OF THE REPUBLIC OF GEORGIA, art. 24, 361.

Parental kidnapping is not considered a criminal offense in Georgia. Only those who abduct somebody else's child may bear criminal responsibility for a child's abduction. Hence, biological and/or adoptive parents may not be prosecuted as kidnappers or child abductors. In cases of disagreement among divorced or separated parents, the abduction of one's own child from the other parent or from an orphanage or another special institution is not considered to be an abduction under Georgian criminal legislation. It may be labeled as an arrogation, which is the "unwarranted exercise in violation of a legally established order, of one's actual or supposed right, causing substantial harm to citizens or to the state or social organizations."[7] Arrogation is punishable by correctional work for a term up to 6 months, or by a fine, or by a social censure. The Law also prohibits prosecuting close relatives of a child (for example, grandparents) for abduction, if they acted for the sake of the child, even if the interests of the child were misunderstood.[8]

Furthermore, Georgian criminal legislation does not provide for punishment for the removal of a child from the country or for retaining a child outside Georgia with intent to obstruct the lawful exercise of parental rights. Retainment is not considered as a separate felony.

Acts, such as parental child abduction, occur very seldom in Georgia. If a foreigner whose home country recognizes the participation of Georgia in the Convention commits such a crime, the child is subject to return. All other cases fall under the laws of the respective state. In such cases, the International Law Department at the Ministry of Justice of Georgia, which was designated as a National Central Authority to discharge the duties imposed by the Convention, must cooperate with foreign authorities in order to find the child, to prevent possible harm to the child, and to secure the child's return. Abilities of the Ministry of Justice to locate an abducted child are limited because under Georgian law only children who are staying without parental supervision are subject to mandatory registration with local social service agencies.[9]

B. Parental Visitation

Family legislation in Georgia is based on the Code of the Georgian Soviet Socialist Republic on Marriage and Family of 1969, which still is currently in force. Since 1991, when Georgia gained its independence, the Code was substantially amended. Amendments reflect major European civil and family law institutions mixed them with ethnic traditions. The major principle of Georgian family law is that decisions relating to a minor should be based on his best interests. According to the Code, all children under 16 years of age are considered minors. The Law on State Support of Children and Youth adopted in December 1999, is aimed at the protection of children's rights. However, this act does not regulate issues related to parental abduction.

Under Georgian law, both parents have equal rights and duties with regard for their offspring, even after divorce; however, court-awarded custody to one of them is allowed in case of a dispute. Unresolved disputes may be taken to the agency of guardianship and curatorship, and/or to the court depending on the particular situation. Parents may recover custody of their children unless the court decides that this would harm the child. In accordance with tradition, custody almost always is awarded to the mother of the child; the father sometimes receives the right of access as determined by the court.

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[7] *Supra* note 6.

[8] COMMENTARIES TO THE CRIMINAL CODE OF THE REPUBLIC OF GEORGIA. Approved by the Ministry of Justice of the Republic of Georgia. Tbilisi, 2002, at 472.

[9] Instruction of the Ministry of Education No. 23 of September 11, 2001, LEGAL ACTS OF GEORGIA, 2002, No. 5, at 19.

However, there is no means of enforcing court decisions and as stories in local newspapers reflect, a father's right to visitation is often violated by mothers and other relatives who have been awarded custody of the child.[10]

In the case of the dissolution of a marriage the courts decide which of the parents should get custody of the child. If parents are absent, the issue of custody for minors will be resolved by the guardianship agencies of local public education departments. These agencies decide disputes about the exercise of family rights; have the power, taking into consideration the interests of the child, to deprive access to parents living at a distance; should be, but apparently are not always, a party to custody suits; and may commence actions that would deprive a parent or parents of their parental rights.

III. Court System and Structure – Courts Handling the Hague Convention

The court system in Georgia is based on provisions of the Constitution and the Law on the Judiciary. The Constitution states that judicial power is independent and is exercised only by the courts (articles 82-91). The courts are the Supreme Court of Georgia and district and city courts at the lower levels of state administration. Justice is administrated in Georgia by a trial of civil disputes and a trial of criminal cases. Lawful penalties are applied to those found guilty of crimes and those found not guilty are acquitted. Declaratory statements are elicited from the court through non-contentious procedures. A number of minor administrative infractions are tried by a single judge and not by a collegiate court.

Except for the courts of arbitration, which have exclusive jurisdiction in commercial disputes between legal entities, no other special courts exist in Georgia. All cases related to implementation of international obligations, as well as civil and family related matters, are handled by regular courts of law. Occasionally, cases of domestic child abduction are brought to the court; however, because of national traditions, such cases are usually resolved by family elders. No cases of international child abduction or application of the Convention on the Civil Aspects of International Child Abduction have been reported.

IV. Law Enforcement System

The very low number of cases of international parental abduction in Georgia may be attributed in large part to the pervasive influence of cultural and religious traditions that have determined the homogenous features of Georgian society and have prevented bi-national marriages. Other reasons include the difficulty of international travel to Georgia and the bureaucratic difficulties related to acquiring a valid travel passport for children.

Because there have been no requests for return of children and no court decisions regarding the problem of parental abduction that have been reported, one may conclude that this issue is not thought to be of great importance in Georgia. However, when enforcement of the Convention is required, some difficulties may arise because of the Ministry of Justice's lack of experience in dealing with family related issues. Because both the Ministry of Justice and the Ministry of Education, which supervises local guardianship and curatorship agencies and whose personnel is more familiar with the related work, are empowered with the administrative authority to order the return of an abducted child, close interagency cooperation may be required. Even though the Convention is a direct implementing document and the Georgian Constitution provides priority for and direct application of international legal norms, Georgian courts have relatively little experience in dealing with the application of international legal norms and may

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[10] *Georgia: UNICEF Official Comments on Family Related Court Rulings.* Moscow, Interfax in English. Published by FBIS. Document ID: FTS 19990212001179.

have problems with their enforcement.

V. Legal Assistance Programs

There is little available legal assistance in Georgia: *pro bono* work is not practiced by attorneys, and legal aid services are just being established. The best sources of assistance and information are officers of the guardianship agencies. Presently the American Bar Association is involved in bi-lateral projects aimed at creating legal aid clinics in Georgia.

VI. Conclusion

The Hague Convention prescribes basic principles for the resolution of disputes in regard to parental abduction of children. These principles serve as the basis for national legislation in all participating states. For Georgia, the Convention provides a new approach: the rejection of traditional provisions in favor of the recognition and enforcement of foreign decisions. The Convention also emphasizes the importance of fostering cooperation among the Central Authorities in each country in order to facilitate the prompt return of children. The Georgian legal system still has not elaborated national norms that correspond with the provisions of the Convention. However, citizens of the Republic of Georgia already have the right and the possibility of using an internationally recognized mechanism for the return of a child in case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the few countries that recognizes Georgia's accession to the Convention.

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GERMANY

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Germany ratified the Hague Convention on the Civil Aspects of International Child Abduction[1] [hereinafter the Hague Convention] on April 5, 1990,[2] and it entered into effect for Germany on December 1, 1990.[3] Since then, Germany has experienced a steady stream of requests for the return of abducted children.[4] According to international criticism, much of it coming from the United States,[5] Germany has frequently refused to return children when the taking parent was German.[6] This criticism was particularly strong in the years 1999 to 2002, and it led Germany to enact a procedural reform. In addition, Germany and the United States set up a binational commission to pursue cooperative approaches.

I. Domestic Laws and Regulations Implementing the Hague Convention

A. Statutory Law – Implementation in General

The German Implementing Act[7] designates the Federal Public Prosecutor of the Federal Court of Justice as the Central Authority[8] for the Hague Convention. The Central Authority is called upon to undertake all necessary measures to locate a child and to effect its return to the claimant from the requesting country and to assist in visitation cases. For these purposes, the Central Authority is empowered to communicate with other German and foreign authorities, file appropriate actions in German courts, represent the claimant from the requesting state in and out of court, and to act on its own initiative

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[1] The Hague, Oct. 25, 1980, T.I.A.S. 11670.

[2] Gesetz , Apr. 5, 1990, BUNDESGESETZBLATT , (BGBl, official law gazette of the Federal Republic of Germany) II 206.

[3] Bekanntmachung, Nov. 12, 1990 (BGBl. 1991 II 329).

[4] A. Schulz, *Internationale Regelungen zum Sorge- und Umgangsrecht*, 50 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FamRZ] 342 (2003).

[5] June 2003 Report to Congress on International Child Abductions, [U.S. Department of State, http://travel.state.gov/abduct; T. Johnson, The Hague Child Abduction Convention: diminishing Returns and Little to Celebrate for Americans, 33 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS [NYUJ Int'L] at 125 (2000). K. Siehr, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction,* 33 NYU JInt'L at 207 (2000).

[6] In 2003, 41 open abduction cases and 37 open access cases were listed for Germany [*Id.* Attachment A: Open Abduction Cases by Country]

[7] The German Act Implementing Custody Agreements [Gesetz zur Ausführung von Sorgerechtsübereinkommen 9 (SorgÜbAG), Apr. 5, 1990 (BGBL. I 701)] implements both the Hague Convention and the European Convention on Recognition on Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children [Luxembourg, May 20, 1980, ratified by Gesetz, *supra* note 2].

[8] On August 1, 1999, the Central Authority moved from Berlin to Bonn. The current address is:
Der Generalbundesanwalt beim Bundesgerichtshof
-- Zentrale Behörde
53094 Bonn
GERMANY
Telephone: 49.228.41040; Fax: 49.228.4105050.

to uphold the purposes of the Convention. [9]

Claimants under the Hague Convention may submit their applications directly to the German Central Authority or route the application through the Central Authority of the requesting country. Claimants also may forego the services of either Central Authority and make their claims directly in the German court. In cases where a voluntary solution appears unlikely, the latter approach may save time. In either event, applications and accompanying documents must be translated into German.

The German Central Authority will check received applications for propriety and completeness. Then, the person who has abducted the child will be requested to return the child within 5 days. If the abductor does not comply, the Central Authority first will work toward a voluntary return of the child before recommending legal action. Throughout the pendency of an application the Central Authority may involve the German Youth Welfare Offices to provide various services to facilitate the voluntary return of the child. If the child cannot be located, the Central Authority may ask the Federal Prosecutor for assistance.[10] If the abductor continues to refuse cooperation, a court proceeding will be initiated. In visitation cases, the process is similar, also involving the Youth Welfare Offices.

In recent years Germany appears to have received between 70 and 100 requests per year, and allegedly 60 to 70% of these have been resolved in a non-controversial fashion, whereas the remaining 30 to 40% have required court proceedings, with a fair percentage of the latter having resulted in a refusal to return the child.[11] A contributing factor in the judicial denials of these requests may have been the length of the German proceedings, and this problem was addressed in the reform legislation of 1999 that centralized the venue for Hague Convention proceedings in 20 family courts. [12]

B. Implementation by the Courts

The statutory base for a German court decision on a Hague Convention request is the Convention itself, and German statutory law has not changed the substantive requirements of the Convention. Nevertheless, German courts have interpreted the Convention in a manner that has led to the rejection of many requests, and many of the first instance decisions have been upheld by higher courts, even at times by the Federal Constitutional Court. In particular, Germany has often applied article 12 of the Convention to justify the refusal of a request in which a child had been away with the taking parent for longer than 1 year. Germany also has applied article 13 of the Convention to find the threat of serious harm in the foreign environment from which the child was taken and allowed children of a tender age to express a preference for remaining with the taking parent. It may be of interest which features of German law in general favor the German judicial practice.

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[9] The functions of the Central Authority are described in: P. Finger, *Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung,* 86 ZENTRALBLATT FÜR JUGENDRECHT 15 (1999); other recent articles on the German practice are A. Bach, *Das Haager Kindesentführungsübereinkommen in der Praxis*, 44 ZEITSCHRIFT FÜR DIE GESAMTE FAMILIENRCHTSPRAXIS [FamRZ] 1051 (1997); N. Lowe and A. Perry, *Die Wirksamkeit des Haager und des Europäischen Übereinkommens zur internationalen Kindesentführung zwischen England und Deutschland*, 45 FamRZ 1073 (1998); M. D Krüger, *Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung,* 52 MONATSSCHRIFT FÜR DEUTSCHES RECHT 695 (1998).

[10] A. Hutchinson, Rachel Roberts, *and* Henry Setright , INTERNATIONAL PARENTAL CHILD ABDUCTION 100 (London, 1998).

[11] Schulz, *supra* note 4.

[12] Gesetz zur Änderung von Vorschriften auf dem Gebiet der Anerkennung und Vollstreckung ausländischer Entscheidungen, Feb. 19, 2001, BGBl. I 288, art. 2, No. 6.

An important aspect of German law is the Federal Constitution's human rights guarantees,[13] in particular, article 6 guaranteeing the family and rights of children and parents; articles 1 and 2, guaranteeing human dignity and liberty; and article 103, guaranteeing due process. These come into play in adjudicating both domestic and international child abductions cases. Three decisions of the Federal Constitutional Court may indicate how various aspects of German domestic law may influence decisions to return a child under the Hague Convention.

The first case [hereinafter *Tiedman* case][14] involved two children of a French mother and a German father. The children had first been abducted to France by the French mother, contrary to a German court order, and had then been re-abducted by the German father and brought back to Germany. The mother's request for a return of the children was granted by the German Appellate Court; however, this decision was reversed by the Federal Constitutional Court. The court held that a careful examination of the welfare of the child is constitutionally mandated in re-abduction cases so that the child will not be shuttled back and forth due to the conflicting court decisions of different countries. Moreover, the court held that the Constitution mandates the appointment of special counsel for a family court proceeding on child abductions if there is a possibility that the interests of the child may conflict with those of the parents, as is required since the 1999 law reform (see above). In the case at issue, such counsel had been appointed and had initiated the complaint to the Federal Constitutional Court.

In the second case[15] the Federal Constitutional Court upheld the decisions of the lower courts that ordered the return of two children to Sweden where they had been abducted by their German mother. The court distinguished the case from the *Tiedman* case by stating that it did not involve a re-abduction and the possibility of having the children moved back and forth on the basis of contrary court decisions.

In the third case, the Federal Constitutional court upheld the decisions of a German family court and appellate court that refused to return a child under a Hague Convention request. The court upheld the use of the exception of article 13, paragraph 2, because the children had been questioned about their preference and stated that they preferred to stay with the German parent.[16] The court held that there is no rigid minimum age for considering the wishes of the child. In the case at issue, the children were 4 and 7 years of age when they were questioned. One of the lower courts had held that the statements of the older child were relevant and that separating the children would have been too hard on the children.

More recent cases show a more differentiated picture. Some of these uphold the international understanding of the purposes of the Convention, whereas others appear to continue the German practice of interpreting the best interest of the child into the Convention.

A decision of the Appellate Court of Zweibrücken of January 2000,[17] ordered the return of children to the United States and rejected the claimed exception of article 13 by the mother, who alleged that the children would suffer grave injury, because the father had left the mother prior to the abduction and

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[13] Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl 1.

[14] Decision of Bundesverfassungsgericht [BVerfG], Oct. 29, 1998, docket No. 2 BvR 1206/98, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 612 (1998).

[15] BVERFG decision, Mar. 9, 1999, docket No. 420/1999.

[16] BVERFG decision, May 3, 1999, docket No. 2 BvR 6/99, reprinted 46 FamRZ 1053 (1999).

[17] Decision of Pfälzisches Oberlandesgericht [OLG] Zweibrücken, Jan. 15, 2000 docket number 5 UF 112/00.

thereby had caused the mother to suffer serious financial difficulties. The court held that these circumstances did not indicate that the father no longer had custody and also did not amount to a serious jeopardy for the children. The court also disregarded the argument of the mother that her return with the children to the United States would be a financial hardship.

The decision, however, was not executed. The mother refused to relinquish the children, and the father requested that the children be removed, if need be, by force through the sheriff and the Youth Welfare Office. The court rejected these requests on the grounds that the exception of article 13 of the Hague Convention – serious injury to the children – applies to the entire proceeding, including the execution of a court decision. The court had requested an expert opinion on the effects of a forceful removal of the children, and the expert had determined that the forceful removal would pose a grave risk to the emotional welfare of the children.[18] The case has since become moot, because the parents agreed that the mother should have custody.[19]

A decision of the Appellate Court of Rostock of 2001[20] appears to introduce a novel concept in the interpretation of the Hague Convention. The court held that the purpose of the Convention is the best interest of the child, which usually is promoted by returning the child, yet the court found that this abstract idea of the best interest of the child is to be disregarded when the actual best interest of the child is better promoted by leaving the child in the place to which he has been abducted.

The case was brought by the father, a naturalized Canadian citizen. The German mother had abducted the child by failing to return from a visit to Germany. The father pressed criminal charges in Canada which the prosecutor upheld even after the father tried to retract them. The mother argued that a return would cause serious harm to the child, because the air pollution existing in the province of Alberta caused the child to suffer from asthma, a condition which was cured when the child stayed in Germany. In addition, the separation from the mother that might ensue from the criminal prosecution of the mother in Canada also was a serious risk for the child.

The court rejected the arguments concerning the air pollution in Alberta. The court held that the general living conditions in a country are part of the general risks of life from which the Hague Convention cannot protect children. The court, however, found that there was the danger of serious emotional injury arising from the threat of being separated from the mother, who for the past 15 months had been the sole caretaker of the child. The child was 3 years old. By referring to the best interests of the child, the court distinguished the case at issue from a Federal Constitutional Court decision that had held that a returning parent can be expected to suffer the sanctions imposed on him by the country from which the child was taken.[21] In addition, the court surmised that the Alberta court would have to award custody to the mother under the circumstances of the case, which would lead to the return of the child to Germany in any event, and it would not be in the best interest of the child to be sent back and forth.

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[18] OLG Zweibrücken, decision of Mar. 21, 2001, docket No. 5 UF 112/00.

[19] OLG Zweibrücken, decision of Dec. 17, 2002, docket No. 5 UF 112/00.

[20] Decision of OLG Rostock of July 4, 2001, docket No. 10 UF 81/01.

[21] BverfG decision of Oct. 29, 1998, docket No. 2 BvR 1206/98.

This case was severely criticized by a K. Siehr, a Swiss law professor,[22] who pointed out that the anticipation of custody decisions was not the purpose of Hague Convention proceedings and that the decision amounts to judicial kidnapping. To counteract the threat of imprisonment for a returning mother, the author points to the institution of undertakings, conditions that can be imposed in the decision to return the child.

In turn, Siehr's views were rebutted by *P. Winkler v. Mohrenfels*, a German law professor.[23] He argued that the German Constitution required an examination of circumstances that might lead to serious harm for the child, whenever it appeared possible that an exception within the meaning of article 13 of the Convention might exist. In addition, this expert found reasons for expanding the German Constitutional Court's holding that custody considerations are appropriate when there are conflicting requests for the return of the child.[24] V. Mohrenfels argued that the threat imposed on the child by the possible imprisonment of the mother poses an equally serious danger for the child as that of being shuffled back and forth by conflicting court decisions.

A decision of the District Court of Schleswig of 2001[25] refused to return a child to a parent who was residing in Germany. The petitioner in this case was an American soldier who was transferred to Germany for duty in the fall of 1999, and 1 year later discovered that the abducting mother also resided in Germany. The child had been taken by his German mother in 1997 and moved first to the Czech Republic and then to Belgium,[26] before her return to Germany in 2000. The court held that the Hague Convention did not apply, because the petitioner resided in Germany. The court was aware of the difference of opinions among the negotiators of the Hague Convention on whether a child should be returned only to the state from which it was taken or whether it should be returned to the requesting parent irrespective of his location. The court, however, found the preamble of the Convention to be controlling, which stresses the purpose of returning the child to the place of his or her habitual abode.

The decision was reviewed favorable by A. Schulz, a German expert of conflicts law.[27] According to Schulz, the Hague Convention protects the rights of states and not directly those of individuals. Moreover, this author argues that granting a Hague Convention request to someone residing in Germany would place him or her in a better position than the other resident parents who seek domestic remedies. In addition, this author found the decision motivated by the length of time (3 years) that had passed between the taking and the application.

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[22] K. Siehr, *Desavouierung des Haager Kindesentführungsübereinkommens*, 22 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRax] 199 (2002).

[23] P. Winkler v. Mohrenfels, *Von der Konfrontation zur Kooperation*, 22 IPRax at 372 (2002).

[24] *Supra* note 14.

[25] Amtsgericht Schleswig, decision of Jan. 5, 2001, docket number 90 F 239/00 HK

[26] The Hague Convention was not in force in these countries when the mother stayed there.

[27] A. Schulz, *Zum Aufenthaltswechsel des Antragstellers im Rahmen des Haager Kindesentführungsübereinkommen,* 22 IPRax 201 (2002).

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction – Civil Provisions

In German domestic law, child abduction is governed by section 1632 of the Civil Code,[28] which provides that custody over a child includes the right to claim the child from anyone who keeps him unlawfully. If one parent claims the child from the other parent, then jurisdiction lies with the local family court. In the ensuing court proceeding, the judge examines any arising custody issues and also hears from the child. German domestic law does not have a summary proceeding that would correspond to the Hague Convention's return mechanism. Instead, each German domestic request for the return of an abducted child may lead to a review of the custody issue, and it is generally advisable for a parent who leaves the marital home to take the children with him, as long as he does not take the child abroad. It has been suggested that this practice in domestic cases may also lead the German courts to conduct a more thorough evaluation of the circumstances in Hague Convention requests for the return of the child than might be done in other countries.[29]

According to German law, custody is held jointly by a married couple until the child reaches the age of 18. For children born out of wedlock, custody is usually held by the mother; however, the father may obtain joint custody together with the mother through a joint declaration made before a notary or by marrying the mother. During and after divorce proceedings, the family court awards custody either jointly to the parents or to one parent while giving rights of visitation to the other, unless this would be harmful to the child under the circumstances.

Joint custody for divorced parents is a fairly new institution in Germany, having been enacted in 1997.[30] It is possible that the courts may still be reluctant to award joint custody and may still be inexperienced in dealing with the problems arising from joint custody.[31] In all custody decisions, the guiding principle of the court is the welfare of the child, and the decision will be made to promote this purpose.[32]

B. Child Abduction – Criminal Provisions

The abduction of a child to a foreign country is a criminal offense, punishable by up to 5 years in prison or a fine. Equally punishable is the unlawful retention of a child in a foreign country. Either offense, however, is punishable, but only if the person entitled to custody presses charges or, if the prosecutor decides that there is a special public interest in the prosecution.[33] In 1999, the German Federal Supreme Court [*Bundesgerichtshof*] upheld a conviction of a German parent of Pakistani origin, who had custody over his child, for removing him to Pakistan to be educated by the child's grandfather, because

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[28] Bürgeriches Gesetzbuch, Aug. 18, 1896, REICHSGESETZBLATT [RGBl, official law gazette of the German Reich] 195, as amended.

[29] W. Gutdeutsch *and* J. Rieck, *Kindesentführung – ins Ausland verboten – im Inland erlaubt,* 45 FamRZ 1488 (1998).

[30] Gesetz zur Reform des Kindschaftsrechts, Dec. 16, 1997, BGBl. I at 2942.

[31] These issues are being studied by the Federal Ministry of Justice [R. Proksch RECHTSTATSÄCHLKICHE UNTERSUCHUNGEN ZUR REFORM DES KINDSCHAFTSRECHT, 5, Köln, 2002)].

[32] BGB, §§ 1627-1671.

[33] Strafgesetzbuch, repromulgated Mar. 10, 1987, BGBl I at 945, as amended, § 235.

this violated the visitation rights of the mother.[34]

C. Visitation

The Civil Code provisions on visitation (sections 1684 through 1688) were reformed in 1998 in order to expand visitation rights to grandparents and siblings. If a German court were called upon to rule on a Hague Convention request for visitation, it is conceivable that the court might apply the law of the state of residence of the child, in keeping with Germany's membership in the Hague Convention on the Protection of Minors.[35] Nevertheless, it appears that the German courts would not apply any foreign law in a manner that would not be deemed to be in the best interest of the child.

III. Court System and Structure - Courts Handling the Hague Convention

Germany is a federated country that consists of 16 states. Nevertheless, substantive and procedural law on domestic relations is federal law. There is one uniform court structure under which the trial courts and appellate courts are state courts, whereas the courts of last resort are federal courts.[36]

Until recently, venue for Hague Convention requests was placed in the court of the district where the child was located. This provision of the Implementing Act, however, was amended in 1999,[37] so as to centralize venue for Hague Convention requests in one family court in each higher appellate court district and to allow each of the states to have an even more centralized venue by designating one family court to have venue over all or several higher appellate court districts within the state. It is hoped that the more centralized venue for Hague Convention requests will lead to more uniformity in the decisions, which until now had been lacking.[38]

A petition to the family court to have a child returned under the Hague Convention should be accompanied by motions to have the costs awarded and to have the decision executed. The petition must be accompanied by a written justification describing family relationship and the age, citizenship, and residence of the children. In addition, all existing decisions dealing with the divorce of the parents, and with custody and right of access must be presented, preferably translated by a translator that is sworn-in and recognized by the court. Moreover, the abduction of the child must be described, and details must be furnished on the social and cultural circumstances, family structures and relationships, the language spoken in the home, and the efforts undertaken to have the child returned voluntarily.[39]

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[34] Bundesgerichtshof decision of Feb. 11, 1998, docket number 4 StR 594/98.

[35] Convention Concerning the Powers of Authorities and Law Applicable to the Protection of Infants, done Oct. 5, 1961, at The Hague, 658 UNTS 143; ratified by Germany Apr. 30, 1971, BGBl. II, 217.

[36] W. Heyde, JUSTICE AND THE LAW OF THE FEDERAL REPUBLIC OF GERMANY 7 (Heidelberg, 1994).

[37] Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgesetz, Apr. 13, 1999, BGBL. I, 702, amending SorgÜbAG, § 6.

[38] Finger, *supra* note 9.

[39] Krüger, *supra* note 9.

Proceedings on Hague Convention requests are non-contentious, *i.e.*, not adversarial.[40] The judge moves the proceeding and orders whatever measures and testimony that are deemed necessary, including the involvement of the youth welfare agencies. It is advisable that the parents are represented by counsel. In addition, the court may appoint on its own initiative counsel for the child, if in situations where there may be conflicting interests between the child and the parent. The judge may also insist on granting the children a hearing, even if they are quite young. The family court may involve the Youth Welfare Office to give information on the social circumstances of the parties. In addition, the family court may also request an expert opinion of a psychologist. However, because this might delay the proceeding, this should only be done in exceptional cases.[41]

Delays in proceedings appear to have been one of the main problems in applying the Convention. It was the legislative intent of the German Implementing Act to have the family court decide Convention requests within 6 weeks.[42] Nevertheless, the Federal Supreme Court found that the due process guarantees of the German Constitution were not violated when a proceeding before the family court for the return of a child lasted 11 months.[43] In that case, the court reasoned, the fault for the delay lay not with the German family court. Instead, the delay was caused by the courts' request that the applicant furnish a decision of the French court of residence of the child to prove that the removal of the child from France was wrongful, as is foreseen in article 15 of the Convention. In the absence of special circumstances, however, the court indicated that a 6 week time limit for the decision of the family court was appropriate.

Decisions of the family court can be appealed to the higher appellate court [Oberlandesgericht], and an appeal usually stays enforcement.[44] The decision of the appellate court is final and enforceable, and the only remedy against such a decision could be a constitutional complaint to the Federal Constitutional Court, alleging the violation of civil rights through the proceeding or the applied legislation. Ordinarily the lodging of a constitutional complaint does not stay the execution of a final judgment. However, in exceptional cases, the Federal Constitutional Court may issue an injunction to postpone execution. The Federal Constitutional Court accepts constitutional complaints only if they are significant from a constitutional point of view and have a reasonable chance of succeeding.[45]

IV. Law Enforcement System

If a German court decides that a child should be returned in response to a Hague Convention request, the judgement will usually order the abducting parent to return the child to the claiming parent or other designated agent who then can remove the child to the requesting country. The abducting parent will not be ordered to take the child to the foreign country, but merely to hand him over in Germany. The abducting parent, however, may express a desire to return the child which the court may make the basis of its decision. In addition, the court may specify that the requesting parent pick up the child himself or

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[40] Zivilprozessordnung [ZPO], re-enacted Sept. 12, 1950, BGBL. I at 533, as amended, § 621 et seq.; Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit [FGG], re-enacted May 20, 1898, BGBL. I at 771, as amended.

[41] Bach, *supra* note 9, at 1056.

[42] BUNDESTAG. DRUCKSACHE. No. 11/5314 at 54, note 105.

[43] *Supra* note 16.

[44] FGG, § 24.

[45] Bundesverfassungsgerichtsgesetz, re-enacted Aug. 11, 1993, BGBL. I at 1473, as amended, §§ 90 *et seq*.

herself.

If there is no compliance, then the court may make use of the enforcement instruments of the Act of Non-Contentious Jurisdiction that are designed to enforce decisions of family law.[46] According to these, the court may impose a coercive fine or coercive detention and the costs of the execution proceeding on the person detaining the child. The fine is to be commensurate with the income of the party to be coerced, but may not exceed €25,000 (US$31,617). A fine can be imposed repeatedly, yet must always be preceded by a warning.[47] In addition, the court may order the use of force through the marshal of the court, who in turn may ask for the assistance of the local police. If the child is not found, the court may order the party responsible to bring the child forth to give an explanation under oath as to the child's whereabouts.[48]

The German courts vary in their use of enforcement devices.[49] Some courts issue the necessary measures expeditiously, even including orders to restrain the abducting parent from leaving the country.[50] Other courts appear less vigorous and may even be suspected of a certain amount of foot-dragging. In a decision of 2001, the Higher Appellate Court of Stuttgart[51] remanded a case to the court of first instance to issue the procedure ally required warnings before coercive measures could be undertaken.

Decisions on visitation rights are enforced according to the same principles as decisions ordering the return of the child. However, in all such cases, the courts will aim at achieving the desired results as much as possible with non-coercive means, such as involvement of the Youth Welfare Offices, the appointment of special counsel for the child, and the acting of the court as a mediator.[52] The tools for the application of such gentler pressures have been given to the courts in the 1998 Reform of Family Law.[53]

The courts may also use coercive tools to find a hidden child. However, cases appear to exist in which coercion was not used successfully. In the above discussed case of the American soldier returning to Germany, the parents of the abducting mother alleged that they did not know of her whereabouts, even though they sent her money.[54]

Finding a child in Germany should be facilitated by the registrations laws that require all individuals to register their residence or their place of sojourn with the police. These registration requirements are regulated and implemented by the states, on the basis of the Federal Framework Act on

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[46] FGG, § 33.

[47] P. Bassenge *and* G. Herbst, GESETZ ÜBER DIE ANGELEGENHEITEN DER FREIWILLIGEN GERICHTSBARKEIT 172 (Heidelberg, 1995).

[48] Decision of OLG Stuttgart, Oct. 22, 2001, docket number 17 WF 385/01.

[49] H. Roth, *Internationale Kindesentführung, "undertakings", und Zwangsvollstreckung nach § 33 FGG*, 23 IPRax 231 (2003).

[50] OLG Dresden, decision of March 22, 2002, docket number 10 UF 753/01.

[51] *Supra* note 48.

[52] S. Motzer, *Die gerichtliche Praxis der Sorgerechtsentscheidung,* 46 FAMRZ 1101 (1999).

[53] FGG, as amended, §§ 50, 52, and 52 (a).

[54] *Supra* note 25.

Registration.[55] The police may also become involved in finding a child or the abducting parent either through the involvement of the Federal Prosecutor, upon referral by the Central Authority, or through an international warrant of arrest through Interpol. Nevertheless, there may be circumstances under which it might be advisable for a Hague Convention claimant to hire a private detective to find the child.[56] Moreover, even if the police locate a child or parent in an Interpol request, Germany does not extradite a parent for foreign criminal charges of child abduction.[57]

V. Legal Assistance Programs

Germany ratified the Hague Convention under the reservation that Germany will assume the costs of attorneys and court proceedings of a requesting party only to the extent that the applicant is deserving of legal aid according to German law. In keeping with this reservation, the German Central Agency may require that an applicant submit a payment for the expected fees in advance. The work of the Central Agency itself is provided free of charge. If an applicant wishes to claim legal aid, an application to that effect should be submitted.

Legal aid for court costs is governed by sections 114 through 127a of the Code of Civil Procedure.[58] According to these provisions, the court will grant legal aid for court costs and for counsel in the proceeding if representation is required or advisable. The party must apply for legal aid to the court, however, the Cental Authority will apply for the claiming parent.

Legal aid will be granted if the party is unable to defray these costs from current income or other available assets, and if the intended legal action has an adequate chance of success and does not appear to be vexatious. The court has some discretion to consider individual circumstances in the granting of legal aid. However, the suggested statutory income thresholds are quite low. For 2003, they have been set at a net monthly income of € 364 (US$460) for each party, plus the same amount for the spouse of the party, plus € 256 (US$324) for each dependent of the party.[59] Parties of higher income levels that still have difficulties paying for their court costs must pay the incurred expenses in monthly installments that are graduated in accordance with the income level.

Legal aid for attorney services outside of a proceeding may also be granted under conditions similar to those prevailing for court costs. Such assistance is governed by the Federal Act on Counseling Assistance[60] which is further implemented by state legislation. Consequently, there may be local changes in how this form of assistance is granted. In most of the states, however, the petitioner will be given a voucher that he can use with the attorney of his choice. It appears that no legal assistance is available for the services of private detectives. However, the court decision on the return of the child may award the expenses of the detective to the successful claimant.[61]

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[55] Melderechtsrahmengesetz, re-enacted June 24, 1994, BGBL. I at 1430, as amended.

[56] Finger, *supra* note 9.

[57] Krüger, *supra* note 9.

[58] ZPO, *supra* note 40.

[59] Prozesskostenhilfebekanntmachung 2003, June 16, 2003, BGBL. I 918.

[60] Beratungshilfegesetz, June 18, 1980, BGBL. I at 689, as amended.

[61] Finger, *supra* note 9.

VI. Conclusion

Germany has been quite aware of the international criticism and adverse publicity that it has incurred for the frequent refusal of Hague Convention requests through German judges. The increased discussion of this issue in the legal literature and the media may have led to a more in depth study of the involved legal issues by the deciding judges who also have become more specialized through a concentration of Hague Convention cases in a small number of family courts. Nevertheless, several recent German decisions have resulted in allowing an abducted child to stay in Germany, and after these decisions have become final, there are no legal remedies to affect their change. Yet it appears that in some of these seemingly hopeless cases some improvements were achieved through cooperative efforts.

Prepared by Edith Palmer
Senior Legal Specialist
January 2004

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GREECE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

On October 25, 1980, Greece was among the first four countries which signed the Final Act of the 14th Session of the Hague Conference on Private International Law. The Final Act contained the text of Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention) and a recommendation for the applications to be used to request the return of children who fell under the scope of the Convention. Greece ratified the Convention more than 10 years later on December 2, 1992. The Convention entered into force between United States and Greece on June 1, 1993.

The Convention's central purpose is to protect children under the age of 16 from wrongful international removal or retention. Greece is required by article 2 of the Convention, as a contracting state, to take all appropriate steps to implement the Convention's objectives, as established in article 1: a) to ensure the prompt return of children who have been wrongfully removed or retained; and b) to ensure that rights of custody and access under the law of other contracting states are respected.

I. Domestic Laws and Regulations Implementing the Hague Convention

On December 2, 1992, Greece enacted Law No. 2102/1992 on Ratification of the Convention on the Civil Aspects of International Child Abduction.[1] Pursuant to article 28, paragraph 1, of the Greek Constitution of 1975, upon its ratification the Convention constitutes an integral part of the domestic legal system and prevails over any contrary provision of domestic law. The ratifying law, which comprises the entire Convention, in English and Greek, entered into force as of its publication in the Official Gazette of Greece on December 2, 1992.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Hague Convention does not deal with the criminal aspects of child abduction. Under the Greek Criminal Code, child abduction by a parent is a criminal offense as well. The Criminal Code contains a specific article on abduction of minors which is also applicable in case the child is removed by a parent.

> Art. 324:[2] A person who abducts a minor from his parents, guardians, or anyone who has custody of the child by law, or one who assists the voluntary escape from the authority of such persons, will be punished by imprisonment for not more than 3 years. If the life of the minor or his physical health, because of lack of care, was endangered, the perpetrator will be punished by imprisonment of at least 1 year.

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[1] EPHEMERES TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [Government Gazette of the Hellenic Republic], part. A. No. 193, Dec. 2, 1992.

[2] 4 Kodikes: POINIKOS KODIKAS [4 Codes: Criminal Code] (Nomike Vivliotheke, 1995) at 741.

> If the minor has not completed 14 years of age, the perpetrator will be punished by imprisonment up to 10 years, unless the act was committed by parents, in which case the previous paragraph is applicable. If the perpetrator committed the act for profit or with the intent to engage the minor in immoral activities or to alter the family unity of the minor, he will be punished by imprisonment up to 10 years.
>
> If the perpetrator intended to ask for ransom or to compel one to act or not take some action, he will be punished by imprisonment. The perpetrator will be punished by jailing if he frees and returns the child safe and sound voluntarily and before any of his requests were fulfilled.

B. Parental Visitation

Relations between parents and children during marriage and in case of divorce, separation, or annulment of marriage, are dealt with in chapter 11 of the Family Law of the Civil Code.[3] Articles 1510 and 1511 provide for parental care of a minor child, which is a right and obligation of the parents and is exercised jointly. Parental care includes the care of the child, administration of his property, and representation of the child in any legal act or before the court. Under Greek family law and on the principle of equality of sexes, both parents have the right and obligation jointly to care for the child during marriage.

Article 1518 defines child care as nurturing, supervision, education, and guidance, as well as determination of the child's place of residence. Parents may request the appropriate judicial authority for assistance and support in the exercising of their right to parental care. The latter are obliged to conform.[4]

In case of a divorce, separation, or annulment of a marriage, if both parents are alive, the exercise of parental care is decided by the court. Custody may be assigned to one parent. Custody may also be assigned to both parents, if they both agree and if the parents mutually decide upon the child's place of residence. The court may opt to decide otherwise, especially to divide custody between the parents, or to assign custody to a third person.[5]

Every decision of the parents that relates to the child must be in the best interests of the child. The court must also apply the same standard when it decides custody issues, including who will be assigned custody and how it will be exercised. Every court decision must be based on the equality of the sexes, without discriminating on the basis of ethnicity, race, sex, political, religious beliefs, or social status.[6] A non-residential parent has the right of personal access to a child.[7] Parents cannot bar contact between the child and the child's grandparents unless there are serious reasons to do so. The right to access is determined by the appropriate court in a detailed manner.[8]

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[3] 4 KODIKES, ASTIKOS KODIKAS [Civil Code] art. 1505-1541 (Nomike Vivliotheke, 1995).

[4] *Id.* art. 1519.

[5] *Id.* art. 1513 and 1514.

[6] *Id.* art. 1511.

[7] *Id.* art. 1520.

[8] *Id.*

The care of minor children born out of wedlock belongs to the mother. If the child is subsequently recognized by his father, then the father has the right to care for the child in the following two instances: if the mother ceases to care for the child or if the mother is unable to exercise such care due to legal or factual reasons. The father may request that he be assigned total or partial custody of the child by the court, if the mother agrees to it.[9]

III. Court System and Structure – Courts Handling the Hague Convention

A. Right to Seek Return

When a parent's custody rights have been violated by another's wrongful removal or retention of the child, that parent may request the return of the child based on the Convention. There are two means to do so. One is through application to the designated Central Authority, and the other is through direct application to the appropriate court where the child is located.

As required by article 6 of the Convention, Greece established the Ministry of Justice as the Central Authority.[10] Thus, in Greece, the aggrieved person may file a request with the Ministry of Justice, which has a website where applications forms can be obtained.[11] Greece further designated the local offices of the Legal Counsel or the Judicial Offices of the Legal Council of the State to perform judicial acts on behalf of the Central Authority. Where such offices do not exist, this responsibility will be assigned to a government attorney by the President of the Legal Council of the State.

The application and all attached documentation must be translated into Greek. Pursuant to the Convention, translations need no authentication. After the application is examined for accuracy and completeness, it is forwarded to the Public Prosecutor through the local office of the Ministry of Justice where the child is presumed to be. Police assistance is sought if the child is not found. At this point, the non-custodial parent is notified and negotiations are arranged for the child's voluntary return. If the child is not returned voluntarily, the Public Prosecutor will file an application with the district court.[12] An interim order may be also requested to ensure that the child remains in Greece.[13]

Since the Hague Convention requires that abduction cases be expedited, such cases in Greece are handled pursuant to articles 682-703 on provisional remedies (safety measures), as provided by the Code of the Greek Civil Procedure.[14] Provisional remedies are ordered by the courts in emergency situations or in order to avert imminent danger, to sustain a right, or to regulate a situation. Provisional remedies can be ordered by the court where the main litigation is pending.[15]

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[9] *Id.* art. 1515.

[10] *Supra* note 1.

[11] *See* http://www.ministryofjustice.gr/eu2003/pj-pdf/kef10.pdf.

[12] INTERNATIONAL PARENTAL ABDUCTION, "Greece," 104-108 (1998).

[13] *See* arts. 731 and 735 of the Code of Civil Procedure. Under the latter, the competent court has the authority to decide who has the temporary custody of children, to remove the custody of the child from his parents, and to arrange visitation rights.

[14] *Supra* note 2, KODIKAS POLITIKES DIKONOMIAS [Code of Civil Procedure] at 520.

[15] Code of Civil Procedure, art. 682.

The courts that are competent to handle child abductions are one-member first instance courts (*Monomele Protodikeia)*, since they are able to order provisional remedies.[16] Provisional remedies may also be ordered by the court nearest to the place where the provisional measures will be enforced, provided that the court has subject matter jurisdiction.[17]

Article 16 of the Convention prohibits domestic courts, upon receiving notice of wrongful removal and retention, from passing a judgment on the merits of the custody issue. This is contrary to Greek Civil Procedure, which provides that a decision on provisional measures does not prevent the adjudication on the merits.[18]

B. Implementation of the Convention

Since the initial report was prepared in 2000, there have not been any major changes, substantive or procedural, in the implementation of the Convention. Courts continue to apply the Convention, as cases arise. The Central Authority has released some preliminary statistics that indicate that most of the child abduction cases involve countries, such as Australia, Germany, Sweden, the United Kingdom, and the United States. Statistical data also suggests that Greek courts tend to render judgements in accordance with the primary objective of the Convention, that is the prompt return of the child who was wrongfully removed or retained to the rightful custodial parent. However, it is claimed that foreign courts are more likely to use the exceptions provided for by the Convention and dismiss applications submitted by the Greek Central Authority for the return of children in Greece.[19]

Other sources note that Greek judges, especially those in provinces, are more prone to nationalistic views than those in the cities and tend to favor "forum litigants." Consequently, they decide that it is in a child's best interest to remain in Greece. The Convention also aims to safeguard the best interests of children in general, as it states in its preamble that the "interests of children are of paramount importance in matters relating to their custody." However, this is a secondary aspect of the Convention, since its primary objective remains the prompt return of the child that was abducted to its country of habitual residence. Judges also take into account the concept of the "welfare of the child."[20]

The most significant problem that the Greek courts have faced in applying the Convention has been procedural. In Greece, civil disputes involving international child abduction are handled pursuant to the procedure provided by the Code of Civil Procedure on provisional measures. The burden of proof required by law under an application for provisional measures is based on probability,[21] rather than on the more substantial standard required by the Convention. Another question is whether or not a decision on provisional measures is subject to appeal. Pursuant to article 699, decisions that allow or deny provisional

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[16] *Id.* art. 683, ¶ 1.

[17] *Id.* ¶ 3.

[18] *See id.* arts. 693 and 695. However, art. 16, because of the superior force of the Convention in the legal system of Greece, will apply. *See* the analysis of the Convention and its effect on the Greek legal system *in* I. Voulgares, *The Hague Convention of 1980 on Civil Aspects of International Abduction of Children* [in Greek] HARMENOPOULOS 23 (1990).

[19] *See* http://www.constantinidou.gr/article4.en.html.

[20] International Child Abduction News, Report of Meetings with Representatives of the Greek Central Authority (June/July 2001), *available at* http://www.law.gov.au/childabduction.

[21] *Supra* note 14, art. 690.

measures are not subject to appeal, unless provided otherwise. The Supreme Court of Greece *(Areios Pagos)* has held that such decisions are subject to appeal, whereas the Appeals Court of Corfu has held otherwise.[22]

C. Court Decisions

As stated previously, Greek courts, when deciding custody issues, are prohibited from discriminating on the basis of the ethnicity, race, sex, or social status of the parents. The following cases illustrate of how Greek courts apply the provisions of the Convention to the facts of the case under consideration.

In 1996, the Court of First Instance in Thessaloniki passed judgment (No. 13601)[23] concerning the following abduction case. The mother, a resident of Alaska, was awarded custody of two children ages 7 and 9, by virtue of a divorce decree, while the father, a Greek citizen, was granted visitation rights. In 1994, the father brought the children to Greece without the required authorization. Two years after the children were removed, the mother filed an application on wrongful removal and retention through the appropriate office of the Central Authority in Greece. The competent court of Thessaloniki established its international jurisdiction to decide the case, since one party was a Greek citizen. The court, for purposes of expediency, decided the case based on article 682 of the Code of Civil Procedure and subsequent articles on provisional measures. The court then made a determination as to the wrongfulness of the conduct within article 3 of the Convention. Taking into consideration article 1511 of the Civil Code, which mandates the application of the principle of the best interest of the child in custody issues, the court held that parental custody must be granted to the father for the following reasons: pursuant to article 12 of the Convention, if the petition is filed within 1 year from the unlawful removal, the court is compelled to return the child immediately. If the petition is filed after 1 year, the court is obliged to return the child, unless it is proven that the child has adjusted to his new environment. Thus, the court in applying the exception in article 12, paragraph 2 of the Convention, held that the children "were well adjusted in the new environment, happily living with their father and grandmother and doing extremely well in school." In deciding whether to send the children back to Alaska to live with their mother, the court noted that such a dramatic change would have a severe psychological impact upon the children. Therefore, the court temporarily awarded the custody of both children to their father.

The second case involved a Greek father and a Swedish mother with two children who resided in Greece. This case is noteworthy, because it reached the Supreme Court of Greece (Areios Pagos), which took the following actions: annulled the decision of the Court of Appeals on the grounds of insufficient standard of proof, as required by the Convention; answered the question of whether or not civil disputes arising from the Convention which are handled pursuant to the provisional measures of the Greek Civil Procedure are subject to appeal; and remanded the case to the Court of Appeals of Thessaloniki.

The Thessaloniki Court of Appeals in its Decision No. 1587/1996 partially upheld the decision of the lower court and stated that the civil dispute that arose due to the international abduction, as provided by the 1980 Hague Convention, is not a provisional measure as provided for in article 682 of the Code of Civil Procedure, nor is it a measure regulating a situation. It is adjudicated on the basis of article 2 and 11, paragraph 1, of the Convention only for purposes of expediency. Thus, in Greece such expedient procedure is provided by article 682 of the Civil Procedure. Therefore, the Court, following the Supreme

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[22] 7 HARMENOPOULOS 895 (1996).

[23] *See* http://www.hiltonhouse.com/cases/Meredith-grc.txt.

Court Decision 1382/1995, held that the decision which adjudicates the case arising from the Convention is subject to appeal, irrespective of article 699 of the Code of Civil Procedure, which holds otherwise. The Court of Appeals in applying article 13, ordered that the boy stay in Grevena with his father after taking into consideration the stated wishes of the boy and his level of maturity. His return to Sweden would endanger his physical and mental well being. Moreover, the court ordered that only the girl should be returned to her mother in Sweden, because it could not establish any of the exceptions that allow a court not to order the return of a child.

As stated above, the concept of the "best interest of a child" has often been used by the Greek courts in deciding cases involving children. In 1996, the Supreme Court of Greece, in examining the meaning of this phrase, held that it is a legal term and as such is subject to review by the Court. In a case decided in 2001, the Supreme Court again considered the best interest of the child in an abduction case.[24] The Court applied the exceptions provided for in article 13, paragraph b, of the Convention, that stipulate that a child should not be returned when there is a grave risk of exposure to either physical or psychological harm; or the child otherwise would be placed in an intolerable situation. Under these circumstances, the court has the discretion not to return the child. Consequently, the Supreme Court affirmed the decision of the Court of Appeals and ordered that the child be kept in Greece rather than be sent back to the United Kingdom.

D. A Case Involving United States and Greece

This case, which was heard on appeal and decided on January 9, 2001, by the New York Court of Appeals, is rather complex, because of conflicting custody awards issued by the courts of Greece and New York. It is also noteworthy, because the U.S. District Court affirmed the decision of the Greek Supreme Court, based not on grounds of comity, but by extending the full faith and credit principle, which is reserved for judgments issued among U.S. Courts. In brief, the facts of the case involve the father, a citizen of the United States; the mother, a citizen of Greece; and two children, dual citizens of United States and Greece. During a family vacation to Greece in 1995, the parents separated. The father returned to the United States, while the mother remained in Greece with the children. In 1995, the mother was awarded temporary custody of the children through the appropriate court in Greece. Soon after, the father filed for divorce and child custody in New York. He was awarded temporary custody in July 1997 and permanent custody in November 1997. The father also proceeded to file a petition with the Greek Central Authority requesting that the children be returned to New York. He appealed his case up to the Supreme Court in Greece, which affirmed the appeal court's decision in favor of the mother. The mother was granted primary custody of the children and the father, visitation rights. In October 2000, the father brought the children to the United States without the mother's consent. The mother filed an International Child Abduction Remedies Act (ICARA) proceeding in the District Court requesting the return of the two children to Greece. The issue under consideration before the district court was to decide whether Greece or the United States was the habitual residence of children. The Court held that the children's habitual residence was Greece, since they were there from 1995 to 2000, unless the mother's retention of the children in Greece was wrongful. It ordered that the children be returned to their mother in Greece. It also held, based on the ICARA's provision which states that "full faith and credit will be accorded by the courts of the states and the courts of the United States to the judgment of any other such court ordering or denying the return of the child," that the Greek Supreme Courts' decision be given full faith and credit. The father appealed the decision. In 2001, the New York Court of Appeals accepted the facts as applied by the Greek Supreme Court. It affirmed the decision of the District Court, which deferred to the Hague

[24] 8 Nomikon Vema [Legal Tribune] at 1313 (Sept. 2001).

Convention decision issued by the court in Greece, in favor of the mother on international comity grounds, rather than the full faith and credit principle. [25]

IV. Law Enforcement System

Greece has designated the Ministry of Health, Welfare, and Social Insurance, through its appropriate offices and based on a prior authorization by the local public prosecutor, to be responsible for the temporary safeguarding of a child until the latter is returned to the rightful parent.

Following a court order, the return of the child to the rightful parent can be effected under the power of the bailiff. In the Greek legal system the bailiff (*dikastikos epimeletes)* is authorized to enforce court orders pertaining to custody issues.[26]

Even when Greek courts order the return of a child to the rightful custodial parent, enforcement of the court order is still problematic. This is illustrated in a case that received much publicity and was raised with the Ministry of Justice in Greece by officials of the United Kingdom. The case was appended to a document drafted by the Parliamentary Assembly of the Council of Europe[27] and involved the abduction of a child from the United Kingdom by his Greek father in 1999. It was used by the Parliamentary Assembly as an example to highlight the problems that often arise in international abduction cases, the psychological trauma of the custodial parent, and the trauma of the children involved who are often caught in between two countries and two diverse cultures. In this case, an application under the Hague Convention was forwarded to the Ministry of Justice in Greece by the Child Abduction Unit of the United Kingdom. The Court of First Instance ordered the father to return the child, otherwise he would be imprisoned for up to 8 months and subjected to a fine. The court order was not effected because, meanwhile, father and child disappeared.[28]

In 2000, the mother traveled to Greece with a television documentary team to locate the child. The Child Abduction Unit stated that Greece was not very cooperative. The Greek police were unable to find the child or the father. In June 2000, the father was arrested and was later released. In November 2000, the father filed for appeal. The Child Abduction Unit was informed that the court order for return remains enforceable irrespective of pending appeal and was also assured that return would be enforced immediately if the appeal failed. During the appeal, the father did not attend the court. As of June 2002, a decision had not been issued yet.

Pursuant to article 19 of the Convention, a decision of a Greek court regarding the return of a child is not a final determination on the merits of the custody issue. Thus, remaining issues involving visitation rights by the non-custodial parent and determinations of the custody of children will be decided pursuant to articles 681B, paragraph b, and 681, paragraph 2, of the Code of Civil Procedure. In accordance with these articles, disputes concerning parental custody of children, the joint exercise of parental care, and parental and grant-parental access (during marriage, in cases of divorce, or for children born out of

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[25] The U.S. Department of State filed a brief in this case with the 2nd Circuit Court in New York, on Jan. 5, 2001, arguing that the district court erroneously affirmed the decision of the Greek Supreme Court by granting it full faith and credit and should be affirmed based on international comity grounds.

[26] Pursuant to art. 950 of the Code of Civil Procedure.

[27] Council of Europe, Parliamentary Assembly, *International Abduction of Children by one of the Parents,* Doc. 9476 (June 3, 2002).

[28] *See* http://www.state.gov/s/l/16142.htm.

wedlock), are dealt with by a one judge district court or by an appointed judge of a three member court. The judge has the discretion to contact the child, if it is deemed necessary, before passing a judgment.[29]

V. Legal Assistance Programs

It appears that the Ministry of Justice will provide free legal assistance only for proceedings under the Hague Convention before the appropriate court in Greece.[30] That means that no *pro bono* legal advice will be given for court proceedings related to divorce or custody issues, unless the applicant meets the requirements of legal aid, as provided by the judicial system of Greece. This is in accordance with a reservation made by the Greek government pursuant to article 42 of the Convention. Under this article, Greece reserved its right not to be bound to assume any expenses provided for in paragraph 2 of article 26 pertaining to the participation of legal counsel or advisers or court proceedings except to the extent that these expenses concern instances of free legal or judicial aid, as provided by the Greek judicial system. In addition, Greece is a signatory to the 1977 European Agreement on the Transmission of Applications for Legal Aid.

In general, the domestic rules on legal aid are provided by articles 194-204 of the Code of Civil Procedure.[31] There have been some changes in legal aid on criminal cases. The terms of its provision are detailed and cumbersome. Legal aid is granted upon furnishing proof that one may not cover legal expenses without jeopardizing his own and his family's support. Legal aid also is provided to foreigners, if they meet the requirement of need and under the clause of reciprocity.

Legal aid is given based on application to the one member court of first instance or the president of the court where the case is pending. The judge who decides on this issue has the discretion to request additional proof, and may examine witnesses including the applicant, with or without requiring them to take an oath.[32]

The application to receive legal aid must be supported by documentation. One must submit a certificate from the mayor from his place of residence, certifying his professional, financial, and family status, along with a certificate from the tax authorities pertaining to his tax return. If the applicant is a foreigner, he must also submit a certificate from the Minister of Justice verifying the reciprocity clause.[33]

VI. Conclusion

Since 1999, there have been a few additional cases involving international abduction of children. The overall number of cases remains relatively small. Nevertheless, cases do arise. However, the Greek legal system provides the necessary judicial remedies in order to facilitate and ensure a speedy return of wrongfully removed or retained children. The system also provides for an aggrieved person to enforce his right to seek the return of a child, either through an application to the Minister of Justice, as the designated authority or through the appropriate court. Greek judges have the necessary knowledge and

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[29] *Supra* note 13, at 519.

[30] *See* http://travel.state.gov./abduction-greece.html.

[31] *Supra* note 13, at 388-391.

[32] *Id.* art. 196.

[33] *Id.*

skills and seem to apply the provisions of the Convention effectively. As stated above, enforcement of court orders is a problem at times. However, this is an issue that could be ameliorated through heightening public awareness of the dire consequences on the abducted child, rather than through legal means.

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Updated in January 2004

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HONDURAS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Honduras acceded to the Hague Convention on the Civil Aspects of International Child Abduction on December 20, 1993, and the Convention entered into force in Honduras on March 1, 1994.[34] According to article 38 of the Convention, the accession has effect only with regard to the relations between Honduras and such contracting states as have declared their acceptance of the accession.[35] Although the Convention entered into force bilaterally between the United States and Honduras on June 1, 1994,[36] Honduras has promulgated no domestic legislation to implement the Convention. The U.S. Department of State has cited Honduras among the non-compliant countries in its annual report to the U.S. Congress regarding compliance with the Convention.[37]

The Honduran government notified The Hague about its designation of the *Junta National de Bienestar Social* (currently known as *Instituto Hondureño de la Niñez y la Familia*) as the Honduran Central Authority for the Convention. However, the executive branch does not recognize its own accession to the Convention, because the Honduran Congress has not yet ratified the treaty, a requirement of the Honduran Constitution for treaties to come into force. Based on this argument, the executive branch believes that Honduras is not obliged to comply with the Convention. The Honduran Executive Branch has been advised by the U.S. Ambassador that by becoming a party to the Vienna Convention on the Law of Treaties, Honduras is bound by articles 26 of 27 of the Vienna Convention.[38] The *pacta sunt servanda* provision found in article 26 states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[39] Article 27 states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . . "[40] Since 1994, Honduras has failed to take an action with respect to four Hague return applications filed by the U.S. Central Authority.[41]

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February 2004

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[34] Hague Convention of Oct. 25, 1980, on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980).

[35] *Id.* art. 38.

[36] *Supra* note 1, Full Status Report, *available at* http://www.hcch.net/e/status/stat28e.html.

[37] Report on Compliance with the Hague Convention on the Civil Status of International Child Abduction, Apr. 2001, http://travel.state.gov/2001_Hague_Compliance_Report.html.

[38] *Id.* at 7.

[39] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 26.

[40] *Id.* art. 27.

[41] *Supra* note 4. The lack of compliance by Honduras continues: Information provided by Kathleen Bresnaham, from the Office of Children's Issues, U.S. Department of Justice on Jan. 12, 2004.

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HONG KONG

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Since 1997, the former British Crown Colony of Hong Kong has been a Special Administrative Region (SAR) of the People's Republic of China (PRC). The PRC is not a party to the Hague Convention on the Civil Aspects of International Child Abduction,[1] but it has made the Convention applicable to the Hong Kong SAR.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hong Kong Child Abduction and Custody Ordinance, promulgated in September 1997,[2] is subtitled "An Ordinance to give effect in Hong Kong to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980." This implementing law thus makes the Hague Convention part of the domestic law on child abduction since 1997.

Section 3 of the Ordinance stipulates that the provisions of the Convention, as set out in Schedule I, will have the force of law in Hong Kong. Section 4 states that for the purposes of the Convention, as it has effect under this Ordinance, the contracting states are those specified by an order issued by the Governor and published in the Gazette under this section. It further provides that an order under this section shall specify the date of the coming into force of the Convention between Hong Kong and any state specified in the order. Also, unless the order provides otherwise, the Convention will apply between Hong Kong and that state, only in relation to wrongful removals or retentions that occur on or after that date.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

In addition to the Child Abduction and Custody Ordinance cited in Part I above, the following domestic law contains provisions pertaining to child abduction:

- the Protection of Children and Juveniles Ordinance, which specifically provides that any person who unlawfully takes or causes any unmarried female infant to be taken, or any young person or child to be taken against the father or mother's will, or any other person having the lawful care or charge of such an infant, young person, or child, is guilty of a misdemeanor[3]
- the Guardianship of Minors Ordinance, which stipulates that a mother and father are to have equal rights and authority in the custody or upbringing of a minor child[4]

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[1] T.I.A.S. 11670.

[2] 31 LAWS OF HONG KONG, ch. 512.

[3] 14A LAWS OF HONG KONG, ch. 213, § 26.

[4] 3 LAWS OF HONG KONG, ch. 13, § 3

- the Separation and Maintenance Orders Ordinance, which gives the District Court power to issue an order providing that the legal custody of any children of the marriage be given to the husband or to the wife[5]
- the Matrimonial Causes Ordinance, under whose provisions the Supreme Court or the District Court is empowered to make orders providing for the custody of children.[6]

It should be noted that the Child Abduction and Custody Ordinance itself states that an order issued by the High Court in the exercise of its jurisdiction relating to wardship, so far as it gives the care and control of a child to any person, is within the definition of a custody order. Under the Convention, the removal or retention of a child would be considered wrongful if the removal or retention is in breach of custody rights granted under the law of Hong Kong (regarding a child who was a habitual resident immediately before such a removal or retention). Such custody rights may arise, according to the Convention, either by operation of law or by reason of a judicial or administrative decision, or by reason of a legal agreement under the law of that state.

B. Parental Visitation

Domestic laws governing questions of parental visitation are the Child Abduction and Custody Ordinance, previously cited, and the following:

- the Guardianship of Minors Ordinance, which contains a number of sections on court orders for custody and maintenance of minors, and specifically regarding the right of access to the minor of either parent. Both the High Court and the District Court are authorized under this ordinance to make such orders.[7]

III. Court System and Structure – Courts Handling the Hague Convention

In the Hong Kong SAR, the hierarchy of the court system is as follows: the Court of Final Appeal (taking the place of the Judicial Committee of the Privy Council), the Court of Appeal, the Court of First Instance, the District Court, and the Magistrates Court. A number of other courts and tribunals are also part of the court system; these bodies include the Coroner's Court, the Lands Tribunal, and the Juvenile Court, rulings from which may be appealed to either the Court of First Instance or the Court of Appeal. The High Court (formerly called the Supreme Court) is the amalgamation of the Court of Appeal and the Court of First Instance.[8]

The Court of Appeal hears both civil and criminal appeals arising from the Court of First Instance, the District Court, and the Lands Tribunal. Cases are heard by a panel of judges (usually three) but only after "leave" or special permission has been granted by the court to do so. The Court of First Instance has unlimited jurisdiction in both civil and criminal matters, and it has original or first instance jurisdiction in all civil matters that involve damages, where the claim involves an amount over HK$120,000

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[5] *Id.* ch. 16, § 5(b).

[6] 14 LAWS OF HONG KONG, ch. 179, § 48.

[7] 2 LAWS OF HONG KONG, ch. 13, § 2.

[8] *See* I. Dobinson and D. Roebuck, INTRODUCTION TO LAW IN THE HONG KONG SAR 68-71 (Hong Kong, Sweet & Maxwell, 1996), ch. 6, 68-71.

(US$15,430). It also exercises exclusive jurisdiction over such matters as bankruptcy, adoption, and probate. The Court of First Instance tries serious crimes, although court proceedings in these cases are first heard by a Magistrates Court, unless the accused waives the right to committal and has the case go straight to the Court of First Instance. Criminal cases coming before the Court of First Instance are heard by a judge and a jury made up of seven or nine jurors. This Court also hears appeals from decisions of the Magistrates Courts, the Labour Tribunal, and the Small Claims Tribunal.

In its article 7, the Convention refers to Central Authorities, and the Hong Kong Child Abduction and Custody Ordinance provides that the functions under the Convention of a Central Authority are to be discharged by the Attorney General. The Ordinance further stipulates that any application made under the Convention by or on behalf of a person outside Hong Kong may be addressed to the Attorney General as the Central Authority in Hong Kong.[9]

Under the Hong Kong Child Abduction and Custody Ordinance cited above, the High Court, which is the Court of Appeal and the Court of First Instance, has the jurisdiction to hear and determine an application under the Convention on International Child Abduction.[10]

IV. Law Enforcement System

Reports are available on only two Hong Kong cases that involve child abduction or removal, and they were heard after the Convention came into force for Hong Kong in September 1997: the case of *S. v. S.*,[11] heard by the Court of First Instance in March, 1998 and the case of *N. v. O.*,[12] which came before the same court in October of that year. *S. v. S.* was initiated in January 1998, by the Department of Justice by means of an originating summons. The child had been abducted by the defendant, the child's mother, from the United Kingdom, after the Ordinance implementing the Convention had come into force in Hong Kong. On the plaintiff's application, the Lord Chancellor of Great Britain made a request to the Secretary for Justice in Hong Kong for the return of the child under the Convention. An application was also made to secure the whereabouts of the child, to prevent mother and child from leaving Hong Kong pending the hearing of the originating summons, and to secure the surrender of their passports. These orders were made by the court *ex parte.*

The case of *N. v. O.* involved an application made by the plaintiff, the child's father, a citizen of Luxembourg, for custody of his child, who had been taken to Hong Kong by the defendant, his mother, a citizen of the United States. The judge in this case issued a number of orders, including one making the child a ward of the Hong Kong court, one that the court itself would resolve the matter of the child's custody, and one that, pending the determination of the custody issue, the child was to remain in the care and control of his mother, the defendant. Another order was issued granting the father reasonable rights of access to the child to be exercised only in Hong Kong. The Court forbade either party from removing the child from Hong Kong without first obtaining the leave of the Court.

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[9] 31 LAWS OF HONG KONG, *supra* note 2, § 5.

[10] *Id.* § 6.

[11] [1998] 2 HKC 316, retrieved from the LEXIS-NEXIS database.

[12] [1999] 1 HKLRD, at 68.

The Rules of Court which govern civil procedure in Hong Kong will be followed in giving effect to and enforcing orders made by the Hong Kong courts,[13] including orders issued by the High Court in cases involving international child abduction regarding return of the child, visitation, or custody determinations. The Rules of Court dealing with the enforcement of judgments and orders in civil cases detail the methods by which such judgments are to be executed, *e.g.*, judgments for payment of money, for possession of land, delivery of goods, or for an act to be done or not done. Where a judgment or order requires an act to be done, such as the return of a child to a parent, the procedure is set out in detail in the rules, including such steps to be taken as serving a copy of the order to the person required to do the act. If a party does not obey the order, a writ of execution may be issued.

The Court may also exercise its power to punish a disobedient party for contempt of court by an order of committal. Civil contempt, or contempt in connection with civil proceedings, arises from the breach of a court order or from the breach of an undertaking made to the Court. Under the Rules of Court, "committal is available to enforce orders which are prohibitory or injunctive in nature and those mandatory orders which specify a time within which the act(s) must be done (mandatory 'time' orders)."[14]

V. Legal Assistance Programs

The Legal Aid Ordinance, chapter 91 of the Laws of Hong Kong, makes provision for the grant of such aid in civil actions, according to a test of eligibility that embraces both income and capital.[15] In order to be eligible for legal aid, a ceiling is set on the amount of the person's financial resources. For most proceedings in the High Court or the Court of Appeal, the ceiling is now HK$169,700 (US$21,821).[16]

In 1984, the original Ordinance was amended to add a system of supplementary legal aid for any person not eligible under the provisions cited above because his financial resources exceed the ceiling, which at the time was HK$120,000 (US$US$15,429). The ceiling for such supplementary aid was readjusted in 1997 to HK$471,600 (US$60,639).[17] These provisions have not been amended since this report was first written.[18] However, the value of the Hong Kong dollar has increased slightly.

The Ordinance defines the scope of legal aid as, consisting of representation by the Director of Legal Aid[19] or by a solicitor, and in so far as necessary, by counsel, including all such assistance as is

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[13] 2A LAWS OF HONG KONG, ch. 4.

[14] G. N. Heilbronn, C. N. Booth, and H. McCook, ENFORCEMENT OF JUDGMENTS IN HONG KONG 129 (Hong Kong, Butterworth, 1998).

[15] 8 LAWS OF HONG KONG, ch. 91.

[16] *Id.* § 5.

[17] *Id.* § 5A(6).

[18] Hong Kong's laws can be found online in the Bilingual Laws Information System, *available at* http://www.justice.gov.hk/Home.htm.

[19] This may include a Deputy Director of Legal Aid, Assistant Director of Legal Aid, or any Legal Aid Officer. 8 LAWS OF HONG KONG, *supra* note 15, § 6.

usually given by solicitor or counsel in the preliminary or incidental steps of any proceeding or in arriving at or giving effect to a compromise to bring to an end any proceeding.[20]

Legal aid is available to any eligible person, whether plaintiff or defendant, including a person "taking, defending, opposing, or continuing…proceedings or being a party thereto."[21] The language of the Ordinance would make legal aid extendable to appellate proceedings.

In the Magistrates Courts, there is a *duty lawyer* system whereby barristers and solicitors are assigned to provide "on-the-spot" advice, as well as to represent persons accused of certain crimes. Free legal advice is also available, given in the evenings by volunteer (i.e., unpaid) lawyers at offices in different locations.[22] Like the *duty lawyer* system, this program is administered by the Law Society.[23]

VI. Conclusion

Hong Kong has been extremely strict in its application of its Child Abduction and Custody Ordinance, the legislation passed to implement the Hague Convention. *S. v. S.*, discussed above, was the first ruling made in Hong Kong under this Ordinance. After the decision was handed down, the abducting wife was ordered to hand her child over to her husband, who was planning to take the child back with him to the United Kingdom. The case was heard in chambers before Justice William Waung Sik-ying between March 30 and April 3. On April 13, the wife killed both the child and herself by lethal injection. Social workers in Hong Kong have urged the Government to be more flexible in implementing the law.[24]

The Law Reform Commission of Hong Kong released a report on international parental child abduction on April 29, 2002.[25] The Commission focused on ways to improve Hong Kong's legal protections against child abduction, under the Hague Convention on the subject, but did not recommend making it a crime for parents without custody to take their children out of Hong Kong.[26] The recommendations include the following suggestions:

- A provision should be added to the primary legislation on child abduction to restrict the removal of a child from the jurisdiction without the consent of the parent with custody, a parent with whom the child lives, or a parent with regular contact with the child. The provisions would apply in cases for which court orders are already in effect and would be modeled on the Children (Scotland) Act 1995.

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[20] *Id.* § 5A.

[21] *Id.* § 10(3).

[22] P. Wesley-Smith, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 100 (Hong Kong, Oxford University Press, 1987).

[23] The Law Society is the governing body for solicitors, with responsibility for maintaining professional and ethical standards, and for considering complaints filed against solicitors. For barristers, the governing body is the Bar Committee.

[24] *New law was used on mother in killing* (South China Morning Post, Apr. 18, 1998), at 4.

[25] Text available at http://www.info.gov.hk/hkreform.

[26] *South China Morning Post,* Apr. 30, 2002, via LEXIS/NEXIS, Asiapc library.

- Courts should be granted the power to order the disclosure of the whereabouts of a child, modeled on Irish and Australian laws, together with the adoption of a provision specifying who should be entitled to apply for such an order.
- Provisions on orders to recover a child, modeled on the Australian Family Law Act 1975, should be adopted.
- Provisions should be introduced empowering the police to hold a child they reasonably suspect would soon be removed from the jurisdiction in breach of a court order, modeled on the Irish Child Abduction and Enforcement of Custody Orders 1991. The report did not propose a general power of arrest.

The report also concluded that:

- The current law in relation to court ordered surrender of passports should be maintained. The idea of implementing provisions of Australian law that give courts the power to order the surrender of passports was rejected as that law did not specify the length of time the passport could be held.
- The parents should have the responsibility to notify the Immigration Department when a court order is issued that prohibits the removal of a child from Hong Kong; such notification is at the discretion of the parents, but if one parent does notify the department, that parent must inform the other parent of the notification.
- The Administration may need to review the rules on applying a means test to the availability of legal aid to incoming applicants for such aid in Hague Convention cases. In addition, a review should be made of the current provisions regarding stays of custody proceedings pending the outcome of Hague applications and of provisions on the confidentiality of information of Hague proceedings.[27]

These recommendations have not yet been implemented.

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[27] Executive Summary, *at* http://www.info.gov.hk/hkreform/reports/abductions-e.doc.

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HUNGARY

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Hungary is an independent, democratic state based upon the rule of law. The Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980, was signed by Hungary on January 9, 1986. It was ratified on July 1, 1988 and entered in force on August 1, 1988.[1] The legal framework for the implementation of the international treaties ratified by Hungary is provided in the Constitution.[2]

Hungary assumed an obligation under article 2 of the Convention to make it and its principles widely known and to disseminate it to the largest possible extent.[3] Governmental and Non-Governmental Organizations (NGOs) have made significant efforts in that regard to make the Convention widely known in Hungary, have issued several publications containing the text of the Convention, and have published independent studies about it.[4]

I. Domestic Laws and Regulations Implementing the Hague Convention

Legal regulations pertaining to children were changed considerably by Hungary's accession to the Convention, which was promulgated by Parliament in the Act LXIV of 1991.[5] This Act regulates under a consolidated structure the obligations related to the support and protection of children. Later, the Child Protection Act (hereinafter, the Act) on the protection of children and on the public guardianship administration was adopted[6] to ensure that a system be created to provide equal opportunities for every child in need of assistance. Under this system, the activities of the institutions that support or, in certain instances, replace the family, build on each other. The Child Protection Act focuses on the formation of a sustainable system concentrating on family care and places emphasis on the efficient co-operation of municipal, state, and NGOs.

The Hague Convention, among other things, places Hungary under an obligation to return a child who has been wrongfully removed to Hungary. Moreover, the provisions also ensure that assistance can be obtained from the authorities if one's child is wrongfully removed from Hungary to another state that is party to the Hague Convention. In compliance with the provisions, the Central Authority designated

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[1] The Hague Convention on International Child Abduction, *at* http://www.hcch.net/e/members/no_hu.html.

[2] Constitution of the Hungarian People's Republic, ch. 12, art. 8.

[3] *Supra* note 1.

[4] The Civil Office of the Hungarian National Assembly, *at* http://www.mkogy.hu/parl_en.htm.

[5] Act LXIV of 1991 Hungarian Rules of Law in Force, *available at* http://www.law.harvard.edu/library/ref/ils_ref/annotated/foreignG.php#Hungary (subcription service); *also* LEXIS *at* http://www.lexis.com/xlink?source=intlaw;hulaw (subscription service).

[6] Act XXXI of 1997, *available at id.*

for Hungary is the Department of Private International Law (DPIL) within the Ministry of Justice.[7] The DPIL is primarily responsible for receiving and transmitting communications concerning return of children who have been wrongfully removed.[8]

A. Wrongful Child Abduction

The Act contains a number of conditions that must be met in order for a child to be regarded as wrongfully removed to Hungary:

- Before the wrongful removal, the child must have been habitually resident in a Convention state other than Hungary;
- The parent who wants the child to be returned must have custody of the child under the laws of the country in which the child was habitually resident before the wrongful removal. It is important to be aware that the child may also be regarded as wrongfully removed if the parents have joint custody of the child and one of the parents takes the child to Hungary without the other parent's consent;
- The removal of the child to Hungary must be in breach of the rights of custody in the country in which the child was habitually resident before he was taken to Hungary;
- The parent who wants the child to be returned must have exercised his rights of custody before the wrongful removal. However, this does not mean that the child must necessarily have lived before the wrongful removal with the parent who wants the child to be returned.[9]

The rules on child abduction also apply if a child is wrongfully retained in Hungary. This may be the case if the parents originally agreed that the child was going to Hungary on vacation, and one of the parents refuses to return the child to his habitual residence at the end of the vacation.[10]

B. Child Abduction Proceedings

A parent who believes that his child has been wrongfully removed to Hungary usually institutes the abduction proceedings. This is done by applying to the Central Authority in his country of habitual residence.[11] This Central Authority transmits the application for return of the child to the DPIL. The application must be accompanied by various documents, such as the marriage certificate, separation or divorce documents, a decision relating to custody of the child, the child's birth certificate, and a photo of the child. The application must also be translated into Hungarian.[12]

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[7] Hague Conference on Private International Law *at* http://www.hcch.net/e/members/no_hu.html. *See also* Igazsagu Miniszterium *at* http://www.im.hu.

[8] *Id. at* http://www.im.hu.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

When the DPIL receives an application for the return of a child, the application is sent to the court where the child is staying in Hungary. If it is not possible to locate the child, the DPIL will ask for the assistance of local law enforcement in finding the child. It is up to the court to decide whether it is a case of child abduction. During the proceedings, the DPIL will often handle the contact between the foreign Central Authority and the court.[13]

Decisions regarding abduction and enforcement of child custody decisions in Hungary are initially brought before the Supreme Court of the Republic of Hungary [hereinafter the Court].[14] In child abduction proceedings decisions on custody of the child are not determined. The point of applying the Hague Convention is to ensure that custody decisions are made in the state where the child was habitually resident before the removal.[15]

If the Court decides that the child has been wrongfully removed, the child will be returned immediately to the State from which he was wrongfully removed.[16] However, the Court may, in certain exceptional circumstances, decide that the child is not to be returned to the State where he was living before the wrongful removal. This is the case if:

- the application is received after more than 1 year has elapsed since the wrongful removal,
- there is a grave risk that the child's return would expose him to harm,
- the child is over the age of 14 and objects to being returned, or
- the return would not be permitted by the fundamental principles of Hungary relating to the protection of human rights and fundamental freedoms.[17]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

In Hungarian law, a child is a person below the age of 18 years, unless married;[18] however, if a person is over the age of 16, the guardianship authority[19] may issue a marriage license, which also means that adulthood has been attained.[20] Hungarian criminal law has penalized the crime of parental

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[13] *Id*.

[14] Supreme Court of the Republic of Hungary, *available at* http://www.ib.hu.

[15] *Supra* note 6.

[16] *Supra* note 7.

[17] *Supra* note 6. See also *Act IV of 1952* on marriage, family and custody in unified structure with *Decree-Law 23 of 1952* on its entering into force and its enforcement as well as with *Decree 7/1999 (VI. 21.)* issued by the Ministry of Justice concerning its enforcement and decree *4/2002 (VI. 14.)* issued by the Ministry of Justice, *available at* http://www.im.hu *and South Eastern European Women's Initiative at* http://www.seeline-project.net/FamilyLaw/HungaryFL.htm.

[18] *Supra* note 5, art. 1, The Family Act.

[19] *Id*.

[20] *Supra* note 5, art. 15, Decree Law on register of marriages, procedures of marriages and taking names.

kidnapping.[21] Additionally, it penalizes the crimes of violation of personal freedom and of smuggling people. The Ministry of Justice and the DPIL are primarily responsible for prosecuting the crimes of parental kidnapping, dissolving the family status, and illicitly transferring of children abroad.[22]

B. Parental Visitation

Under the Civil Procedure Code, in case of an annulment or a dissolution of marriage, the court must rule on the placement and maintenance of children who are under the legal age, even if there is no claim to this effect.[23] As a general rule, parents decide on the placement of their child. In the absence of agreement by the parents, the court decides the issue and places the child with the parent who can best ensure the child's physical, intellectual, and moral development. If placement with either of the parents endangers the child's best interests, the court can place him with other persons.[24]

If the child's custody was granted to one of the parents, either due to the parents' agreement or court's ruling, the custody is exercised by that parent, except if the court orders joint custody at the request of the parents or approved the parents' agreement to this effect.[25]

After the child's placement, separated parents exercise their rights jointly on major issues that have a bearing on the child's upbringing, even in the lack of joint custody, unless the custody rights of the separated parent are limited, discontinued, or abolished by the court.[26] These issues include: deciding on or changing the name of a child, designation of residence, and the choice of school and university.[27]

The court can authorize the non custodial parent to exercise the rights of property administration and legal representation in the child's property affairs, and, if the child's interests so require, can limit or even withdraw custody rights to which the parent would otherwise be entitled.[28]

III. Court System and Structure – Courts Handling the Hague Convention

There are no specific family courts in the Hungarian legal system. Under the Civil Procedure Act,[29] proceedings concerning the invalidity of marriage; the establishment of its validity, existence, or non-existence; and divorce and trials concerning paternity and origin, as well those concerning the

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[21] *Supra* note 5, art. 11 of the Criminal Code.

[22] *Supra* note 7.

[23] Code of Civil Procedures, chapters XV and XV (2001), art 3.

[24] *Supra* note 17.

[25] *Supra* note 1, art. 67.

[26] *Supra* note 1; *see also* Act XXX1 of 1997.

[27] *Id.*

[28] *Id.*

[29] *Act III of 1999* on Code of Civil Procedures, chapters XV and XVI, *available at* http://www.seeline-project.net/FamilyLaw/HungaryFL.htm.

dissolution of parental supervision, are considered special procedures.[30] As previously stated, decisions regarding the enforcement of decisions in child abduction proceedings may be brought before the Supreme Court of Hungary.[31] In child abduction proceedings no decision is made on who is to have the custody of the child in future since, in compliance with the Convention, the primary focus is to allow any decision concerning the custody of the child to be made in the state where the child was habitually resident before the wrongful removal. Consequently, no custody decisions can be made by Hungarian courts in child abduction proceedings.[32]

IV. Law Enforcement System

Under the Constitution, the courts are responsible for the administration of justice with the Supreme Court exercising control over the operation and judicial procedure of all other courts.[33]

In the field of police cooperation and the fight against child abduction, amendments to the criminal law[34] that aim at aligning Hungarian legislation with regard to the trafficking of human beings and organized criminal groups, entered into force in April 2002.[35] In anticipation of the conclusion of a cooperation agreement with Europol in April 2002,[36] a specialized attaché of the Ministry of the Justice was posted to the Hague to act as a liaison officer when the agreement is concluded.[37]

Hungary has made further progress in aligning itself with the EU legislative requirements in the field of criminal matters. Amendments to the Criminal Procedural Code on issues, such as extradition and sentenced persons, entered into force in June 2002.[38]

V. Legal Assistance Program and Information Resources

Currently, Hungary relies upon NGOs to assist the courts and law enforcement in the realm of child abduction. The Office for the Program of Protecting the Rights of Women and Children[39] is the largest private, government-recognized organization whose primary focus is on providing efficient protection of women's and children's rights in legal procedures.[40] Working in cooperation with the

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[30] *Id.*

[31] *Supra* note 7.

[32] *Supra* note 1, ch. X, art. 50.

[33] *Supra* note 1, ch. X., art. 45.

[34] *Supra* note 7.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See* Extradition and Surrender Procedures Across the EU, *at* http://europa.eu.int/comm/justice_home/fsj/criminal/extradition/wai/fsj_criminal_extradition_en.htm.

[39] *See* Child Focus *at* http://www.childfocus.be/1/html/daphne_hungary_noes.htm

[40] *Id.*

Ministry of Health, Social and Family Affairs[41] and the International Legal Department of the Ministry of Justice, police, and judicial authorities, the Office handles national and international parental abduction petitions and provides information, legal representation, and mediation assistance for the custodial parent, independent of his citizenship, in the processing of his case with the judicial authorities [42]

VI. Conclusion

Hungary continues to meet the conditions specified in the Hague Convention and has made considerable progress in the implementation of reforms to combat international child abduction.

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[41] *Id.* *See also* *Supra* note 7, and The Ministry of Health, Social and Family Affairs *at* http://www.eszcsm.hu/eszcsm/eszcsm_angol.head.page?nodeid= 18.

[42] *Supra* note 7.

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REPUBLIC OF IRELAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Republic of Ireland is comprised of 26 counties grouped together in four provinces. The Republic covers a great deal of the island of Ireland; the remainder, Northern Ireland, is a part of the United Kingdom.

Even before 1991, when Ireland gave effect to the Hague Convention on Civil Aspects of International Child Abduction, Ireland's legislation focused on the well-being of the child rather than any "rights" of a parent.

The Constitution of Ireland, adopted in 1937, recognizes the "Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Further, the state "guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."[1]

The Guardianship of Infants Act 1964[2] (1964 Act) provides instruction for the care of children upon the breakup of a marriage:

> **Sec. 3.** Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

Under the 1964 Act the preference is to give joint guardianship to both parents. The 1964 Act also provides for court orders for custody, access, maintenance, and fit person orders. The intent of the 1964 Act intent is to provide an order that promotes the well-being of the child in question.

The Status of Children Act 1987[3] eliminates the differences between legitimate and illegitimate children, allowing for the protection of both. The Judicial Separation and Family Law Reform Act 1989[4] refines the idea of custody in cases of judicial separation.

This report reviews the domestic legislation implementing the Hague Convention, domestic legislation regarding child abduction, the court system and structure for handling child abduction cases, the law enforcement system in place to handle these incidents, and legal aid available to assist applicants.

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[1] Art. 41, the Constitution of Ireland, 1937.

[2] No. 7 (1964).

[3] No. 26 (1987).

[4] No. 6 (1989).

The report concludes that Ireland's legal, court, law enforcement system, and legal aid have been set up to meet the goals of the Hague Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Child Abduction and Enforcement of Custody Orders Act 1991[5] (1991 Act) gives effect to the Hague Convention. The 1991 Act gives the Hague Convention the force of law in Ireland, and provides that it receives judicial notice.[6] The 1991 Act, as amended by section 55 of the Family Law Act 1995[7] and section 18 of the Children Act 1997,[8] establishes Ireland's Central Authority to act under the Hague Convention. The 1991 Act applies to children under the age of 16 who are habitual residents in a contracting state.

More recently, the Protection of Children (Hague Convention) Act, 2000 (2000 Act) gave effect to another Hague Convention of October 19, 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures For The Protection Of Children. The 1996 Convention builds on the previous by determining priority when conflicts arise when authorities in different countries are asked to take measures regarding the same child, granting preference to the authorities of the child's habitual residence, except in emergencies. Section 17 of the 2000 Act amends the 1991 Act by authorizing the Central Authority to obtain any information which would assist in discovering the whereabouts of the child.

In 2001, a regulation that was issued inserted Order 133 into the Rules of the Superior Courts to provide for rules regarding child abduction.[9] These rules help clarify the exact procedure necessary for such a case.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

In 1997, Ireland passed the Non-Fatal Offenses Against the Persons Act, 1997 (1997 Act).[10] Sections 16 and 17 specifically relate to child abduction.

Section 16 of the 1997 Act applies to a parent, guardian, or a person to whom custody of a child under the age of 16 has been granted by a court. Under Section 16, a person is guilty of an offense, who takes, sends, or keeps a child under the age of 16 out of the state or causes a child under that age to be so taken, sent, or kept, (a) in defiance of a court order or (b) without the consent of each person who is a parent, a guardian, or a person to whom custody of the child has been granted by a court, unless the consent of the court was obtained.

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[5] No. 6 (1991).

[6] *Id.* § 6. A foreign law decision is not normally judicially noticed, i.e., taken notice of by the court without proof.

[7] No. 26 (1995).

[8] No. 40 (1997).

[9] S.I. 2001, No. 94.

[10] No. 26 (1997).

Section 17 of the 1997 Act applies to persons not covered in Section 16, which would include non-custodial parents. Section 17 states that a person, other than those to whom section 16 applies, is guilty of an offense who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16, or causes a child under that age to be so taken or detained, (a) so as to remove the child from lawful control of any person having lawful control of the child; or (b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.

Both Section 16 and Section 17 include prison terms, as well as fines, for convicted offenders. Thus, the 1997 Act goes further than the Hague Convention by making abduction out of the state a criminal offense.[11]

B. Parental Visitation

The Guardianship of Infants Act 1964 (1964 Act)[12] covers parental rights of guardianship, custody, and access to children upon the breakup of a marriage. As stated in the introduction, the preference of the 1964 Act is to provide joint guardianship. However, that preference may be overcome by circumstance. The High Court has jurisdiction for all matters dealing with the guardianship of infants. In response to a parental application to it, the Court may give directions as to what it thinks is proper regarding the right of access to the infant by the mother or father. Section 18 of the 1964 Act, dealing with custody upon separation of the parents, was repealed by the Judicial Separation and Family Law Reform Act 1989 (1989 Act).[13] The 1989 Act provides that when the court grants a decree of judicial separation, it may declare either spouse to be unfit to have custody of any dependent child of the family.[14]

III. Court System and Structure – Courts Handling the Hague Convention

Ireland's court system and structure are consistent with the Hague Convention goals of informality and expediency.

The courts receive their authority from articles 34 through 37 of the Irish Constitution. Under the 1991 Act, the High Court may receive cases from the Central Authority, or the Court may take cases directly without intervention of the Central Authority. While the High Court has jurisdiction of first instance for cases arising under the Hague Convention, the Supreme Court of Ireland has the authority to review the High Court's decisions.

The 1991 Act, implementing the Hague Convention, uses the 1989 Act to express the requirements of court proceedings. It calls for an informal and fair process. It requires that family law proceedings before the High Court shall be as informal as is practicable and consistent with the administration of justice.[15] In hearing and determining such proceedings under the Hague Convention, neither the judges

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[11] The U.S. Department of State notes several risks to filing criminal charges in an international child abduction case, *available at* http://travel.state.gov/int'lchildabduction.html#part7 (last reviewed Dec. 2, 2003). Review of these risks with respect to Ireland is beyond the scope of this report, but researchers should be aware of the issue.

[12] No. 7 (1964).

[13] No. 6 (1989).

[14] *Id.* § 41.

[15] *Id.* § 33 (3).

sitting in the High Court, nor the barristers or solicitors appearing in the proceedings, wear wigs or gowns.[16] The informality is intended to foster a less adversarial proceeding.

The High Court of Ireland has jurisdiction to hear and determine applications under the 1991 Act. Prior to its enactment, the High Court was the proper place to hear child abduction cases, so the Act did not affect pre-existing law. The High Court is available 24 hours a day, which satisfies the expediency requirement of the Hague Convention. There are cases where the Court will have to make a child a ward of the court, which is within the jurisdiction of the High Court. The High Court is also experienced in child abduction cases which arise in an international setting that also raise constitutional questions. As a result, the High Court may receive direct applications from those seeking help. The High Court also has the power to discharge any order regarding the custody of, or access to, the child, so long as it is making an order under the Hague Convention.[17]

Prior to its determination of an application under the Hague Convention, the High Court may also give interim directions as it thinks fit, on its own motion or on an application, for securing the welfare of the child, or preventing prejudice to the interested persons or changes in the circumstances relevant to the determination of the application. The High Court also has the authority to order any person to disclose any relevant information regarding the whereabouts of the child. As a result, the person revealing information may not rely on the rule against self incrimination or the incrimination of a spouse. However, the same person is protected from having the information admitted to prove perjury and perjury of a spouse.

In making determinations under the Hague Convention the High Court may refuse the return of a child. In certain cases, the Court may refuse to return a child if:

- The person opposing the return of the child establishes that the person who had the child in the other state did not exercise rights of custody at the time of his removal;
- There is a grave risk that return of the child would expose him to physical or psychological harm or place him in an intolerable situation;
- The child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of his views.

The court may also refuse the return of a child if it would be contrary to the fundamental principles of the state relating to the protection of human rights and fundamental freedoms. The following cases are illustrative:

In *Northampton County Council v. ABF and MBF,*[18] the return of a child to England was refused, because doing so would have created an adoption without consent of one of the parents. In this decision, the Court relied heavily on article 41 of the Irish Constitution. It understood article 41 to grant the father the right to enforce his rights as the natural father in a foreign jurisdiction. The Court believed that this result was in concert with the protection of the rights of the father and the infant pursuant to article 41.

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[16] *Id.* § 33 (4).

[17] Child Abduction and Enforcement of Custody Orders Act 1991, § 6.

[18] (1982) I.L.R.M. 164 (MC).

In *Kent County Council v. C.S.,*[19] the Court returned a child abducted from England. The Court found that although the family received the highest protection from the Constitution, it would be in the best interests of the child to be returned to England. This decision shows that although Ireland was late in adopting the Hague Convention, its judicial decisions incorporate its ideology.

In more recent decisions, Irish courts have continued their tradition of acting in the best interests of the child. In *T.M.M. v. M.D.,*[20] two children were removed from England to Ireland by their maternal grandmother. In looking at the circumstances of the situation, including the opinion of one of the children,[21] the children were not returned to their mother due to the grave risk of physical and psychological harm it would have caused.

In *W.P.P. v. S.R.W.,*[22] the Court differentiated between rights of custody and rights of access. A mother who had full custody of her children removed them from California to Ireland. The Court held the father's right to access did not require the return of the children to the jurisdiction in which they had been habitual residents.

In *Minister for Justice, Equality and Law Reform v. C. (V.),*[23] the High Court emphasized that the date of determining a child's habitual residence under section 3 of the Hague Convention is the date immediately before the removal or retention, and applied that rule to a situation where it was unclear when retention had occurred.

In *H. (D.G.) & Ors v. H. (T.C.),*[24] the High Court reviewed sections 6 of the 1991 Act, section 11 of the 1991 Act article 29 of the Hague Convention, and the Superior Courts Rules Committee construction of the 1991 Act in the provisions of Order 133[25] and determined that while the Central Authority could be included in a proceeding where appropriate, nothing required the Central Authority to commence proceedings in the High Court, even if the applicant chose to make an application to the Central Authority for the return of the children in question. In other words, an applicant may act in his own name and commence proceedings in the High Court.

IV. Law Enforcement System

Pursuant to its powers, the Irish Central Authority will take steps to locate a child who has been abducted into the state. It will also seek the return of the child or secure access to the child. If required, the Central Authority will also arrange for court proceedings to secure the return of, or to secure access to, the child. Should a child be abducted from the state, the Central Authority will assist the wronged party in seeking the return of the child. The Central Authority will also take upon itself the task of

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[19] (1984) I.L.R.M. 292 (MC).

[20] (1999) I.E.S.C. 8.

[21] Judge McGuinness spoke with the older of the children who was 11 years old. The Judge found the child to be mature enough to appropriately take her views into account, pursuant to art. 13 of the Hague Convention.

[22] (2000) I.E.S.C. 11.

[23] (2002) I.E.H.C. 52 (26 Apr. 2002).

[24] (2003) I.E.H.C. 47 (24 June 2003).

[25] *Supra* note 7.

gathering and sending information about the abducted child to other Central Authorities. The Central Authority will not impose charges in relation to applications submitted to it, but it may, however, recoup the expenses it incurred in bringing the child back home.

Through An Garda Síochána (Guardians of the Peace, i.e., the police) the Central Authority can detain a child it suspects is about to be or is being removed from the state in a breach of an order of the High Court. When this occurs, the Garda must return the child to the person who had been awarded custody or access to the child at the earliest opportunity. If the child in question is in the custody of the Health Board, the Garda must return the child immediately to the Health Board. When this occurs, the Garda are required to inform the child's parent, the person acting in loco parentis, or the Central Authority, as soon as possible.

V. Legal Assistance Programs

The Central Authority refers cases to the Legal Aid Board. Law Centres were set up in Ireland by the Scheme of Civil Legal Aid and Advice in 1980,[26] as a response to Ireland becoming a party to the European Agreement on the Transmission of Applications for Legal Aid in 1977. Law Centres give legal aid in family law matters. The Legal Aid Board was created by the Civil Legal Aid Act 1995 (1995 Act).[27] The 1995 Act gave the Scheme a statutory backing and set out to regulate the powers and duties of the Board. It also established the criteria for the granting of legal aid and advice, as well as the initiation of litigation for which it is proper to have legal aid. The Law Centres are staffed by full time solicitors and provide mainly family law services.

In order to receive legal aid, an applicant must usually pass both a merits and a means test.[28] However, applicants under the Hague Convention are entitled to legal aid "where the Central Authority in the state, within the meaning of the Child Abduction and Enforcement of Custody Orders Act, 1991, is under an obligation to provide assistance to the person under the said Act of 1991, for the purpose of being provided with such assistance."[29] Thus the 1991 Act affords more opportunity to an applicant than would otherwise exist. However, legal assistance is not automatic for access applications made under Article 21 of the Hague Convention.

VI. Conclusion

In cases of parental abduction, Ireland has consistently looked to the best interests of the child. This had been the case prior to Ireland becoming a Member State of the Hague Convention. There have been cases in which children have been returned, and others in which children were allowed to stay with the offending party, because the child's best interests lay with that party. Ireland's judiciary has helped to shape the way in which the spirit of the Hague Convention is incorporated into its own laws.

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[26] REPORT ON CIVIL LEGAL AID IN IRELAND, ch. 3, at 4.

[27] No. 32 (1995).

[28] *Id.* § 28.

[29] *Id.* § 28 (5) (b).

The most recent statistics on how Ireland has dealt with cases arising under the Hague Convention are from 2002.[30] The Minister for Justice, Equality, and Law Reform compiled and released the statistics. In 2002, there were 72 cases involving 112 children, which was an increase of seven cases from the previous year. The Central Authority dealt with 93 cases total (including 21 cases held over from the previous year). Of those cases, 51 deal with abductions into Ireland from other countries, and 42 dealt with abductions from Ireland into other countries.

Of the abductions into Ireland, ten cases resulted in an order to return the children; three cases resulted in a refusal by the Court to return a child. In fourteen cases the children were returned voluntarily or the parties reached an agreement. Nine applications were withdrawn; two access orders were registered, and thirteen cases awaited resolution at the end of the year.

Of the abductions from Ireland, in eight cases foreign courts ordered the return of the children; in two cases foreign courts refused the return. In nine cases the children were returned voluntarily or the parties reached an agreement. Seven applications were withdrawn, and thirteen cases awaited resolution at the end of the year.

Of these cases, 65% involved the United Kingdom, 10% involved the remaining European Union Member States, 9% concerned the United States, and 16% involved other contracting states.

Although each year there are cases awaiting resolution, most cases in Ireland are resolved. Ireland's domestic legislation implementing the Hague Convention, domestic legislation regarding child abduction, its court system and structure for handling child abduction cases, the law enforcement system in place to handle these incidents, and legal aid available to assist applicants are all set up to meet the goals of the Hague Convention.

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Western Law Division Extern
November 1999

Updated by Kersi B. Shroff
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December 2003

[30] See the Press Release of June 17, 2003 from the "Press Office" *available at* www.justice.ie.

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ISLE OF MAN

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction[1]

The Isle of Man, located in the Irish Sea, is a self-governing British Crown Dependency. Although it is not part of the United Kingdom, its foreign affairs and defense are a responsibility of the United Kingdom for which the Island makes an annual payment to the United Kingdom Government. The Island is not a Member State of the European Union, nor even an associate member, but it is part of its common customs territory.

The Isle of Man has an ancient Parliament, called Tynwald, claimed as the oldest continuously running legislature in the world. Tynwald consists of a popularly elected House of Keys and a Legislative Council whose members are elected primarily by the Members of the House of Keys. Its people, called the Manx, exercise extensive political and legislative independence through Tynwald.

The Manx legal system is based on English common law, although English law has no direct application to the Island. Manx laws are thus very similar to English law in areas such as crime, contract, tort, and family matters.

Under its responsibility for the external relations of the Island, the United Kingdom extends international treaties to the Isle of Man, but the Manx Government is consulted before any treaty affecting it is finalized.

I. Domestic Laws and Regulations Implementing the Hague Convention

On June 28, 1991, the United Kingdom extended the Convention on the Civil Aspects of International Child Convention to the Isle of Man with entry into force on September 1, 1991. Enabling legislation enacted by Tynwald, brought the Convention into force in the Isle of Man on October 14, 1991.

The Child Abduction and Custody Act 1985 (Isle of Man) Order 1994,[2] issued in the United Kingdom, provides that references in the United Kingdom statute[3] to orders made and proceedings brought under the Convention will have effect as if they included a reference to orders made, proceedings brought, and other things done in the Isle of Man.

The Manx legislation giving effect to the Convention is its Child Custody Act 1987.[4] The Act sets out the provisions of the Convention in Schedule 2 and declares the Convention to have the force of law

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[1] Based on Analysis Of The Isle Of Man As A Jurisdiction, Cains Advocates, Douglas, Isle of Man, Sept. 1, 2001; Home Office, Review of Financial Regulation in the Crown Dependencies, Part 4, Isle of Man, Cm. 4109-IV (1998) "Edwards Report," *available at* http://www.archive.official-documents.co.uk/document/cm41/4109/4109.htm.

[2] SI 1994/2799.

[3] Child Abduction and Custody Act 1985, c. 60. *See* the United Kingdom report on its application.

[4] Child Custody Act 1987, c. 11.

in the Island. Section 25 requires the Attorney General of the Isle of Man[5] to discharge functions as the Central Authority under the Convention. Section 28 authorizes the Attorney General to request the Department of Health and Social Security or a probation officer to report to him in writing with respect to any relevant matter relating to a child protected under the Convention.

Under the Convention an application may be made in the Isle of Man for the return of, or access to, a child removed or retained in breach of custody rights. The application may be made by any person who claims that a child has been removed in breach of rights of custody or access. The conditions that must be satisfied for a valid application are: the child must be under age 16; the child must have been habitually resident in a contracting country; and the retention or removal of the child must be wrongful.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Section 50 of the Child Custody Act 1987 makes it an offense for a parent or a person connected with a child, to take or send the child out of the Island without appropriate consent. The consent required is that of the child's mother, father (if he has parental responsibility for him), any guardian, and any person with whom he lives in accordance with a residence order. The offense is not committed if the child is taken or sent out of the Island for a period of less than 1 month.

For abduction of a child by someone other than a parent, section 51 makes it an offense to take or detain a child under the age of 16, so as to remove or keep him out from the lawful control of any person. The penalties for the offenses are, upon summary conviction (before a magistrate), imprisonment for a term not exceeding 6 months or a fine not exceeding 5,000, or both (section 53).

Manx law no longer uses terms such as, 'custody' of or 'access' to, a child. Instead, under the Children and Young Persons Act 2001, the orders which a court may make with respect to a child, include:

> 11(1)(a) a "residence order," that is, an order settling the arrangements to be made as to the person with whom the child is to live;
>
> (b) a "contact order," that is, an order requiring the person with whom the child lives or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other; …[6]

Documents required[7]

For a child abducted to the Isle of Man, the Attorney General of the Island, as its Central Authority, is entitled to receive a letter signed by the applicant empowering the Attorney General, or his

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[5] H.M. Attorney General, Attorney General's Chambers
2d Floor, New Wing Victory House, Prospect Hill
Douglas, Isle of Man 1M1 3PP
Telephone: 01624 685452
Fax: 01624 629162

[6] Ch. 20, at: www.gov.im/infocentre.

[7] Section 32 provides that the procedure to be followed on applications for the return of a child and for documents, information and notices to be given may be made by rules of court. In the absence of the availability of the rules, the information provided is based on The Child Custody Act 1987, Notes for Guidance, issued by the Attorney General (copy with author).

designated representative, to act on the applicant's behalf. A court order regarding the custody of the child, if there is one, should also be submitted. If the order was issued in the absence of the person alleged to have taken the child, evidence should be provided of service to the person at the start of the proceedings that resulted in the order. It can be helpful to include a sworn affidavit or a statement in support of the application, providing evidence of the applicant's right of custody and the exercise of that right at the time of the removal of the child. A photograph of the child would also be helpful; a copy of the birth certificate will be required.

III. Court System and Structure[8] – Courts Handling the Hague Convention

The court system consists of the High Court, whose two permanent judges are called Deemsters and which has jurisdiction over all criminal and civil matters. In more serious cases, a Deemster may sit with a jury of seven in the Court of Gaol Delivery. There is a Manx Court of Appeal and further appeals, although rarely pursued, may be brought before the Judicial Committee of the Privy Council in London.

There are also two full-time magistrates, known as the High Bailiff and the Deputy High Bailiff, who deal with summary offenses. There also is a bench of lay magistrates for less serious cases.

Under section 26 of the Act, the court having jurisdiction to entertain applications under the Hague Convention is the Manx High Court. Section 27 authorizes the Court, at any time before the application is determined, to give such interim directions as it thinks fit "for the purpose of securing the welfare of the child concerned or for preventing changes in the circumstances relevant to the determination of the application."

IV. Law Enforcement System

The Child Custody Act 1987, section 47(1), grants the High Court the power to order the disclosure of a child's whereabouts from any person who it has reason to believe may have relevant information as to where the child is located. Section 47(2) provides that a person will not be excused from complying with such an order on ground that it may incriminate him or his spouse of an offense; however, an admission made in compliance will not be admissible in proceedings against either of them in proceedings for any offense other than perjury.

Where necessary criminal proceedings are backed up with civil remedies, such as an order of restraint or an injunction. Child protection services are provided by the Isle of Man Department of Health and Social Security.[9] Social workers will make enquiries if it is suspected that a child is suffering or likely to suffer harm and take action to safeguard or promote the child's welfare.

V. Legal Assistance Programs

The United Kingdom made in respect of the Island a reservation that it will not be bound to assume any costs referred to in the second paragraph of article 26 of the Convention 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. Accordingly, a grant may be made under the Legal Aid Act 1986. For applicants seeking the return of a child abducted overseas or the enforcement of rights of access

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[8] Based on Edwards Report, *supra* note 1, *see* www.gov.im/dhss/services/family/ch_pro.xml.

[9] *Id. see* http://www.gov.im/dhss/services/family/ch_pro.xml.

to a child outside the Island, legal work undertaken in the Isle of Man may be entitled to receive legal aid under the Legal Advice and Assistance (Green Form) Scheme.[10]

VI. Conclusion

The Edwards report stated in the context of financial regulation that "the Isle of Man has made a clear commitment to prevent, deter and punish crimes of all kinds … and is willing to assist other jurisdictions in the pursuit of criminals and crime to the greater extent possible."[11] No indication has been gained in the course of researching the issue of the domestic application of the Convention that the approach on this issue is any different from that reported on financial crimes. The Isle of Man laws, regulations, and enforcement practices in the area are similar to those in the United Kingdom.[12]

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March 2004

[10] The Child Custody Act 1987, Notes for Guidance, *supra* note 5, at 4.

[11] Edwards Report, *supra* note 1, at 69.

[12] That only a negligible number of applications have been made in the Isle of Man under the Convention was confirmed by a legal officer at the Attorney General's Chambers in Douglas.

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ISRAEL

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction was incorporated into Israeli law in December of 1991. The implementing law offers a speedy route for the return of minors to the country from which they were illegally removed so that the courts of the other country are able to deal with the issue of custody. The remedy under the Convention is return of the status quo that existed prior to the abduction.[1]

According to annual statistics for the year 2002, there were 17 active cases for the return of children abducted from Israel to other contracting states. One case was rejected by the Central Authority, one was withdrawn, six ended with a final judicial order to return, one was rejected, one case was inactive, and in one case an agreement was reached. Six cases remained pending. Similarly, there were 17 active cases of the return of children abducted from other contracting states to Israel. Three cases were withdrawn, three resulted in voluntary return, five in final judicial order to return, one remained inactive, one was resolved by an agreement, and four remained pending at the end of the year.[2]

I. Domestic Laws and Regulations Implementing the Hague Convention

A. The Implementing Law

The Knesset passed the Hague Convention (Return of Abducted Children) Law, 5751-1991[3] on May 29, 1991. The law incorporates the Convention on the Civil Aspects of International Child Abduction, signed in the Hague on October 25, 1980 (hereinafter the Convention),[4] into Israeli domestic law subject to a reservation regarding the reimbursement for legal expenses in accordance with article 26 of the Convention.[1]

According to the law,[2] the Attorney General's Office is designated as the Central Authority for the purpose of discharging the duties under the Convention.[3] The Attorney General is authorized to

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[1] Civil appeal 7206/93 *John Doe v. Jane Doe*, 51(2) Piske Din [Decisions of the Supreme Court, hereinafter PD] 241 (5757/58-1997).

[2] For detailed information *see* "Annual Statistics Relating to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction," information received from the Department of International Affairs, Office of the State Attorney, Ministry of Justice, State of Israel on Nov. 26, 2003.

[3] SEFER HACHUKIM [Book of Laws, official gazette] No. 1355 (5751-1991).

[4] T.I.A.S. No.11670, *available* at http://www.hcch.net/e/conventions/menu28e.html

[1] *Supra* note 3, *see also* http://www.hcch.net/e/status/stat28e.htm.

[2] *Id.* § 4.

[3] The address is: The Attorney General, International Department, Ministry of Justice, P.O.B. 1087, Jerusalem 91010, Israel. TL: 972(2) 646-6797; Fax: 972(2) 628-7668.

designate qualified welfare officers within the meaning of Welfare Services Law, 5718-1958,[4] in order to carry out necessary tasks in accordance with the Convention.

The delivery of information necessary for implementing the Convention depends on receipt of a guarantee of secrecy by the Attorney General and a promise that the information will not be used for any purpose other than that for which it was delivered.[5]

The law designates the family court as the authorized court to adjudicate suits involving the application of the Convention.[6] In accordance with article 16 of the Hague Convention, after the government receives notice of a wrongful removal or retention of a child, no decision on the merits of rights of custody of the minor can be made until it is determined that the child is not to be returned under the Convention. Therefore, any proceedings relating to custody of children, either in civil or religious courts in Israel, will cease until a determination is made on the status of return under the Convention.

B. Procedure in Hague Convention Actions

The implementing law authorizes the Minister of Justice to pass implementing regulations. In accordance with Civil Law Regulations (Amendment) 5756-1995,[7] Chapter 22(1) titled "Return of Abducted Children Abroad" was added to the principal regulations. The regulations provide that an action for the return of a child abroad under the Convention will begin with the delivery of a pleading to the court in the geographical jurisdiction in which the child is present. If the location of the child is unknown, the pleading should be filed with the authorized court in Tel-Aviv.[8]

The pleading should be in the form of an affidavit that includes personal information regarding the child and the parents such as names, places of birth, passports and Israeli identity cards, places of marriage, place of last shared residence, information regarding the person holding the child, and circumstances of the transfer of the child to a different address. The affidavit should be accompanied by the following: an authentic original or copy of a decision or an agreement regarding the plaintiff's right to have the child in his custody; any other document substantiating the pleading, including proof of the law governing in the child's regular place of residence; and an affidavit from any other person the plaintiff deems necessary.

At the time of filing the request, the plaintiff may request any relevant temporary relief. The court may decide *ex parte* (in the presence of the plaintiff only) in the following matters:[9]

(1) the issuing of exit orders against an abductor and/or a child to prevent their departure from Israel

(2) the prohibition of the removal of a child from a location specified in the orders

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[4] 12 LAWS OF THE STATE OF ISRAEL (hereinafter LSI) 120 (5718-1957/58).

[5] *Supra* note 3, § 5.

[6] *Id.* § 6.

[7] Kovets Hatakanot [Regulations] (Sept. 29, 1995).

[8] Civil Courts Regulations, 5754-1984, as amended, § 258c, Kovets Hatakanot [Regulations] 4685, p. 2220 (5754- Aug. 12, 1984).

[9] *Id.* § 295(5).

(3) the issuance of a decree for deposit of the child's passport or a passport where the child is registered

(4) the issuance of an order for the police to investigate the circumstances of the abduction, locate the child and assist a welfare officer to bring the child before the court

(5) the issuance of an order directed at other judicial or administrative agencies not to review the matter

(6) the issuing of any order necessary to prevent any additional harm to the child or to the rights of the parties or that will guarantee the return of the child by consent or by peaceful means.

In addition, the law also gives the court general jurisdiction to issue stop orders when a civil suit is filed before it.[10]

A notice on the date of the hearing and a copy of the pleading and any order handed by the court should be provided to the respondent, who is under an obligation to respond not later than 2 days before the hearing. The respondent should provide an affidavit and any document or any other person' s affidavit substantiating his response. The hearing should take place not later than 15 days following the filing of the suit.

Before reaching a decision, the court may order the plaintiff to provide proof of a decision or a determination from the authorities of the country of the child' s regular residence indicating that the child' s removal was carried out illegally. A respondent who claims that the return of the child would deprive the minor of the protection of human rights and fundamental freedoms will similarly be requested to provide clear and convincing evidence to substantiate such a claim.[11]

The Court may order the immediate return of the child to his regular place of residence, even in the presence of one party, as long as a summons for the hearing was delivered to the respondent or his designee. When such an order is issued, the court will provide instructions as to the return of the child to all relevant parties, as well as to a welfare officer and the Israeli police.[12] The court should provide a detailed decision no later than 6 weeks following the filing of the suit.

An appeal on the decision or on any other order should be filed within 7 days from the date it was made. Copies of the appeal pleading should be delivered by the appellant to all parties at the time of the filing.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

There are three sections in the Penal Law related to the abduction of a minor. "Stealing of a minor" is defined as the taking away, detention, receipt, or concealment of a minor under 14 years of age, by fraud, force, or by enticement "with the intent to deprive the parent, the guardian or other person who

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[10] *Supra* note 12, § 366, see also Israel's response to Questionnaire on Preventive Measures (3/30/03), *available at* ftp://ftp.hcch.net/doc/prevmeas.il.doc.

[11] Rule 295(11).

[12] *Id.*

has the lawful care or charge of him, of possession of the minor and to secure such possession for himself or for another." The offense of stealing a minor is punishable by 7 years imprisonment.[13]

The taking or enticement of a minor under 16 years of age from the custody of his lawful guardian without the consent of such guardian is punishable by 20 years imprisonment.[14] If the abduction involves removing the minor from the country, the perpetrator may be subject to an additional penalty of 20 years imprisonment.[15]

A response to Questionnaire on Preventive Measures submitted by the office of the State Attorney to the Permanent Bureau, the Hague, on March 30, 2003, states with regard to the above offenses: "All are considered serious felonies with one felony carrying a maximum penalty of 7 years imprisonment, and two carrying a maximum penalty of 20 years imprisonment. It is possible that such stringent penalties serve to deter potential abductors and may have a preventive effect."[16] Some, however, have suggested that the preferred policy in such cases should be to avoid resorting to criminal intervention as long as civil remedies are available.[17]

B. Parental Visitation

Israeli law recognizes the principle of equality with respect to guardianship of children. Although both parents are considered "the natural guardians of their children," a competent court is authorized to determine guardianship "with the interest of the children as the sole consideration."[18]

According to the Capacity and Guardianship Law, 5722-1962,[19] as amended, parents of a minor who live separately may agree on custody arrangements of the minor, including visitation rights.[20] The court will determine custody and visitation arrangements only in cases where the parents either have not reached such an agreement or have not carried out the agreement they had reached. In so doing, "[t]he court may determine it to be the best interest of the minor: provided that children up to the age of 6 will be with their mother unless there are special reasons for directing otherwise."[21]

A decision by an authorized court in Israel under the Hague Convention does not determine the

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[13] Penal Law, 5737-1977, LSI Special Volume (5737-1977), §367, as amended in Penal Law (Amendment No. 12) Law, 5740-1980, § 27 (34 LSI 125 (5740-1979/80).

[14] *Id.* § 373(a), as amended in Penal Law (Amendment No. 12) Law, 5740-1980, § 28 (34 LSI 125 (5740-1979/80)).

[15] *Id.* § 370.

[16] See ftp://ftp.hcch.net/doc/prevmeas.il.doc.

[17] P. Shifman, 2 FAMILY LAW IN ISRAEL 238 (1989). *See also* Family Appeal 41/97 *Lifmanovitz v. Kovaliakov*, 97(2) Takdin Mehozi [District Court Decisions on Takdin] at 54 (5757/58-1997).

[18] Women's Equal Rights Law, 5711-1951, as amended, 5 LSI 171 (5711-1950/51).

[19] 16 LSI 106 (5722-1961/62).

[20] *Id.* § 24.

[21] *Id.* § 25.

merits of any custody issue.[22] Rather, such a decision offers an emergency remedy: by ordering the immediate return of an abducted child, the Israeli court enables the court of the country in which the abduction took place to deal with custody related issues.[23]

III. Court System and Structure - Courts Handling the Hague Convention

A. Court System and Structure

In accordance with a 1995 amendment of the Hague Convention (Return of Abducted Children) Law, the authorized court for purpose of implementation of any judicial or administrative function relating to abducted children is the family court.[24] The latter court, thus, handles all Hague Convention child return proceedings, visitation, and enforcement of related orders.

Family courts are magistrates' courts that have been designated as family courts by a decree signed by the Minister of Justice, with the consent of the Chief Justice of the Supreme Court. Judges can be appointed to the family court if they prove to have knowledge and professional experience in this area.[25]

The Israeli court system is composed of a general court system and a number of specialized courts. The general court system is comprised of three instances: magistrates' courts, district courts, and the Supreme Court.[26] As explained above, the courts that have jurisdiction over implementation of the Hague Convention are the family courts, which are magistrates' courts, and thus part of the general court system.

Appeals on decisions of magistrates' courts are entertained by district courts. The five Israeli district courts are located in Jerusalem, Tel Aviv, Haifa, Beer- Sheva, and Nazareth. District courts have residual jurisdiction over all criminal and civil matters that do not fall within the jurisdiction of the magistrates' courts, and general residual jurisdiction to hear any matter that is not under the exclusive jurisdiction of any other court or tribunal.[27]

The Supreme Court sits in Jerusalem and has jurisdiction throughout the whole country. Its substantive jurisdiction lies mainly in two areas: it hears appeals against judgments and other decisions of the district courts, and also sits as a High Court of Justice. "When so sitting, it will hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court. . . ."[28]

In addition to the general system of courts, Israel has some special courts, including labor courts, military courts, and religious courts. The rulings of the appellate tribunals of these courts are subject to

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[22] The Hague Convention § 19.

[23] *See, e.g.* Civil Appeal 7206/93 *Doe et al. v. Joe*, *supra* note 1.

[24] *Supra* note 4, § 6. *See also*, The Family Courts Law, 5755-1995, as amended, § 1(5), SEFER HACHUKIM [Book of Laws, Official Gazette] issue No. 1537 at 393 (Aug. 7, 1995).

[25] *Id.* §§ 2- 3.

[26] Basic Law: Adjudication, § 1(a), 38 Laws of the State of Israel 101 (5744-1983/84).

[27] Courts Law (Consolidated Version), 5744-1984, § 40, 38 LSI 282 (5744-1983/84).

[28] *Id.* § 15.

a limited review by the Supreme Court sitting as a High Court of Justice.

Although family courts have exclusive jurisdiction over requests for implementation of the Hague Convention,[29] the issue of permanent custody may be adjudicated by either the family court or the appropriate religious court.

The religious courts of Israel have jurisdiction in matters of personal status relating to members of their communities. According to the Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953,[30] "matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, will be under the exclusive jurisdiction of the rabbinical courts."[31] Matters incidental to divorce, including suits for maintenance and custody of children, however, are not within the exclusive jurisdiction of the rabbinical courts. Jurisdiction by a family court may be established by filing an action there before filing an action for divorce and other incidental matters in the Rabbinical court. The Christian religious courts and the Druze courts have jurisdiction similar to that of the rabbinical courts. The religious courts of the Muslim community (the Sharia courts), enjoy the highest level of substantive independence in that they are empowered with general exclusive jurisdiction over all personal status matters, not merely over marriage and divorce.[32]

B. Court Decisions

Numerous cases involving implementation of the Hague Convention (Return of Abducted Children) Law have been entertained by Israeli courts. In most cases the Israeli courts have ordered the return of the children. The Supreme Court repeatedly held that the general rule dictated by the Convention is the return of an abducted child to the country of habitual residence and the protection of rights of access. While the general rule enjoys broad interpretation, exceptions to it are interpreted very restrictively. In the absence of proof of severe harm to the child expected as a result of the return, the child should be returned. The time that lapsed since the abduction, the child's positive adjustment to the new place, and the strong contact with the abducting parent are all important considerations in the determination of custody. Israel's highest court, however, held that such considerations should be evaluated by the court of the country from which a child was abducted during the process of determining the custody of a child based on the best interest of the child.[33]

The following is a summary of recent decisions of the Supreme Court on this matter, reflecting its approach to implementation of the Convention. According to the rule of *Stare decisis* as applicable in Israel, decisions by this court bind all other courts.

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[29] Hague Convention (Return of Abducted Children) Law, 5751-1991, § 6, *supra* note 4.

[30] 7 LSI 139 (5713-1952/53).

[31] *Id.* § 1.

[32] *See* S. SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 105-108 (1994).

[33] *See* Dr. Gonzburg v. Elena Gail Grinwald, 49(3) PD 282 (5755/56-1995).

C. Jurisdiction

Einat Ron v. the Superior and Regional Rabbinical Courts, and Erez Ron.[34] Decision rendered on January 10, 2002, and confirmed in rejection of a request for a special hearing on October 6, 2002.[35] In its decision the High Court of Justice recognized the authority of a New York court under the treaty to determine the habitual residence of the children as New York ordered the Israeli rabbinical court to refrain from hearing a suit for their custody. The Court thus rejected the request to return the children to Israel.

Facts:

The petitioner and the third respondent (the husband) are both citizens of Israel. In 1991 they were married in the United States in a civil marriage. In 1992, they returned to Israel and went through a Jewish religious marriage. The couple's two children were born in Israel in 1993 and 1995. They jointly bought a house in 1995. Upon the advice of a marriage counselor trying to save the marriage, the couple relocated to the United States in August 1997. The husband argued that there was consent that the relocation would be temporary. In May 1998, following the filing for a divorce, custody of the children, alimony, and property division, the petitioner and the children moved to the petitioner's sister's house in the United States. Welfare authorities of New York started investigating suspicions of sexual abuse by the husband towards the children following a report by a nursery school teacher of strange behavior by one of the children. Although the husband was notified that the hearing of the divorce request was scheduled for May 8, 1998, he left the United States three days earlier and returned to Israel. He then filed for a divorce, division of property, custody of the children, and child support at the Tel- Aviv regional rabbinical court.

On July 27, 1998, the New York court ordered the dissolution of the civil marriage and further ordered the husband to divorce the wife in accordance with Jewish law in the rabbinical court in New York. The court granted the wife exclusive custody of the children without visitation rights to the husband and ordered the division of the couple's joint property in Israel. In early 1999, the husband filed a request for return of the children to Israel in accordance with the Hague Treaty. The New York court rejected the request and held that it had not been proved that the regular place of residence of the children was not in New York.

The petitioner requested the High Court of Justice to prohibit the rabbinical court to entertain the suits for divorce, children custody, and division of property.

Decision of the High Court of Justice:

While recognizing the jurisdiction of the regional rabbinical court to hear the suit for divorce and for division of joint property, Justice Beinish distinguishes between these suits and the suit for custody of the children. She concludes that even if the rabbinical court had jurisdiction to entertain a suit for custody of the children, it should refrain from exercising it in this case. Based on the Hague Convention, the authority to determine the place of habitual residence of the children prior to their removal or lack of return is vested with the court of the requested state where they are present. It follows that the New York court has the jurisdiction to determine the children's place of regular residence. Because Israel is a party to the Convention, it is obliged to respect this determination. The Israeli courts, including the rabbinical

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[34] H.C. 8754/00, available on Takdinet, (Juridisc Database).

[35] Request for Additional Hearing 843/02, available on Takdinet.

courts, cannot sit as a court of appeals over determinations made by authorized agencies in New York under the Hague Convention. Doing so will result in circumventing Israel's obligations under the treaty

and will have a negative impact on the strength of the treaty, which is based on mutual respect among Member States.

Another reason for the obligation of the rabbinical court to refrain from exercising its jurisdiction is based on the doctrine of *Forum Non Conveniens*, which recognizes the forum which has most relevant links to the case as the proper forum for the proceedings. Generally, the proper forum for child custody proceedings, in accordance with the treaty, is the child's regular place of residence. In the current case a hearing on this issue will require removing the children from their regular residence and education system to Israel. An additional difficulty arises from the fact that many social and education workers who handled allegations of sexual abuse against the husband are in New York. The New York forum is, therefore, the proper forum.

Justice Englard agreed that the rabbinical court should refrain from exercising jurisdiction based on lack of sincerity on the part of the husband, who attached his claim for custody of the children to a suit for divorce before the rabbinical court even though he knew that custody proceedings had already begun in the United States and proceeded with him, or his a representative, intentionally absent.

Based on the above, the rabbinical court was ordered to refrain from entertaining the suit for custody of the children subject to a commitment by the petitioner to do whatever she could to allow the entry and the stay of the husband in the United States for the duration of the proceedings.

A case where the High Court of Justice reached an opposite decision recognizing the jurisdiction of an Israeli rabbinical court to determine the children's place of regular residence and to hold that they were removed from Israel illegally is *Malina Esther Hagag v. the Superior and Natania Regional Rabbinical courts and David Hagag.*[36] The decision was rendered on August 6, 2001 to return the children to Israel.

Facts:

The petitioner is a Danish citizen who arrived in Israel in 1994. During her stay in Israel, she converted to Judaism with her first two children and married the third respondent (their father, hereafter the husband) who was an Israeli citizen, and they had their third child. In 1998, the petitioner left Israel with her children for Denmark where she filed a suit for divorce. Three months later the husband filed a suit at the rabbinical court in Natania to which he later attached a suit for return of his children to Israel and a determination of their custody. The Rabbinical court issued an order to the petitioner to return the children to Israel within 30 days of the date of the order. The petitioner's appeal to the Superior rabbinical court was rejected. At the request of the husband, Israel's Attorney General's Office filed a request with the Central Authority in Denmark in accordance with the Hague Convention to return the children to Israel. The Danish court held that although there was no appropriate reason to refuse the return of the children to Israel, a final decision would be made after receipt of a report from a child psychologist and a determination by the Israeli High Court of Justice regarding the validity of the Superior Rabbinical Court's decision.

[36] H.C. 1480/01 available on Takdinet.

Decision of the High Court of Justice:

Justice Cheshin held that in the circumstances of this case the rabbinical court has jurisdiction under Israeli law, which requires that both spouses are Jewish and citizens of Israel. He interpreted the additional requirement that the spouses are "in Israel,"as a requirement of proof of strong linkage to Israel. The petitioner's strong linkage is manifested by the fact she lived in Israel with her husband for 4 years, went through the very demanding process of conversion to Judaism with her two older children who went to Israeli schools and spoke Hebrew, had a third child born in Israel, and became an Israeli citizen with her children. The husband filed for divorce and return of his children 2 months after the petitioner left Israel.

Although the rabbinical court is not the designated Central Authority under the Convention, it was fully authorized to make a determination that the children must be returned. This is because the rabbinical court has full authority to hear child custody cases based on Israeli domestic law. Its decision to return the children to Israel does not mean that it recognizes the rights of the husband for custody, rather that the petitioner violated the custody rights of the husband. The issue of custody will be determined after the return of the children and a hearing of the parties and experts, in accordance with the best interest of the children.

Justice Cheshin finds no contradiction between the provisions of Israel's domestic law and the treaty. Indeed, it is the family court which has exclusive jurisdiction under the Convention in cases where the child is in Israel after being illegally taken from Israel to another state. The Central Authority under the Convention is located in the requested state. In this case, however, there are no proceedings in Israel where a Central Authority is requested to order the return of the children to another country. Instead, it is the Central Authority in Denmark which is requested to order the return of the children to Israel.

The decision of the rabbinical court is therefore within its power and can properly be forwarded to the Denmark court. If the latter will order the return of the children, Israeli courts will make a determination of their custody based on the principle of the best interest of the children.

D. Return of children Illegally Removed or Whose Return Was Illegally Prevented

Joe v. Doe.[37] Decision rendered on April 29, 1999 ordering the return of children to Italy.

Facts:

The petitioner (the mother) was married to the respondent (the father). They lived in Italy and had two daughters. In accordance with the divorce agreement, the mother was awarded custody of the daughters and the father obtained visitation rights. The mother was prohibited from taking them out of Italy. In violation of the agreement, the mother took the girls to Israel. Following the district court decision to return the daughters to Italy in accordance with the Hague Convention, the mother petitioned the Supreme Court to allow an appeal.

[37]Civil Appeal Request 2610/99, 99(2) Tadkin Elyon 55 (5760-1999).

Decision of the Supreme Court:

After reviewing all the evidence including the testimony of the psychologist, Justice Strasberg-Cohen held that although the girls have adjusted to life in Israel, their arrival there was wrong, being in violation of a court order given in Italy. Their continued stay in the country was also in violation of Israeli court orders. The continued efforts of the mother to avoid compliance with her obligation by repeatedly disappearing and changing her address convinced the Court that the mother should not be given even temporary custody. Furthermore, the lapse of time since the petitioner abducted the daughters was not in her favor, since the Hague Convention did not recognize extending legal proceedings as a defense.

D.S. v. A.S.[38] Decision rendered on June 1, 1999 to return a child to the United States.

Facts:

The petitioner (the mother) was born in Israel, left the country as a child and settled in the United States with her parents. She had dual United States and Israeli nationality. The respondent (the father) was born in Israel and was an Israeli citizen who resided in the United States for 23 years and held an American work permit. The parties married in the United States in 1979, where they had a child in 1986. They maintained close contacts with Israel and visited it frequently. The child was bilingual. They planned to move to Israel. For this purpose, they sold their residence and deposited the proceeds in their joint account in a bank in New York. In 1998, the relationship between the parties deteriorated and the petitioner reversed her plan to immigrate to Israel. She conveyed her decision to the respondent and the child and filed for custody with the authorized court in New York. The respondent then withdrew all the money from their joint account and transferred it to Israel. He convinced the child to immigrate with him to Israel using a new passport based on a false claim that the child's passport, which was held by the mother, was lost. The petitioner filed a request with the Haifa family court for the return of her son. The respondent's defense was that the petitioner agreed that the child would live in Israel and that the child objected to being returned. An appeal to the Supreme Court was lodged following the district court decision accepting an appeal over the family court decision accepting the request for return.

Decision of the Supreme Court:

The Court accepted the appeal and determined that the child should be returned to the United States. Justice Dorner held that a child's objection was not sufficient for the application of the exception to the rule of return. Rather, the Court should apply its own discretion by interpreting the exceptions specified by the Convention very restrictively. Moreover, the Court should always presume that the best interest of the child is not to be abducted by one parent and lose contact with the other parent. The child's wish to remain in the country to which he was abducted and his positive adjustment to it are considerations that should be reviewed in the process of determining custody. The determination over custody, in accordance with the best interest of the child, is to be made by the court of the country from which he was abducted.

In the circumstances of the case, it was determined that the child loved his mother. The need to choose between his parents resulted in a deep anguish for him. The court found that the child was not mature enough to make a determination based on consideration of all the circumstances. In light of the

[38] Appeal Request 3052/99, 99(2) Tadkin-Elyon (jurisdisc) (5759/60-1999).

restrictive interpretation of the exception laid by article 13 of the Convention, the Court accepted the appeal and ordered the return of the child to the United States.

T.D. v. S.D.[39] Decision rendered on June 14, 1999 to return a child to the United States.

Facts:

The parties (a married couple) were Israeli citizens and did not hold any additional citizenship. They arrived in the United States in the summer of 1994 for a two week visit to the petitioner's parents who had been living there for twenty years. During the visit, they agreed to stay in the United States for a period of two years, during which the petitioner would develop a business and the respondent would study. They applied for green cards and bought an apartment. The petitioner established a company with his father. The respondent completed her studies for a Masters Degree and started looking for a job in the United States. In December 1995, the minor who became the subject of the request, was born in the United States and as such was an American citizen. In 1996, the respondent, with the consent of her husband, flew to Israel with her one year old son for a visit. Although their tickets were round-trip tickets, the respondent and the child did not return to the United States on the return date specified on the tickets. Both parties started custody proceedings, the petitioner in New Jersey and the respondent in Israel. The petitioner submitted a request for return of the minor to New Jersey under the Hague Convention. The Israeli family court accepted the petitioner's request for return of the child to the United States, holding that he was removed from his regular place of residence and was illegally prevented from returning to it. This determination was reversed by the district court.

Decision of the Supreme Court:

In accepting an appeal on the decision of the district court, Justice Beinish analyzed several aspects of the Hague Convention. She held that the court's role in handling requests under the Convention was viewed as "putting out fires" or the provision of "first aid," for the purpose of nullifying the results of the abduction and preventing the abductor from benefitting from the abduction by returning the status quo prior to the abduction. According to Justice Beinish, the Convention presumes that any court by virtue of its nature and its judicial role will do the utmost to make sure that the abducting parent will not benefit from the abduction. The court will refrain from ordering the return of an abducted minor, only in rare cases enumerated by the Convention, such as high probability of physical, psychological, or other harm to the child. Determination of the custody should rely on the best interest of the child. The latter, however, is to be decided by the court in the country of habitual residence and not by the court in the country to which the child was abducted.

In the circumstances of the case, Justice Beinish held that the respondent abducted the child. The date of the return ticket was the date of the "abduction" for the purpose of implementation of the Hague Convention. There was insufficient evidence to conclude that the petitioner gave up his claim to the return of his child. In her decision, Justice Beinish recognized the anguish of the mother who wished to continue her life in Israel, supported by her family and in the social and cultural environment with which she was most familiar. The Convention, however, does not recognize these circumstances as justification for not returning the minor to the United States. Although holding that the child should be returned, the Court recommended that the parties reach an agreement rather than continue litigation.

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[39] Appeal Request 7994/98, 99(2) Takdin-Elyon (Juridisc)1472 (5759/60-1999).

E. Exception to Return: Consent to Illegal Removal or Giving up Rights of Custody

Roni Gabai et al. v. Efrat Gabai.[40] Decision rendered on March 21, 1994 to return a child to the United States.

Facts:

The first petitioner and the respondent were Israeli citizens and residents when they were married in Israel. They immigrated to the United States and acquired United States citizenship (in addition to their Israel citizenship). Their two children were born in 1981 and 1987 and raised in the United States. In 1992, the family arrived in Israel on round-trip tickets to spend the summer in an apartment they had bought the year before. The parties returned to New York as planned, allowing their minor child to extend his stay in Israel. The petitioner, who suspected that his wife was committing adultery, misled her by claiming that he had to return to Israel to tend to some financial matter. In fact, he consulted an attorney there to initiate divorce proceedings in Israel. During that visit he did not visit his child. Upon returning to the United States, he falsely convinced his wife that they must leave the United States to escape prosecution for tax evasion. Believing the petitioner, the respondent consented to leave the minor child in Israel for an additional period of time and even requested that the child be registered at a school in Israel. The petitioner then had her sign a document, according to which she consented to arrive in Israel within 12 days, and allow him to take the children to Israel, or lose all her property. Two days later the petitioner arrived in Israel and initiated divorce proceedings in the rabbinical court including a suit for custody of the children, child support, and division of property. The rabbinical court ordered temporary custody of the minor with the petitioner in Israel and a stay of the child's exit from the country.

The respondent and her daughter (the second child) stayed in New York in a grave economic and emotional state. She filed for return of the minor child under the Hague Convention, but avoided travel to Israel for fear she would be prevented from leaving the country under the proceedings in the rabbinical court. The respondent mother tried to take the minor child out of Israel, but failed because of the stay injunction. The child was taken by the petitioner and resided at the petitioner's parents' home in Israel. The respondent talked with her son on the phone and agreed that he would register for school in Israel so that he would not be harmed.

Decision of the Supreme Court:

Chief Justice Barak rejected the petitioner's claim that the mother gave up her rights of custody of the child. Consent or giving up rights under Section 13(a) of the Convention is a one-sided legal action which requires its receipt by the other parent. It is based on a subjective parental wish manifested by the parent's behavior. Consent or giving up rights made under error, fraud, coercion, or duress are voidable.

The Court recognized the United States as the place of habitual residence of the minor prior to his arrival in Israel. There he resided, was educated, and raised. In the circumstances of the case the mother only consented to a temporary stay of the minor in Israel while constantly expressing her wish to have him returned to the United States. The purchase of the apartment reflected a financial investment, but not an act of settling in Israel. The fact that the child was registered to a school in Israel did not signify a surrender of the right to an immediate return of the child. Moreover, the mother's written consent to the taking of her children to Israel was taken fraudulently, because her husband knew well that her signature

[40] Civil Appeal 7206/93, *supra* note 1.

did not reflect her will to leave the minor in Israel permanently.

The Court ordered the return of the child to his mother in the United States.

F. Exception to Return: When the Return of a Child Contradicts Israel's Fundamental Principles

Exceptions to implementation of the general rule regarding the return of abducted children are interpreted very restrictively. However, in accordance with article 20 of the Convention, when the court is satisfied that the return of a child contradicts Israel's fundamental principles, Israeli courts could refuse a return of a child. One such case is where the child's return is requested to a country which would sever his contact to the other parent. This holding was made by the High Court of Justice in reference to decisions made by Spanish courts in the matter of *John Dow v. The Minister of Foreign Affairs, the Minister of Justice, the Attorney General and two others.*[41] The decision exemplifies the extent of injustice to the parties and to the child which may result from manipulation and deception by abducting parents.

John Dow v. The Minister of Foreign Affairs, the Minister of Justice, the Attorney General and two others. Decision rendered on July 1, 1999.

Facts:

The petitioner (the husband) married the respondent (the wife) in Israel in a Jewish ceremony. The couple resided in Israel. Following the birth of their daughter, the relationship between the spouses deteriorated. The respondent sued the petitioner for alimony in the district court. The petitioner, on his part, filed for divorce at the rabbinical court. As part of the proceedings before the latter court, the petitioner initiated a proceeding aimed at declaring his wife as *isha moredet* ("rebellious" wife).[42] At the time all these proceedings were pending before the Israeli courts, the respondent and her daughter disappeared. They were found half a year later in Barcelona, Spain, residing in proximity to the wife's relatives, among whom was Mr. M., the wife's uncle, who at the time served as Honorary Consul of Israel in Barcelona. During the search for the mother and daughter, the rabbinical court issued an *ex parte* injunction for the wife to return the child to Israel and transfer custody of the minor to the petitioner. After the discovery of their whereabouts, the petitioner requested the Israeli authorities to start proceedings under the Hague Convention.

The Spanish family court in Barcelona rejected the Israeli request for return of the minor to Israel. An appeal lodged by the respondent to the Spanish Court of Appeal was also rejected. Both courts applied article 20 of the Convention in deciding that the transfer of the custody of the child from the mother to the father was against the basic principles of Spanish law and that the child would be severely harmed if the mother were declared a rebellious wife and, as a consequence, lose all her custodial rights. Custody of the child was given to the wife, while the petitioner was awarded very limited visitation with his daughter under difficult conditions: not conducive to establishing any meaningful parent-child relationship.

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[41] High Court of Justice 4365/97, 99(1) Takdin-Elyon 7 (5759/60-1999).

[42] According to Jewish law, *isha moredet* is a wife who persistently refuses to cohabit with her husband either because of anger or quarreling, or for other reasons offering no legal justification, or because she cannot bring herself to have sexual relations with him and can satisfy the court that this is for genuine reasons, which impel her to seek a divorce. In both cases, the *moredet* immediately loses her right to maintenance, and in consequence thereof, her husband loses the right to her handiwork since he is only entitled to this in consideration of her maintenance. Ultimately, this may lead to a divorce. *See* M. Elon, The Principles of Jewish Law 381 (Encyclopaedia Judaica, 1975).

In his suit, the petitioner requested that the Court order the Israeli authorities to resort to any legal or diplomatic means to change the Spanish ruling in the matter. The petitioner also requested assistance in financing legal representation, a psychologist, and an interpreter in Spain for the purpose of guaranteeing the return of the minor to Israel.

Decision of the High Court of Justice:

The Supreme Court reviewed the decisions of the Spanish courts in the process of evaluating the petitioner's claim. Justice Cheshin concluded that the Spanish courts' decisions were detrimentally influenced by a false document signed by the wife's uncle, Mr. M., on formal stationery of the Israeli Consulate. The document purported to describe the consequences of the potential declaration of the wife as *isha moredet* by the Israeli rabbinical court. According to the statement, such a declaration would result in the full and lifelong disconnection between the mother and her child.

Justice Cheshin held that the Israeli court, faced with proof of a similar rule applied by another country, would decide the same way the Spanish courts did in this case. He stated the following:

> an Israeli court would not even imagine, under Israeli law, to "extradite" a child to a country which is about to disconnect him from his mother only because of a quarrel between the mother and the father.[43]

Thus, the Spanish courts applied a just rule. The problem, though, was that they were misled by Mr. M's statement. The statement by the wife's uncle was provided without authority or permission. Not being an expert on the Israeli legal system, Mr. M. was not authorized to provide such a legal opinion. Such a document would not be admissible in Israeli courts. Moreover, the statement was completely false. A declaration of a wife as *isha moredet* has no bearing on her rights toward her children. The implications of such a declaration may only affect the relationship between the husband and the wife, mostly in financial issues, and not her custodial or visitation rights. A legal opinion explaining the meaning and implications of such a declaration was submitted to the Barcelona Court of Appeals by the Chief Rabbi of Israel, who served as the president of the Rabbinical Court of Appeals, a person who was regarded as the top rabbinic legal authority on the subject in the State of Israel. The Spanish Court of Appeals, however, refused to accept into evidenced the Chief Rabbi's expert opinion.

As to the specific remedies requested by the petitioner against Israeli authorities, the Court concluded that such are not normally provided. Justice Cheshin recognized that the Ministry of Foreign Affairs could not have foreseen the irresponsible action of Mr. M. Once the false statement was made, the Ministry should have resorted to stronger measures in order to contradict the statement in Mr. M.'s document. According to the Court, this would have prevented a personal harm to the petitioner, and a harm to the State of Israel, which was falsely identified as a backward country which removes custodial rights from a mother due to controversy with the father. Considering that Mr. M. resigned from his voluntary post as an honorary consul, that the Ministry of Justice in Israel assisted and continue to assist the petitioner, and, as the nature of the remedies requested, the Court rejected the petition. However, the Court expressed its wish that the Spanish courts would revisit the case in total disregard of the statement issued by Mr. M.

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[43] Translated by the author, Ruth Levush.

G. Rejection of Claims: That Terrorist Attacks Pose "A Grave Risk" Within the Exception Under article 13(b). Official Position of Israel's Central Authority

A recent document submitted by the Office of the State Attorney to a foreign Central Authority in connection with a specific case reflects Israel's position on rejecting claims that "Israel is a war zone and the return of children abducted from Israel would expose them to physical or psychological harm or otherwise place them in an intolerable situation."[44] The document analyzes foreign courts' relevant holdings in the United States, Denmark, Canada, France, Argentina, England, Germany and Belgium, and concludes that "although the courts, in interpreting the Convention have not proposed a uniform interpretation of "grave risk of harm" (within the exception to return provided by article 13(a)), it is clear that the harm must be grave, not just serious, and must demonstrate imminent danger to the child prior to the resolution of the custody dispute."

The document rejects the general claim that terrorist acts in a requesting country make it unfit for posing "grave risk of harm" to abducted children. It states that "after the recent events in the United States, terrorism today is a worldwide problem, with terrorist attacks being perpetrated against civilians in many countries . . . under the Convention, the issue is not which country is the 'safest' or 'the best' country for the child (that determination should be made in the country of habitual residence of the child), the issue is which country is the child's home."

The document further states that Israel is not at war and is not a war zone. In spite of events of terrorism in the past 3 years,

> "Israeli citizens and residents continue to lead normal lives and to go about their daily business. Shops and businesses continue to operate as normal. Kindergartens, schools and universities have remained open continually. …there continues to be a steady stream of people wishing to immigrate to Israel from various countries . . . .It is noteworthy that the Israeli Central Authority has processed a significantly greater number of incoming cases (abductions to Israel) in the past three years of unrest, than in the same period prior to the current *intifada*. This would be an unlikely statistic for a 'war-torn' country."

IV. Law Enforcement System

The Execution Law, 5727-1967,[45] as amended, regulates the enforcement of court decisions for the "surrender of a minor." The law provides:

> 62. (a) Where the judgment directs that a minor will be surrendered, or that contact, interviews or communication between the parent and the minor child not in his custody will be enabled or that anything else will be done in connection with the minor, the Execution Officer will take all steps required for the execution of the judgment, and for that purpose he will avail himself of the assistance of a welfare officer, within the meaning

[44] A position paper dated 11/12/03 and signed by Irit Kohn, Director, and authored by Leslie Kaufman, Senior Deputy to the State Attorney, of the Department of International Affairs, Office of the State Attorney, Ministry of Justice, State of Israel to a foreign Central Authority regarding Hague Convention Application. A copy of the paper was received by this author and is available upon request.

[45] 21 LSI 112 (5727-1966/67).

> of the Welfare (Procedure in Matters of Minors, Sick Persons and Absent Persons Law), 5715-1955.[46]
>
> (b) Where the Execution Officer finds that the judgment can only be executed against the will of the minor and, in his opinion, the minor is capable of understanding the matter, or where the execution of judgement involves other difficulties, the Chief Execution Officer may apply to the court which gave the judgment for directions.

Although requests for stay of enforcement (until a final decision in an appeal is made) can be filed, the courts normally do not grant such stays in cases where there is no clear chance for winning on appeal. This policy is based on the essence of the Convention itself, which is designed to return children immediately to the country from which they were kidnaped.[47]

V. Legal Assistance Programs

Israel has made a reservation on article 26 of the Convention. Accordingly:

> [t]he State of Israel hereby declares that, in proceedings under the Convention, it will not be bound to assume any costs 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.[48]

Legal aid is provided to those applicants who would qualify in their own jurisdiction.[49] Clients resorting to private attorneys are usually charged $10,000, exclusive of taxation at 17%, or more to handle the case in the family court. Appeals are billed separately.[50] The party held liable by the court for the abduction may be ordered to cover legal and related expenses, such as hotel stay and travel expenses of the injured party.

VI. Conclusion

Following its adoption of the Hague Convention on the Civil Aspects of International Child Abduction, Israel incorporated the Convention into its domestic law and passed implementing regulations to enable proceedings under the Convention. A study of relevant court decisions and statistical data indicates an overall compliance with the obligations under the Convention.

According to Israel' s Minister of Justice, neither the actual implementation of the Convention, nor the policy of his office and the Office of the Attorney General include any reference to the religion of the

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[46] 9 LSI 139 (5715-1954/55).

[47] *Lifmanovitz v. Kovaliakov*, *supra* note 21.

[48] http://www.hcch.net/e/status/stat28e.htm.

[49] A. Hutchinson et al., 2 INTERNATIONAL PARENTAL CHILD ABDUCTION (1998).

[50] *Id*.

minor or the parents.[51] Return will be denied only under the limited reasons enumerated by the Convention.

Prepared by Ruth Levush
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November 2003

[51] Minister of Justice Z. Hanegbi, in a 1998 response to a Constituent Request, *available at* http://www1.knesset.gov.il/tql/mark1/H0000680.html.

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ITALY

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Italy ratified and implemented the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention), on October 25, 1980, through Law No. 64 of January 15, 1994.[1] Following ratification, the Convention entered into force in Italy on May 1,1995.[2]

I. Domestic Laws and Regulations Implementing the Hague Convention

According to article 3 of Law No. 64, the Central Office for Juvenile Justice at the Ministry of Justice has been designated the Italian Central Authority pursuant to article 6 of the Convention. In the discharge of its responsibilities, the Central Authority avails itself, whenever necessary, of the assistance of a state attorney (*Avvocatura dello Stato*), as well as of the Juvenile Services of the Justice administration (*Servizi minorili*). It may further request the cooperation of any public administrative body, the police, or any agency or authority whose objectives correspond with the functions entrusted to the Central Authority under the Convention.

Any judicial documents for the implementation of Law No. 64 in the judicial proceedings initiated at the request of the Central Authority are free of any charge or fee, including the stamp duty and registration tax.

Applications for the return of a removed child or for securing the effective exercise of the rights of access are filed through the Central Authority pursuant to articles 8 and 21 of the Convention; however, the interested party may apply directly to the appropriate authorities, according to article 29 of the Convention.[3]

According to Law No. 64, the Italian Central Authority, having made the necessary preliminary investigations, must expeditiously send all documents to the public prosecutor attached to the Juvenile Court where the minor was found, to make an urgent request to this court to order the return of the minor or the effective exercise of the rights of access. The date of the hearing in chambers is set by the presiding judge and is communicated to the Central Authority. The applicant is informed by the Central Authority of the date of hearings so that he may appear, being responsible for his own expenses, and may be heard. The Court should issue a decision within 30 days from the date the application was received. The person caring for the minor, the public prosecutor, and, when appropriate, the minor must be heard.

The decree of the Court is immediately enforceable. The filing of an appeal to the Supreme Court (*ricorso per Cassazione*) does not stay its enforcement. The public prosecutor, with the cooperation of

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[1] GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA [official law gazette of Italy, G.U.] No. 23 of Jan. 29, 1994, Ordinary Supplement.

[2] G.U. No. 97 of Apr. 27, 1995, Ordinary Supplement.

[3] Law No. 64, art. 7.

the Juvenile Services of the Justice Administration when needed, provides for the enforcement of the decisions of the Court and immediately informs the Central Authority.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Under Italian penal law, removing a child under the age of 14 from the custodial parent, a guardian, or from anyone having supervision or custody of a child, or detaining a child against the will of those persons, constitutes a crime punishable (on complaint of the offended party) by imprisonment from 1 to 3 years. Removing or detaining a minor who has attained the age of 14 without the minor's consent entails the same punishment.[4]

The crime may be committed by anyone, including the parent who does not have custody rights over the minor, and by either one of the two parents, inasmuch as parental authority is exercised by mutual agreement of both parents, according to article 316 of the Civil Code.[5] Furthermore, when the removed or retained child is also deprived of his personal freedom, the perpetrator of the crime may also be subject to the provisions of article 605 of the Penal Code on abduction (*sequestro di persona*) and may be subject to more severe punishment.[6]

B. Parental Visitation

Family relations and the resulting rights and obligations, whether the parents are married or unmarried, as well as guardianship, adoption, separation, and divorce, are regulated by numerous provisions of the Civil Code and by special legislation.[7]

Parental authority is exercised by the mutual agreement of both married parents.[8] The same criterion applies to unmarried parents who live together. When unmarried parents do not live together, parental authority normally belongs to the parent with whom the child resides, but the judge, in the exclusive interest of the child, can provide otherwise. The judicial authority can also exclude both parents, whether married or unmarried, from the exercise of the parental authority and provide for the appointment of a guardian.[9]

Civil courts (*tribunali*) deciding cases of separation or divorce provide for the custody of children. They also provide for access rights for the parent not entitled to custody and adopt any other measure relating exclusively to a child's moral and material interests. The courts establish the extent and the manner of the non-custodian parent's contribution to the support, education, and rearing of the child. The

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[4] *See* art. 574 of the Italian Penal Code, *in* T. Padovani, *ed*. CODICE PENALE (Milano, Giuffre', 1997).

[5] *Id*. at 2089 and 2091.

[6] *Id*. at 2091 and 2179.

[7] *See* Law No. 184 of 1983, as amended, on Adoption and Custody of minors; and Law No. 898 of 1970, as amended, on the Dissolution of Marriage, *in* F.Galgano, B. Inzitari, ed. CODICE CIVILE E LEGGI COMPLEMENTARI [Civ. C.] (Padova, CEDAM, 2002/2003).

[8] *Id.* Civil Code, art. 316.

[9] *Id*. Civil Code art.155, 317, 317 *bis*, 330, and 343.

parent may petition the court if he deems that decisions prejudicial to the interest of the child have been adopted.

III. Court System and Structure – Courts Handling the Hague Convention

Competence in matters pertaining to family relations, guardianship, adoption, and custody of minors, as well as to separation and divorce, belongs to Juvenile Courts (*Tribunali per i minorenni*), to Civil Courts (*Tribunali ordinari*), and to Guardianship Judges (*Giudici Tutelari*). In a few special situations pertaining to suspension or loss of parental authority in connection with penal matters, competence belongs to the Penal Courts. Appeals are heard in the Court of Appeals.

Applications for the enforcement of the provisions of the Convention are submitted, according to Law No. 64 (see Part I) to the Juvenile Courts, which are part of the Italian judicial system. Ordinary magistrates, as well as honorary magistrates selected from among citizens for their expertise in the fields of biology, psychiatry, criminal anthropology, education, and psychology, and who have distinguished themselves in community service, sit on these courts.

These Courts avail themselves of the cooperation and assistance of the Juvenile Services of the Justice Department and of the welfare services instituted at the local government level for all the needs of minors, for their support and protection, as well as for emotional and psychological assistance to them.

IV. Law Enforcement System

Enforcement of Italian court orders in Hague Convention cases is carried out by the Public Prosecutor (see Part I). It has been pointed out that in the event that an abductor refuses to comply with the order, it becomes the duty of the Chief Public Prosecutor in the region of the child's residence to ask the police Minor Division for assistance in removing the child, usually with the support of social services.[10]

Under the provisions of the Italian System of Private International Law,[11] any judicial rulings by foreign authorities relating to the existence of family relations are effective in Italy if they have been issued by the authorities of the state to which reference is made in the Italian law, provided that they do not conflict with the requirements of public policy and provided that the fundamental rights of the defense have been complied with.

Regarding determinations pertaining to the custody of a child, a recent ruling of the Italian Supreme Court (*Corte Di Cassazion*) needs to be considered.

In 1997, the Italian Supreme Court decided an appeal in a case of removal of a child by his father from Australia to Italy, and upheld a Juvenile Court's decision that ordered the immediate return, in application of the Convention, of the removed child to his mother, who had been assigned custody of him by an Australian family court.[12]

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[10] *See* A. Hutchinson and H. Straight, INTERNATIONAL PARENTAL CHILD ABDUCTION, (Family Law, Reunite, 1998) at 135.

[11] Law No. 218 of May 31, 1995, G.U. No. 128 of June 3, 1995, Ordinary Supplement.

[12] Corte Di Cassation, Decision No. 507 of January 18, 1997, *in* RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE, No. 1 (1998), at 145-149.

The Supreme Court rejected challenges of constitutional illegitimacy of Italian Law No. 64 implementing the Convention, on the consideration that the Convention aims at the protection of minors from the wrongful behavior of their parents or relatives independently of any control over the merits of the case by the authorities of the requested contracting state.

Having acknowledged the Convention's primary purpose, namely the protection of the minor from the harmful effects of wrongful removal or retention in breach of custody rights, the Court underscored the fact that the main objective in such cases is to discourage any form of "legal kidnapping" by a parent or relative. This is done by providing forms of protection that attempt, above all, to re-establish the pre-existing conditions and to neutralize any interest of the perpetrator of the removal or retention to obtain through wrongful behavior any beneficial effect from forum shopping.

The Court excluded any conflict with article 30 of the Constitution, which pertains to parents' rights and obligations to support and educate their children, on the basis of two considerations: that the Convention is a duly accepted international instrument, whose function is the effective protection of minors against wrongful behavior of parents or relatives; and that the limitations imposed on the requested state's judicial authority pertaining to any control over the merits of the case are not applicable when it is determined that a serious risk exists, that the child would be exposed to physical or psychological harm or would be placed in an intolerable situation upon his return.

The Court stated that only in the presence of such a risk may Italy's judicial authority refuse to restore custody and review the merits of the case. The existence of a situation of risk, the Court observed, was not invoked by the removing parent, and the condition that allows the judicial authority to ascertain whether or not the child objects to being returned was not met.[13]

The Court went on to clarify that in the Italian system the decision to return the child, as such, is not even potentially capable of conflicting with the decision to be issued in the separation case between the two parents pending before an Italian court.

In the same decision, the Court also confirmed that Hague Convention-related cases are adjudicated by the court at the place where the minor is found, pointing out that such a legislative solution regarding territorial competence is not a novelty, but rather is found in the Law on Adoption as well.[14]

V. Legal Assistance Programs

Legislation enacted in 2002 contains provisions on legal aid in criminal, civil, administrative, and tax related proceedings.[15] There is no automatic right to legal aid. It is granted, upon request, only to individuals who are able to prove that they have minimal income. The law applies to citizens, and to foreigners legally residing in Italy, as well as to stateless persons. Article 25 of the Convention applies.

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[13] The Convention, art. 13.

[14] *Supra* note 7.

[15] G.U. No. 139 of June 15, 2002.

VI. Conclusion

With the ratification and implementation of the Convention, Italy has provided its legal system with an instrument whereby it can confront situations of great social relevance, such as abduction of minors, frequent in modern industrialized societies.[16]

The Italian implementing legislation has fully adhered to the principles contained in article 2 of the Convention, which requires the use of the most expeditious procedures available in cases of abduction of minors. The implementing legislation mandates proceedings in chambers, imposes a short term for deciding the case, and limits appeals to a petition to the Court of Cassation (Supreme Court). Such a petition, however, does not stay the enforcement of the lower court's order.

Judging from the decision discussed in Part IV of this report, and subsequent ones,[17] it appears that the rulings of Italian courts strictly adhere to the spirit of the Convention, which is aimed at the protection of children, a concern of paramount importance in matters relating to their custody.

Prepared by Giovanni Salvo
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October 1999
Updated November 2003

[16] According to information provided by the Italian Central Authority, in the first semester of 2003 Italy had a total of 63 cases, of which 38 were activated by the Italian Central Authority (10 towards the U.S.) and 25 activated by foreign authorities (2 by the U.S.), *at* www.Giustizia.it.

[17] *Supra* note 12. *See also* the following decisions of the Corte di Cassazione: No.10090 of 1997, *in* RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE (RDIPP) No. 4 of 1998; No. 70 and No. 3767 of 2001(RDIPP No. 1 of 2002); No. 11999 and No. 13823 of 2001(RDIPP No. 2 of 2002); No. 2748 of 2002(RDIPP No. 3 of 2002); No. 299 of 2002(RDIPP No. 1 of 2003).

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LUXEMBOURG

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction was signed by the Grand-Duchy of Luxembourg on December 18, 1984. It was ratified on October 8, 1986, with the reservation according to article 42 of the Convention, that the Grand-Duchy of Luxembourg will not be bound to assume any costs referred to in article 26, paragraph 2, of the Convention, resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs are covered by the Luxembourg system of legal aid and advice. The Convention entered in force for the Grand-Duchy on January 1, 1987.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

In accordance with article 6, paragraph 1, the Grand-Duchy has designated as the Central Authority the State Procurator-General, Bâtiment de Justice, 1450 Luxembourg, 12, Côte d'Eich.

According to the Constitution of the Grand-Duchy of Luxembourg,[2] the Convention became part of the legal system of the Grand-Duchy upon its approval by Parliament, its ratification, and its publication. The courts will apply it whenever called upon to do so.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

For a decision relating to the wrongful removal and retention of a child, the competent court is the District court (Tribunal d'arrondissement) where the child resides or is found, and this court is also competent in proceedings under the Hague Convention. The proceedings are governed by the provisions of the Code of Civil Procedure.[3]

Child abduction may also be prosecuted under articles 368-et. sea (Abduction of Minors) of the Criminal Code.[4] Abduction of a minor is punishable by imprisonment from 1 to 5 years and a fine from €251 to € 5,000 (US$316 to $6,332). For abduction of a minor below the age of 16, the punishment is imprisonment from 5 to 10 years. If a minor younger than age 16 consented and voluntarily followed the abductor, the punishment is imprisonment from 6 months to 3 years and a fine from €251 to €2,000.

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[1] Law of May 16, 1986, on the Approval of the Convention, MEMORIAL A-41, May 24, 1986, p. 1379, rectified in MEMORIAL A-63, Aug. 20, 1986, p. 1808, further rectified in MEMORIAL A-79, Oct. 6, 1986, p. 2064.

[2] Constitution of the Grand-Duchy of Luxembourg of Oct. 17, 1868, consolidated text of June 2, 1999, MEMORIAL A-63, June 8, 1999, p. 1401, art. 37. Central Service of Legislation, 2001.

[3] New Code of Civil Procedure, Law of Aug. 11, 1996, Decree of Aug. 3, 1998, MEMORIAL A-64, Aug. 17, 1998, p.1106, arts. 1108-1116. Consolidated text of Nov. 1, 2003.

[4] Criminal Code, Law of June 16, 1879, consolidated text of Nov. 1, 2003, Ministry of Justice, Luxembourg, 2003.

If the abduction is committed by the father, mother or others to take the minor from the person who has custody or in breach of a judicial order, the punishment is imprisonment from 8 days to 2 years and/or a fine from € 251 to €2,000.

B. Parental Visitation

For a decision relating to parental visitation, the competent court will be the District court where the child resides or is found. This court will also be competent in proceedings under the Hague Convention. The proceedings are governed by provisions of the Code of Civil Procedure.[5]

III. Court System and Structure – Courts Handling the Hague Convention

General trial courts in civil matters are the District courts (Tribunaux d'arrondissement), one in each territorial district. Appeal against their decisions goes to the Court of Appeal (Cour d'appel), which also has specified trial jurisdiction. Decisions of the Court of Appeal, as well as those of the District courts, are subject to annulment by the Court of Cassation (Cour de cassation) for breach of law. Trial courts in child-return proceedings, visitation, and enforcement of related orders under the domestic Luxembourg law, as well under the Hague Convention, are the District courts.[6] In criminal matters, the structure is identical.

IV. Law Enforcement System

The District courts enforce their decisions. Decisions not subject to further remedy are immediately enforceable. This is done by court bailiffs and the police.

V. Legal Assistance Programs

The office of the State Procurator-General is entrusted with legal assistance under the Hague Convention. Further assistance can be obtained from the court in legal proceedings.[7]

VI. Conclusion

The Grand-Duchy of Luxembourg is in full compliance with the Hague Convention. The powers under the Convention are exercised by the Central Authority, the State Procurator-General, and the pertinent courts.

Prepared by George E. Glos
Special Law Group Leader
November 2003

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[5] *Supra* note 3.

[6] *Id.*

[7] Law of Aug. 18, 1995, on Legal Assistance, MEMORIAL A-81, Oct. 3, 1995, p. 1913, and Regulation of Sept. 18, 1995, on Legal Assistance, *id.* at 1916.

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REPUBLIC OF MACEDONIA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Republic of Macedonia ratified the Hague Convention on International Child Abduction on December 1, 1991. Macedonia is one of the former republics of the Federal Republic of Yugoslavia that gained its independence from Yugoslavia over a decade ago. Macedonia does not have a law that would specifically regulate the applicability of the Hague Convention to the Republic of Macedonia and establish procedures that need to be followed by the government authorities, as well as Macedonian citizens, in order to apply the Convention domestically. Therefore, in order to determine how the Convention could be applied to Macedonia, one has to look at the Macedonian Constitution, as well as other pertinent laws.

I. Domestic Laws And Regulations Implementing The Hague Convention

As in many other European Constitutions,[1] the Constitution of the Republic of Macedonia contains a provision that states that international obligations entered into by Macedonia have universal domestic application and are a part of the domestic legal system. International treaties that Macedonia entered into are equal to Constitutional laws and have a superior status in the domestic legal system. In other words, international treaties that have been ratified by Macedonia are self-executing and cannot be repudiated or altered by an internal Macedonian law. Any internal law that does not comply with international obligations ratified by Macedonia is invalid. This is a legal principal that is fundamentally different from the legal doctrine that dictates that the newer law would prevail (a doctrine followed by, e.g., the United States). However, in order to attain the status of the superior or Constitutional law, an international obligation in question should comply with the requirements of the Macedonian Constitution.[2] Given the fact that few Macedonian laws directly address issues regulated by the Convention, the provisions of the Convention should be regarded as the internal law of the Republic of Macedonia and construed as such. The Convention could be relied upon in any legal action commenced in Macedonia with regard to child abduction and other related issues.

As a tribute to its Socialist past, the Constitution of the Republic of Macedonia contains a provision that states that the state takes particular care and protection of the family.[3] It is stated in the Constitution that Macedonian laws regulate legal relationships in the family and marriage. The Constitution of the Republic of Macedonia determines the rights and duties of the parents in caring for the upbringing of their children. According to the Law on the Family, parenthood could be established by birth or adoption. Under the Macedonian laws, parents have a duty to care for the upbringing, care, health, preparation for independent life and work, education, training and development of work capabilities of their children.

The Constitution also provides for the special assistance from the state to the parentless children.

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[1] KONSTITUTSIA ROSSIISKOI FEDERATSII [Constitution of the Russian Federation] [Konst. RF (1993), translated in VLADIMIR V. BELYAKOV &WALTER J. RAYMOND, CONSTITUTION OF THE RUSSIAN FEDERATION (1994).

[2] Macedonian Constitution, art. 118, *available at* http://mlrc.org.mk/list.htm.

[3] *Id.* art. 40.

In accordance with the principle that both parents are responsible for the raising and development of their children, the parents have equal rights and duties in regard to their children. If one of the parents is deceased or unknown, or his parental rights were taken away, the parental right is exercised by the other. While exercising parental rights, parents have to act in conformity with the needs and interests of the children. In case of disagreement between the parents in the exercise of the parental right, the Center for Social Work decides the issue.

The principle of responsibility of both parents for their children is reflected in the proceedings for marital disputes. At the reconciliation hearing, as well as during the divorce proceedings, when the marital partners have common minor children, the court is obligated to cooperate with the social work organs in reaching an agreement for maintaining, educating, and supporting the children. When a marriage is dissolved by mutual agreement and there are minor children, an agreement on the manner of exercising the parental rights is submitted for the records of the competent court. When assessing the agreement, the court is obliged to obtain an opinion from the competent social work organ, and if it determines that the agreement is contrary to the interests of the children, it will refuse to grant the divorce.

The Law on the Family foresees the possibility, if this is required by the interests of the child, for the parents to entrust the child to a third person or to place him in an appropriate institution. If the parents, or the parent, who has custody of the child, are absent from their residence for a long period of time for justified reasons and they do not take the children along, the children may be entrusted to another person, provided that the Center for Social Work previously approves such an accommodation.

A. Return Requested From Abroad

Under the Law on Internal Affairs of Macedonia, the Ministry of Internal Affairs will be the main point of contact for a foreign person or government from another country applying for the return of a minor. As described in the pertinent provisions of the law, the Ministry will cooperate and exchange information with foreign police and administrative bodies, as well as organizations from other countries and international organizations.[4]

B. Return Requested From Macedonia

When a return is requested from Macedonia, pertinent provisions of the Law on General Administrative Procedures will apply.[5] This Law states that when legal assistance is being asked from foreign agencies, Macedonia is to follow the provisions of international agreements that are valid for the particular situation.

II. Domestic Laws Regarding Child Abduction And Parental Visitation

Macedonian laws provide for parental visitation and alimony after the divorce of the parents of a child.[6] The typical issues that arise after the divorce are the physical custody of a child, parent's ability to maintain relations with a child, and the support that a child will need to receive after the parents are divorced. Under Macedonian law, the court order will state who should get legal custody over a child

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[4] Law on Internal Affairs, art. 44, *available at* http://mlrc.org.mk/list.htm.

[5] Law on General Administrative Procedure, art. 38(1), *available at* http://mlrc.org.mk/list.htm.

[6] Family Law Report, *available at* http://www.seeline-project.net/FamilyLaw/YugoslaviaFL.htm#4.5.

after the divorce has been granted. The courts must try to consider the best interest of the child (best interest rule) in decisions concerning custody. Macedonian courts are authorized to make one of the following decisions: one of the parents could be awarded child custody; if there are several children, siblings may be separated and custody will be given to both parents; or parental rights may be terminated and children will be transferred to a third party (e.g., foster parents). However, no matter what decision is made by the court, the court must apply the "best-interest" test in every case. Court orders awarding parental custody are not final and could later be challenged and reversed. The request to terminate a court order may come from either parent or the Center for Social Welfare.

Macedonian law also states that a parent who was not awarded custody of a child still has a right to maintain a relationship with his children. Generally, it is up to the former spouses to set up conditions for visitation. However, if they fail to reach an agreement, the court would make an appropriate decision. Under Macedonian laws, parents also have a duty to provide support to their children after the divorce. The court must decide on the level of support, particularly in regulating the duties of the parent who didn't get custody.

When issuing the divorce decree, the court shall decide on the maintenance, education, and support of the children. If the parents have not reached an agreement on this, or if their agreement does not conform to the interests of the children, the court will obtain an opinion from the Center for Social Work and investigate all circumstances. The court will decide whether the children will remain with one parent, some will remain with the mother and some with the father, or all of them will be entrusted to a third person or institution. The parent who does not win custody has the right to maintain personal relations with them, unless the court determines otherwise, considering the interests of the children.

The Criminal Code sanctions the maltreatment and neglect of children in several articles. Murdering a child at birth (article 127) is prohibited, as is causing a child to commit suicide and assisting in suicide (when this act is done to an adolescent) (article 128 (2)); kidnapping (when this act is done to an adolescent) (article 141 (2)); sexually attacking a child (article 188); raping a child through the abuse of position (when this act is done to an adolescent) (article 189 (2)); seducing, prostituting, and permitting sexual acts to transpire (article 192); cohabitating with an adolescent person (article 197); abducting an adolescent (article 198); changing a family condition (article 199); neglecting and mistreating an adolescent (article 201); neglecting obligations to support children (article 202); neglecting family obligations (article 203); having incestuous relations (article 194); serving alcoholic drinks to an adolescent (article 204); intermediating prostitution (if it is done to an adolescent female person) (article 191); showing pornographic material (article 193); and abandoning a helpless child (article 200).

The Criminal Code forbids the sale, trade, and kidnapping of persons, including minors. Forcing an adolescent into a slave relationship or transporting him as a slave (article 418) is punished with at a minimum of 5 years in prison. Anyone who unlawfully transfers other people across the border of the Republic of Macedonia or who (out of self-interest) assists another person in unlawfully crossing the border will be punished with 6 months to 5 years of imprisonment (article 402). If an adolescent is abducted (article 141), the perpetrator will be punished with at least 3 years in prison. Article 198 of the Criminal Code prohibits taking an adolescent away from his parents, guardian, or the institution or a person to whom he has been entrusted; preventing him from being with a person who has legal custody over him; or obstructing the implementation of a decision regarding custody. The punishment for these crimes is 1 year of in prison. If the act has been carried out from self-interest or from other indecent motives or with the use of force, threats, or lies, or if because of this the health, upbringing, support, or education of the adolescent is seriously threatened, the perpetrator will be punished by 3 months to 5 years in prison.

III. Court System And Structure – Courts Handling The Hague Convention

The Law on Courts provides the following court system. Macedonian judiciary is composed of 27 Basic Courts, 3 Appellate Courts, a Supreme Court, and a Constitutional Court. No specialized courts currently exist. By July 1996, over 660 judges had been appointed to the bench under the Law on Courts. The signing of the Stabilization and Association Agreement had a positive impact on the improvement of the level of harmonization of current legislation with EU legislation. Articles 68 and 74 of the SAA attach particular importance to the reinforcement of law enforcement institutions and institutions of justice and single out the improvement of the effectiveness and training of the legal professions as an area for cooperation. Apart from the need to train judges and prosecutors in performing their functions, it will also be necessary to train new and experienced judges and prosecutors, with respect to new laws, Constitutional principles and international agreements signed and ratified by the former Yugoslav Republic of Macedonia.

IV. Law Enforcement System

Under the Convention, a member state should designate a Central Authority to discharge the duties that are imposed on the state by the Convention. In 1997, Republic of Macedonia created an office of the Public Attorney (Ombudsman) and the Department for Protection of Children's Rights. The Public Attorney is a Constitutional institution authorized to protect the Constitutional and legal rights of the citizens, when these rights are violated by the state administration bodies and other bodies and organizations with public competences.[7] The Department For Protection Of Children's Rights is functioning as part of this institution. Law on the Public Attorney prescribes the competence and the functioning of the Public Attorney office.

The Department For Protection Of Children's Rights undertakes its activities in accordance with the competencies and functioning of the Public Attorney prescribed by the Law. The Department For Protection Of Children's Rights primarily works on specific cases for protection of the children's rights following a submitted complaint. A violation of a right is most often addressed through a recommendation, submitted to the competent bodies for the adequate solution of the problem. The Department is also continuously following the legislation and its implementation; it submits proposals for changes and amendments to the laws and better implementation of the existing legislation and the Convention on the Rights of the Child. It is continuously monitoring the status of the rights of children through regular visits and direct contact with the children, and it submits proposals for the improvement of their position to the competent bodies. The Department also monitors the rights of children with special needs in special institutions through regular visits and direct contact.

If the competent bodies do not act on the requests, recommendations, suggestions, or other measures undertaken in accordance with the Law, then the Government of the Republic of Macedonia is informed, as is the Parliament of the Republic of Macedonia through a special report. The Department can also publicly declare that the rights of children are being violated by the competent state bodies in order to put pressure to respect the rights of children. At least once a year a report is submitted to the Parliament of the Republic of Macedonia on the work of the Public Attorney.

Following the initiative of the Department, a new Law on Child Protection was passed. This Law states that persons up to 18 years of age are considered children, and they enjoy special protection guaranteed by law by the state (persons up to 18 years of age) in accordance with the Convention on the Rights of the Child. The Department has also proposed opening a shelter for street children who usually

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[7] Law on the Public Attorney (Ombudsman), art. 2, *available at* http://www.omineurope.info/uk/getetz_macedonia__uk.htm.

have parents, but are abused by their parents. The Department also succeeded in establishing a shelter for the victims of human trafficking, a crime which involves a number of children. This shelter was formed under the Ministry of Internal Affairs and is already functioning.

The Parliament introduced the new Ombudsperson Law[8] during the session of September 10, 2003, implementing Amendment XI of the Constitution. Under the new legislative solutions, the jurisdiction and responsibilities of the Ombudsperson are significantly increased to include:

- the possibility to undertake actions and measures for protection against unlawful postponement of court procedures or irresponsible flagrant performance of court duties
- the possibility, at any given time, without prior notification or consent, to enter the premises of the state authorities or other institutions with public authorization and carry out direct surveying of the projects under their jurisdiction; this also applies to the so called "closed" institutions (where the persons have legally limited freedom of movement), as well as to freely interview such persons
- the possibility to have immediate audience with the highest state officials
- the possibility to have access to the most confidential information (the institutions have the responsibility to supply all the evidence, data, and information, regardless of the degree of confidentiality)
- the possibility to initiate legislative changes and amendments for the authorized applicants and to make suggestions to the Constitutional Court to examine the accordance of the laws and other regulations and legislative acts with the Constitution, etc.

V. Legal Assistance Programs

The Office of the Ombudsman works with the Center for Social Work, which supervises the exercise of parental rights and makes decisions on the exercise of parental right. In order to provide financial security for the child, the right to a child supplement has been foreseen when the income of the parent is under a specific level. According to the Law on the Family, either the court or the Center may take a child away from the custodial parent(s) if the child is neglected or a serious threat exists for its proper development and upbringing. An appeal can be lodged against such rulings to the Ministry of Labor and Social Policy. If the Ministry confirms the ruling, the person who has a legal interest has the right to initiate an administrative dispute before the competent court. In the cases when a parent abuses his parental right or neglects his parental duties, the court can take away the parental right from that parent, with a ruling in an out-of-court procedure, after obtaining an opinion from the Center for Social Work.

VI. Conclusion

In accordance with the Law on the Public Attorney, the state administration bodies and other bodies and organizations with public authorities are obliged to act upon the requests of the Public Attorney and the Department For Protection Of Children's Rights and to implement their recommendations, opinions and suggestions in their actions. However, there is still a lack of complete awareness about the role and function of the Public Attorney and the Department For Protection Of Children's Rights, because

[8] Official Gazette of the Republic of Macedonia 60/03, *available at* http://mhc.org.mk/eng/a_izveshtai/a_2003-09mi.htm.

certain competent state administration bodies do not act upon Department's requests, suggestions, and recommendations. In certain cases, the difficulties for a consistent implementation of children's rights are comprised in the limited material resources of the state, due to which the Department is not able undertake any specific measures except to request that the competent bodies give priority to children's rights when allocating and using their resources.

Prepared by Suren Avanseyan
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March 2004

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MALTA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

I. Domestic Laws and Regulations Implementing the Hague Convention

The Republic of Malta consists of six small islands located in the Mediterranean Sea between Sicily and Libya. It is one of the most densely populated countries in the world. The Hague Convention on the Civil Aspects of Child Abduction[1] was ratified in Malta by the Child Abduction and Custody Act 1999,[2] which entered into force on August 1, 2000. The Convention came into force between Malta and the United States of America on February 1, 2003.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Maltese Criminal Code[3] provides for two offenses of abduction. The first offense consists of cases where there is violence and the intent to abuse or marry the abducted person.[4] The second offense addresses the abduction of minors under 18 years of age where there is intent to traffic them to exploit them for the production of goods or provision of services.[5] In cases of abduction, if there has been no impact on public order or any instance of public violence, it appears that criminal proceedings can only be instituted upon the complaint of a private party.[6] As such, it appears that one parent can begin proceedings against the other provided a complaint is lodged with the police.[7]

To prevent child abduction from occurring, the Maltese Code of Organization and Civil Procedure[8] provides that a warrant of prohibitory injunction may be issued to prevent a child being taken out of Malta. Once the warrant has been filed, it is distributed to the Comptroller of Customs, the Chairman of the Malta International Airport, the Principal Passports office, and the Commissioner of Police. The warrant remains in force until revoked by a court order. It appears that the courts can also order the confiscation of the passport of a potential child abductor.[9]

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[1] Hereinafter The Convention.

[2] Child Abduction and Custody Act 1999, c. 410, Act XIII of 1999, as amended.

[3] The Criminal Code, c. 9.

[4] *Id.* § 199.

[5] *Id.*

[6] *Id.* §§ 543 and 544.

[7] *Id.* and *see also*: Malta, Questionnaire on Preventive Measures, *at* ftp://ftp.hcch.net/doc/prevmeas_mt.doc. (Last accessed Jan.7, 2004).

[8] The Code of Organization and Civil Procedure, c. 12.

[9] Malta, *supra* note 7.

B. Parental Visitation

In Malta, it is considered important that a parent with visitation rights be allowed to exercise them. To ensure this, if the parent with custody of the child intends to relocate, they are required to notify the other parent of that intent. Once the parent has been notified of the custodial parent's intent to relocate, they have a limited time in which they can contest the request. Any decisions made on this issue are always made in the best interests of the child.

III. Court System and Structure – Courts Handling the Hague Convention

A. Family Proceedings Generally

The Child Abduction and Custody Act 1999 provides that the First Hall of the Civil Court has the jurisdiction to hear cases concerning child abduction which have the right of appeal to the Court of Appeal.[10] If he sees fit, the Minister of Justice can make an order allowing any other court to have jurisdiction to hear applications under the Convention. Orders may be issued by the court, both ex parte and out of hours, to safeguard the interests of the child.

B. Under the Convention

When an application has been made under the Convention to the First Hall of the Civil Court, the court may give interim directions to ensure that the welfare of the child is protected or to prevent any "change in the circumstances relevant to the determination of the application."[11] The court has the authority to make a declaration that the removal of a child from, or retention of a child outside, Malta is wrongful.[12]

To prevent the spirit of the Convention from being frustrated by any contrary custody orders issued in Malta, the Child Abduction and Custody Act 1999 provides that any custody order that is inconsistent with a custody decision or order for the return of an abducted child will cease to have effect.[13] Furthermore, "a custody decision given in or entitled to recognition in Malta is not a ground of the Maltese Court to refuse to return a child, although the Maltese Court may take account of the reasons for that decision."[14]

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[10] *Supra* note 2, § 6.

[11] Child Abduction and Custody Act 1999, c 410, Act XIII of 1999, as amended, § 7.

[12] *Id.* § 10.

[13] *Id.* § 27.

[14] *Supra* note 9.

IV. Law Enforcement System

The Central Authority in Malta is the Director of the Department of Family Welfare.[15] Applications made under the Convention are received and processed by the Central Authority and filed to the competent court by the Office of the Attorney General. A form for applications under the Convention is available from the Department of Family Welfare[16] which requests information about:

- the identity of the child and his parents
- the identity of the applicant information
- the place where the child is thought to be, including any details about the abductor
- the date and circumstances of the wrongful removal or retention
- the factual or legal grounds justifying the request
- any civil proceedings in progress

If the child has been removed from Malta during custody proceedings the court can, upon an application for the return of the child, declare the removal to be unlawful if "it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of Malta without the consent of the person having the right to determine the child's place of residence."[17]

V. Legal Assistance Programs

Malta has made a reservation as mentioned in article 26 of the Convention that the costs of applications under the Convention are not provided for by any authority in Malta.

VI. Conclusion

Overall, Malta has a variety of preventive measures in place to help stop the abduction of children from within its territory. It's robust notification procedure ensures that if an abduction has occurred, the relevant individuals at port entry and exit points are informed.

The overriding principle when dealing with matter affecting children appears to be that whatever is in the best interest of the child will prevail.

Prepared by Clare Feikert
Legal Specialist
January 2004

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[15] Child Abduction and Custody Act 1999, c 410, Act XIII of 1999, as amended, § 5. The contact information of the director is: Director, Department of Family Welfare, Social Work Centre, St. Joseph High Road, Santa Venera, Malta. Tel:+ (356) 2144 3415 3415/2144 1311. Fax: + (356) 2149 0468.

[16] Department of Family Welfare, *available at* http://www.msp.gov.mt/documents/family/child_abduction.pdf (last accessed Jan. 7, 2004).

[17] *Supra* note 9.

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MEXICO

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction was ratified by Mexico effective March 6, 1992.[1] Mexico has no specific federal legislation for implementing the Hague Convention; rather, the Convention is implemented under existing Mexican state law.[2]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Mexican law provides that the parents will exercise custody of their children jointly.[3] In the event the parents separate and do not come to an agreement as to the custodial rights of their children, a judge will award custody to one parent, specifying visitation rights of the non-custodial parent. [4]

In addition to the Hague Convention, Mexico is a member to the Inter-American Convention on International Restitution of Minors (IACIRM) adopted in Montevideo, Uruguay, on July 15, 1989, and ratified by Mexico on November 18, 1994.[5] This Convention applies to any return case involving a minor whose permanent residence is in any of the member countries and has been illegally or wrongfully taken abroad.[6] Member countries are: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay, and Venezuela.[7] The IACIRM provides that in cases involving parties to this Convention and to the Hague Convention on Civil Aspects of International Child Abduction, the IACIRM will apply, unless the parties agree otherwise through bilateral agreements.[8]

III. Court System and Structure - Courts Handling the Hague Convention

Mexico is a federal republic formed by 31 states and the Federal District.[9] Each state has an

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[1] Decreto Promulgatorio de la Convencion sobre los Aspectos Civiles de la Sustraccion Internacional de Menores, D.O., 3/6/1992.

[2] Telephone Interview with Rosa Isela Guerrero Alba, Central Authority in Mexico for the Hague Convention on International Child Abduction, Minister of Foreign Affairs in Mexico, Sept. 17, 2003.

[3] Art. 414, Codigo Civil Federal, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/2.pdf.

[4] *Id.* art. 416.

[5] Decreto por el que se aprueba la Convencion Interamericana sobre Restitucion Internacional de Menores, D.O., Nov. 18, 1994.

[6] Convencion Interamericana sobre Restitucion Internacional de Menores, art. 1, *available at* http://www.oas.org/juridico/spanish/tratados/b-53.html.

[7] Paises miembros de la Convencion Interamericana sobre Restitucion Internacional de Menores, *available at* http://www.oas.org/juridico/spanish/firmas/b-53.html.

[8] *Supra* note 6, art. 34.

[9] Constitucion Politica de los Estados Unidos Mexicanos, art. 43, D.O., Feb. 5, 1917.

independent judicial organization empowered to apply and interpret the laws of that state.[10] The judiciary in each state is headed by a Superior Court of Justice and contains civil, family, and criminal judges. It is the family judges who have jurisdiction over problems concerning custody, rights of access, and child abduction based on the laws of that state. Therefore, they are the judges who receive and rule on Hague Convention cases.

IV. Law Enforcement System

Mexico has established a Central Authority charged with applying the procedures of the Hague Convention by working with state authorities.[11] The Mexican Central Authority is part of the *Secretaria de Relaciones Exteriores*, or Foreign Ministry, and is responsible for cases of children taken to and from Mexico. The Central Authority generally coordinates its work through the offices of *Desarrollo de Integral de la Familia* (DIF), similar to offices of family services in the United States.[12] The Mexican Central Authority, upon receipt of the Hague Convention application, will prepare a written communiqué for the court, containing an explanation of the Hague Convention and its objectives. The special circumstances of the specific case and its possible solution are also outlined for the court.[13]

The first step in a Hague Convention case in Mexico is to confirm the location of the child. The judge serving the area where the child is living will have jurisdiction over the case. A case cannot move forward in the judicial system until the location of the child is known. If an application contains a known address for the child, the Mexican Central Authority will forward the application to the Superior Court of Justice of the state where the child is thought to be residing.[14] That office will then assign it to the specific judge. When no specific address is known, the Mexican Central Authority submits a request to the appropriate police authority for them to locate the child.[15]

Once the case is in the court, the judge sets the schedule for the rest of the case. Generally, the family judge will encourage the parent who abducted the child to voluntarily return the child. If the abducting parent refuses, the judge can order that the parent cannot leave or take the child, or both, from the jurisdiction of the court until the Hague Convention case is finished.[16]

The Mexican Central Authority is notified in advance of the hearing date and time by the judge's office. After listening the arguments of the involved parties present at the hearing, the judge will issue the order of return (or denial of return) of the child. This order is usually effective immediately.

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[10] *Id.* arts. 40 & 41.

[11] Manual para la Restitucion Internacional de Menores, Secretaria de Relaciones Exteriores, p. 3. (Unpublished manual, on file with author.)

[12] *Id.* at 3, 8.

[13] *Id.* at 9.

[14] *Id.*

[15] *Id.* at 12.

[16] International Parental Child Abduction: Mexico, Official Website of the U.S. Department of State, *available at* http://travel.state.gov/abduction_mexico.html.

Generally, the judge will order that the child be turned over to the Central Authority for coordination of the logistics of the return.[17]

Notwithstanding the actions that the Mexican government has taken so far in order to comply with the Hague Convention, there are reports indicating that Mexican authorities have not been able to fully implement the Convention.[18] Systemic problems continue to delay the resolution of cases. These problems include: the Mexican Central Authority's lack of adequate resources, the lack of implementing legislation integrating the Convention into the Mexican legal system, and an apparent lack of understanding of the Convention among the judiciary.[19]

The lack of resources, including personnel, resulted in difficulties in communication between the Office of Children's Issues in the Bureau of Consular Affairs, which acts as the United States Central Authority (USCA), and the Mexican Central Authority (MCA). Communication began to improve in May 2002, when monthly meetings to discuss cases began between the MCA and the consular section at the United States Embassy in Mexico.[20]

Currently, there is a judicial precedent in which a federal court of appeals in Mexico determined that an order to return a child can be contested at anytime.[21] The ability of the Mexican courts to reconsider the facts of a case at any stage of the proceeding is a major area of concern. It highlights how the lack of implementing legislation integrating the Convention into the Mexican legal system has made the Convention less effective.[22]

Another systemic problem is the apparent lack of understanding of the Convention's purpose and intent by many judges in Mexico.[23] The Convention was not designed to address underlying custody issues. Those were meant to be dealt with by the courts in the country of the child's habitual residence, after the child had been returned.[24] However, the lack of implementing legislation has allowed judges to apply Mexican procedural and custody law in Hague cases to deny return when the only issues the court is supposed to examine are: (a) whether the child was "habitually resident" in another Hague state prior to the abduction or illegal retention; (b) whether the left-behind parent had some form of custodial rights at the time; and (c) whether those rights were being exercised.[25]

The USCA has raised these issues with the MCA and the Embassy of Mexico in ongoing meetings and conversations. The Assistant Secretary for Consular Affairs raised concerns about the implementation

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[17] *Supra* note 11, at 11.

[18] *See* http://travel.state.gov/2003haguereport.html.

[19] *Id.*

[20] *Id.*

[21] Tribunales Colegiados de Circuito, "Penayo, Mirta," 6 S.J.F. 767 (1999. Epoca, 1997).

[22] *Supra* note 18.

[23] *Id.*

[24] *Supra* note 11, at 10.

[25] *Id.*

of the Convention in Mexico during a meeting that took place in November 2002.[26] A Binational Working Group agreed to work together to ensure the passage of implementing legislation and to promote judicial training aimed at improving compliance with the Convention. As a result, a group of Mexican judges and Central Authority officials visited Washington in December 2002 for a U.S. Government arranged program focused on familiarization with Hague Convention implementation in the United States.[27] In November 2003, the United States and Mexico agreed again to work together in order to resolve issues pertaining to the implementation of the Hague Convention, such as promotion of judicial training, regular meetings on specific cases, and the use of visitors programs which allow key officials and judges to focus on implementation of the Convention.[28]

V. Legal Assistance Programs

While the Mexican Central Authority will not assign an attorney to take charge of the case, they will prepare the documents needed to submit the case to the judge.[29] Family judges in Mexico are authorized to intervene ex-officio in matters involving family and have the power to enforce their decisions, so the moving party is not strictly required to retain the services of a private attorney.[30] However, there are parents who believe that having a private attorney resulted in less time delays in the application process.[31] Conversely, a federal court of appeals in Mexico considered that abducted children and their legal representatives must be afforded the right to legal counsel during a Hague Convention case.[32]

VI. Conclusion

In the last few years, Mexico has taken important measures to address international child abduction issues, such as the adoption of the Hague Convention in 1992. Nevertheless, Mexico has not enacted the implementing legislation to integrate the Convention into the Mexican legal system. In addition, the Mexican Central Authority's lack of adequate resources, and an apparent lack of understanding of the Convention among the judiciary, has prevented Mexico from fully implementing this international agreement. A United States-Mexico Working Group agreed to work together to ensure passage of implementing legislation and to promote judicial training aimed at improving compliance with the Convention in Mexico.

Prepared by Gustavo E. Guerra
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January 2004

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[26] *Supra* note 18.

[27] *Id.*

[28] U.S.-Mexico Binational Commission Working Group on Migration and Consular Affairs, *available at* http://www.state.gov/p/wha/rls/rpt/26216.htm.

[29] *Supra* note 16.

[30] *Supra* note 11, at 10.

[31] *Supra* note 16.

[32] *Supra* note 21, at 767.

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MONACO

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Convention] was incorporated into Monegasque domestic law by Ordinance No. 10-767 of January 7, 1993,[1] with an effective date of February 1, 1993. Monaco, which was not a member of the Hague Convention Conference on Private International Law, acceded to the Convention in accordance with article 38.[2] The instruments of accession were deposited on November 12, 1992, with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The accession has effect only between Monaco and the contracting states that have accepted the accession. The accession of Monaco was accepted by the United States on March 5, 1993, and the Convention became effective between the two countries on June 1, 1993.[3] The United States had no case pending with Monaco as of June 2003.[4]

I. Domestic Laws and Regulations Implementing the Hague Convention

Article 2 of the ordinance[5] designates the *Direction des Services Judiciaires* as the Central Authority.[6] Because of the size of its territory and the uniqueness of its administration and justice, Monegasque authorities perceived the designation of a Central Authority as less indispensable than larger nations where the petitioner is more likely to face problems regarding the courts' territorial competence. However, the Central Authority still has its importance, as it will be the first to receive the application for return.[7] Upon receipt, the Central Authority will check that the application satisfies Convention criteria and is accompanied by the proper documentation. At this time, all measures necessary to ensure the return of the child or the effective exercise of visitation rights will be taken. However, these measures will be

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[1] JOURNAL DE MONACO [Official Gazette of Monaco], Jan. 22, 1993, at 90.

[2] The Convention was open for signature to the state members of the Hague Conference on Private International Law. However, Article 38 provides that any other state may accede to the convention by depositing the instruments of accession with the Ministry of Foreign Affairs of the Netherlands.

[3] Article 38 provides that the Convention enters into force as between the acceding state and the state that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

[4] http://travel.state.gov/2003_June_Hague_attach.html.

[5] *Supra* note 1.

[6] Direction des Services Judiciaires:
Palais de Justice
5, Rue Colonel Bellando de Castro
MC 98000 Monaco
Telephone: 3 77 93 15 84 11
Fax: 3 77 93 50 05 68

[7] Letter of April 26, 1999, from the Director of The *Direction des Services Judiciaires* in response to an inquiry from the Law Library of Congress.

decided on a case-by-case basis and will depend on the specific necessities of each instance since no implementing measures to the Convention have been taken and no specific procedure has been set forth.[8]

The *Direction des Services Judiciaires* felt that domestic laws already in place offer all the necessary tools for the implementation of the Convention. In addition to the investigations which can be carried out by the *Services de la Sureté Publique* (Public Safety Services), one may resort to the procedure of educational assistance before a specialized judge, the *juge tutélaire*, who deals with family problems, including guardianship of children. The Code of Civil Procedure contains provisions covering legal aid, and the Penal Code contains provisions covering parental child abduction and withholding access rights from a person entitled to such rights.[9] These provisions are examined in greater detail below.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The abduction of a child is punishable by up to 20 years in prison in certain cases.[10] In addition, refusal by the person in charge of a child to present the child to the person(s) entitled to claim him is punishable by a minimum imprisonment of 5 years and a maximum imprisonment of 10 years.[11]

Furthermore, when the custody of a child has been awarded by a court decision, withholding access rights from the person entitled to these rights, or abduction of the child from the person who has custody (even without fraud or violence by the father, mother or any other person), is punishable by imprisonment up to 1 year, a fine between €2250 and €9000 (US$2,825 and $11,300), or both.[12]

B. Parental Visitation

In case of divorce or separation, the judge determines which parent will be granted custody. The judge has full authority to decide visitation rights and to set the contribution of each parent for the education and support of their children. The Code Civil further states that, irrespective of the judge's decision on custody, the father and mother maintain the right to monitor the education of the children and their support. They must contribute to their children's support according to their means.[13]

The best interests of the child are the prime consideration in all decisions affecting children. The judge may use inquiries by social welfare agencies, expert psychological reports, and the views of the child when allowed by the law.

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[8] *Id.*

[9] *Id.*

[10] CODE PÉNAL (C. PÉN) arts. 280, 290 and 292.

[11] *Id.* art. 289.

[12] *Id.* art. 294.

[13] CODE CIVIL (C. CIV.) art. 206-20.

III. Court System and Structure – Courts Handling the Hague Convention

The lowest tribunal in the system is that of the *Juge de Paix* (Justice of the Peace). The court, in which the judge sits alone, hears minor civil (up to €4600) and criminal cases.[14]

The next court in the hierarchy is the *Tribunal de Premiere Instance* (Court of First Instance). It is the court of general competence.[15] This court functions with a panel of judges presided over by the President. The court hears civil, criminal, commercial, and administrative cases. The President of the Court of First Instance presides over emergency procedures known as *référés.* The president may order *en référé* any provisional measures whose aim is to prevent imminent harm or to end manifestly illegal behavior.[16]

The *juge tutélaire* is a judge from the Court of First Instance, specialized in family matters.[17] Under the educational assistance procedure, this judge has exclusive competence to take all necessary measures to protect the well-being of children whose health, security, morality or education is threatened. He may order any type of investigation he feels is necessary to help him reach his decision. Petitions before the *juge tutélaire* may be filed by the mother, father, legal guardian of the child, the minor himself or the *procureur général* (general prosecutor). In addition, in case of divorce or separation, he has full authority to modify a custody order if a change in circumstances has occurred: for example, to organize visitations rights and to modify the amount of alimony set for the child.[18]

Appeals of decisions of the Court of First Instance and of the *juge tutélaire* lie in the *Cour d'Appel* (Court of Appeals).[19] The Court of Appeals sits in panel with a minimum of three members. It re-examines the facts and the legal points of a case. The court reviews the files as presented by the lower court and orders additional investigation if necessary.

The supreme judicial court is the *Cour de Révision.* It decides whether the rule of law has been correctly interpreted and applied by the Court of Appeals.[20] In practice, the Monegasque judiciary consists of French judges detached to the Monegasque courts. No court decision concerning the application of the Convention could be found as Monegasque court reports are nearly inaccessible.[21]

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[14] CODE DE PROCEDURE CIVILE (C. PRO. CIV.), arts.6 to 19.

[15] *Id.* art. 21.

[16] *Id.* arts. 20 and 414 - 421.

[17] *Id.* art. 832.

[18] C. CIV. art. 317 and following & C. PRO. CIV. arts. 833 and following.

[19] C. PRO. CIV. art. 22.

[20] *Id.* art. 23.

[21] Thomas H. Reynolds & Arturo A. Flores, FOREIGN LAW, CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD, Vol. II A, Monaco.

IV. Law Enforcement System

To be enforceable, a judgment must contain the *formule exécutoire* (enforcement formula), and it must have been served on the defendant.[22] The enforcement formula requires, in the name of the Prince, the sovereign of Monaco, all *huissiers de justice*,[23] the general prosecutor, and the officers of the public force to lend their assistance to the enforcement of the judgment when requested.[24]

In the absence of voluntary compliance with a judgment or court order, one needs to resort to the *execution forcée* (forced compliance) and request the assistance of the public authorities as specified in the enforcement formula.

V. Legal Assistance Programs

Monaco made the following reservation to article 26 of the Convention:

> In conformity with article 26, paragraph 3, of the Convention, the Principality of Monaco declares that it shall not be bound to assume any costs referred to in Article 26, paragraph 2, resulting from the participation of legal counsels or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Legal aid is available to a person who can show that he "is not able to pay for legal expenses without drawing from resources which are necessary for his and the family's livelihood."[25] Applications and justifications must be addressed to the general prosecutor.[26] Decisions are generally made within 15 days of the application date by a body (*bureau d'assistance judiciaire*) composed of the general prosecutor, a representative from the treasury and an attorney designated for a year by the President of the Court of First Instance.[27] The applicant is notified of the decision within 3 days, and it cannot be appealed.[28]

Legal aid covers the following expenditures:[29] court fees, expenses incurred by witnesses who have been authorized by the court, remuneration of experts, emoluments of *officiers ministériels*,[30] and attorneys' fees.

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[22] C. PRO. CIV. arts. 470 & 478.

[23] The *huissiers de justice* have the exclusive rights to notify all procedural acts in relation to legal proceedings, and they are responsible for the enforcement of court orders and judgments.

[24] C. PRO. CIV. art. 471.

[25] *Id.* art. 38.

[26] *Id.* art. 40.

[27] *Id.* art. 39.

[28] *Id.* art. 42.

[29] *Id.* art. 44.

[30] This expression covers various categories of practitioners who have obtained from the administration the exclusive right to perform certain legal acts and/or execute certain legal instruments.

VI. Conclusion

Although the Principality of Monaco did not establish specific procedures for the implementation of the Convention after its incorporation into domestic law, the Monegasque court structure and its substantive laws offer all the necessary tools that are needed to effectively meet the Convention's objectives.

Prepared by Nicole Atwill
Senior Legal Specialist
November 2003

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MONTSERRAT

HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Montserrat, a British overseas territory, is a small island in the Carribean, southeast of Puerto Rico. The island was largely destroyed by the eruption of the Soufriere Hills volcano, which began on July 18, 1995, and has resulted in the evacuation of almost two-thirds of the population.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction[2] was extended to Montserrat by the British Government on December 10, 1998, entering into force on March 1, 1999. Montserrat has implemented the Hague Convention through its Child Abduction and Custody Act of 1997;[3] very little information concerning its implementation is available.

II. Domestic Law Regarding Child Abduction and Parental Visitation

A. Child Abduction

It is a criminal offense to remove a child under age 14, either forcefully or fraudulently, from a parent or guardian that has the legal care of the child in Montserrat. It is also an offense to remove a girl under the age of 16 from the care of her parents.[4]

In cases where children have been abused or ill-treated, the courts can remove a child from their parents. A Magistrates Court may issue a warrant to grant the police the power to search for and remove the juvenile from the place where they are in danger.[5]

B. Parental Visitation

The rights and responsibilities of parents to their children is recognized in the common law. However, these rights and responsibilities may be removed by an order of the court. The Guardianship of Infants Act[6] provides that the welfare of the child is the first consideration in cases where the custody

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[1] CIA, The World Factbook, Montserrat, *available at* http://www.cia.gov/cia/publications/factbook/geos/mh.html (updated Dec. 18, 2003).

[2] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

[3] Child Abduction and Custody Act 1997, 12/1997.

[4] United Nations, Committee on the Rights of the Child, Consideration of Reports Submitted by State Parties Under article 44 of the Convention, Overseas Territories and Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland, CRC/C/41/Add. 11, Feb. 2000, at 270.

[5] *Id.* at 267.

[6] The Guardianship of Infants Act, c. 297.

of a child is being decided.[7] It also provides that mothers have the same rights as fathers to seek custody of their children.

III. Court System and Structure - Courts Handling the Hague Convention

The court system in Montserrat is:

> based on a High Court, presided over a resident puisne judge of the Eastern Caribbean Supreme Court. The High Court has jurisdiction over all matters civil and criminal. It is assisted by a Magistrate's Court, which has jurisdiction in minor-level civil cases. Appeals from the High Court go to the Court of Appeal of the Organization of Eastern Caribbean states. Further appeal, if allowed, is to the Judicial Committee of the Privy Council.[8]

Responsibility for the rights and welfare of children falls under the Ministry of Education, Health, and Community Services. Responsibility for enforcing regulations dealing with children falls to the Legal Department and the Police.[9]

IV. Law Enforcement System

The Central Authority in Montserrat, as designated by the British Government, is the Attorney General.[10]

V. Legal Assistance Programs

There is no information available on Legal Assistance Programs.

VI. Conclusion

Overall, the effectiveness of the implementation of the Convention in Montserrat is difficult to ascertain. The numerous natural disasters that the island has been subjected to have resulted in the mass migration of the population, with the stability of the island only tentatively returning recently.

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January 2003

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[7] *Supra* note 4, at 254.

[8] JERRY DUPONT, THE COMMON LAW ABROAD 271 (2001).

[9] *Supra* note 4, at 243.

[10] Attorney General, Attorney General Chambers, Montserrat, West Indies.

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THE NETHERLANDS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (the Convention) was ratified for the Kingdom of the Netherlands on June 12, 1990, and entered into force on September 1, 1990.[1] The text of the Convention was published in the Bulletin of Netherlands Treaties.[2] With respect to cases of child abduction, the Netherlands can also apply the European Convention regarding the Recognition and Execution of Decisions concerning Custody over Children, which was implemented at the same time as the Hague Convention.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Convention was implemented by the Law of May 2, 1990.[3] This Law not only implements the Convention but also is applicable to those cases relating to the international abduction of children that are not covered by the Convention.[4] The designated Central Authority dealing with the duties which are imposed by the Convention is part of the Ministry of Justice.[5]

When the Central Authority decides not to deal with a request for the return of a child, or when it decides to halt the discussion of a case, this decision is immediately communicated to the applicant. The applicant can request that the Central Authority document the reasons for its decision in a decree. Within 1 month after receiving the decree, the applicant may submit a petition against the decree to the District Court in The Hague, which will hear the case.[6] This Court is empowered to quash the decision of the Central Authority, allowing the applicant to pursue the matter in the Juvenile District Court (*infra* Part III).

The Central Authority informs the person with whom the abducted child resides by registered letter of the request for the return of the child and of the grounds on which the request is based. The Authority also notifies the person of its plans to obtain a court order for the return of the child, unless the request is voluntarily complied with within a reasonable time. This notification is not carried out if ,due to the circumstances of the case, it appears unlikely that the person with whom the child is staying will not comply voluntarily or because of the urgency of the case.[7]

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[1] Law of May 2, 1990, Staatsblad [official law gazette of the Netherlands, Stb.] 201.

[2] TRACTATENBLAD VAN HET KONINKRIJK DER NEDERLANDEN 139 (1987).

[3] Law of May 2, 1990, Stb. 202, as amended.

[4] *Id.* art. 2.

[5] *Id.* art. 4.

[6] *Id.* art. 6.

[7] *Id.* art. 10.

The local authorities, the civil registration service, and the public prosecutor's office will assist the Central Authority by supplying the Authority with all information needed and copies of all registries at no cost.[8]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Under Dutch Penal law, the person who intentionally removes a minor from the custody of the person or persons exercising legal authority over that child, or from the supervision of a person legally vested with such supervision, is liable to a fine or a term of imprisonment for a maximum term of 6 years. If the abduction is a ruse, or if an act of violence or threat of violence has been used, or if the minor is under the age of 12, a maximum 9 year prison term or a fine may be imposed.[9]

A person is liable to a fine or imprisonment for a maximum term of 3 years if he intentionally hides, or conceals from the investigation by judicial officers or police officers, a minor who has been removed or had himself removed from the custody of the person or persons exercising legal authority over him or from the supervision of a person legally vested with such supervision. In case the minor has not reached the age of 12, a maximum 6 year prison term or a fine may be imposed. This provision is not applicable to the person who:

- without delay, communicates the minor's whereabouts to the Child Care Protection Board
- has been granted funding pursuant to the Law on Assistance to Young Persons[10] and acts in accordance with certain articles of the Law
- acts for the purpose of providing conscientious aid to the minor.

B. Parental Visitation

Family relations and the resulting rights and obligations, whether the parents are married or not, as well as custody, separation, divorce, and visitation rights, are regulated by numerous provisions in the Civil Code. During marriage, both parents exercise parental authority jointly. After a divorce, the parents can ask the court for continuing joint parental custody. If the parents have not requested join custody, the court decides which of the parents will be entrusted with custody.[11] Parents who are not married and have not lived together can jointly exercise parental custody if they have registered their combined request in the "Custody Registers."[12]

The parent who does not have custody has reciprocal right to see and meet the child. The court mandates the rules for this access, including the frequency of the visits. The court is also competent to deny the parent this claim. It will do so only if:

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[8] *Id.* at arts. 8 and 9.

[9] The Penal Code of the Netherlands of Mar. 3, 1881, as amended, art. 279.

[10] Law of Aug. 8, 1989, Stb. 358, as amended.

[11] Civil Code of the Netherlands, Book I, art. 251.

[12] *Id.* art. 244 and 252.

- The contact would be seriously disadvantageous to the child.
- The parent is considered clearly unsuitable or unable to have contact with the child.
- A child who is 12 years of age or older has serious objections to the visitation rights of his non-custodial parent.[13]

The parent who has custody over the minor has the obligation to inform the non-custodial parent about important circumstances concerning the person and the property of the child.[14] The rules about visitation and information can be amended by the court if circumstances change.[15]

III. Court System and Structure – Courts Handling the Hague Convention

Justice is administered in criminal and civil cases by 61 Sub-District Courts, 19 District Courts, 5 Courts of Appeal, and the Supreme Court of the Netherlands. All courts are presided over by judges appointed for life who retire on reaching a certain age set by law. There is no trial by jury. The Sub-District Courts and the District Courts are Courts of First Instance. Either party may then lodge an appeal with, respectively, either a District Court or Court of Appeal. Each Court of Appeal has jurisdiction over a number of District Courts, each of which in turn has jurisdiction over a number of Sub-District Courts. The Supreme Court of the Netherlands is the highest court in the country in civil and criminal matters. The Supreme Court can also pass judgment in cases that have been heard by courts in the Netherlands Antilles and Aruba, islands of the Caribbean, which are autonomous parts of the Kingdom of the Netherlands.

The Juvenile Judge of the District Court in whose jurisdiction the child has been retained is authorized to take all cases into consideration with respect to the application of the Convention. If it cannot be determined where the child is kept, the Juvenile Judge in the District Court in The Hague is authorized to hear the case.[16] The judge who deals with the request of the return of a child must handle the case speedily; the court proceedings are closed. A decision will not be made before the child has been given the opportunity to express his opinion.[17] If the child is not able to come to the court, the judge may interview the child at another location.[18] At the request of the applicant or by virtue of his own office, a judge may order that the child be placed under temporary custody with a specially assigned institution.[19]

An appeal of the final decision of the District Court must be made to the Appellate Court within 2 weeks of the decision.[20] The highest instance for decisions made by the Appellate Court is the Supreme Court.

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[13] *Id.* art. 377a

[14] *Id.* art. 377b.

[15] *Id.* art. 377e.

[16] *Supra* note 3, art. 11.

[17] *Id.* art. 13, § 2.

[18] Law on Civil Procedure, Sept. 16, 1896, Stb. 156, as amended, art. 802.

[19] *Supra* note 3, art. 13, § 4.

[20] *Id.* art. 13, § 7.

IV. Law Enforcement System

If the judge approves an applicant's request, he orders the handing over of the child to the person who has the custody of the child, or, in case that is not immediately possible, the child is temporarily placed in the custody of a specially designated institution. The judge can order that each person who is responsible for the international abduction of the child make a payment of money for the costs incurred as a consequence of the abduction and the subsequent return of the child. The payment is to be made to the Central Authority or to the person who has custody of the child. Each of the persons involved in the abduction is liable for the full amount.[21] The Prosecutor's Office will assist with the enforcement of the decisions.

The Juvenile Judge of the District Court in whose jurisdiction the child has been retained is authorized to take all circumstances into consideration with respect to visitation procedures.[22] A judge who must decide on a petition concerning the custody of a child for whose return an application has been made with the Central Authority puts his decision on custody on hold until an irrevocable decision has been made with respect to the return of the child.[23] If a judge in a custody case has good reason to believe that the child has been internationally abducted, he must wait a reasonable time before making a decision on custody.

V. Legal Assistance Programs

Anyone who brings suit in the Netherlands with respect to the application of the Convention or with respect to the Law that implements the Convention may be entitled to legal assistance if the person's resources are insufficient to pay for the litigation.[24] The matter is governed by the Law on Legal Assistance.[25] However, it should be noted that the Netherlands made a reservation with regard to the second paragraph of article 26 of the Convention. The reservation states that the Netherlands will not be bound to assume any costs referred to in that paragraph resulting from the participation of legal counsel or advisors from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

VI. Conclusion

By the Law of May 2,1990, the Netherlands implemented the Hague Convention on the Civil Aspects of International Child Abduction and the European Convention with respect to the Recognition and Execution of Decisions Concerning Custody over Children. Both Conventions can be applied to the international abduction of children.[26] The Law of May 2, 1990 is also applicable to those cases relating to the international abduction of children that are not covered by the Conventions. The implementing legislation has fully adhered to the principles contained in the Conventions, which require expeditious procedures, the establishment of a central authority insuring compliance, and strict procedural rules.

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[21] *Id.* art. 13, § 5.

[22] *Id.* art. 11.

[23] *Id.* art. 15.

[24] *Id.* art. 16.

[25] Law of Dec. 23, 1993, Stb. 775, as amended.

[26] *Supra* note 2.

According to information obtained from the Dutch Central Authority in 2002, a total of 58 cases were activated by the Authority towards foreign Central Authorities, of which four were towards the United States, and 46 cases from foreign Authorities; three were from the United States to the Dutch Central Authority. In 2003, the Central Authority has so far dealt with a total of 110 cases.

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NEW ZEALAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

New Zealand is a relatively isolated island nation that has traditionally accepted immigrants from many developed countries. The country, therefore, has been viewed as a potential place for settlement for persons in other countries who are contemplating defying a court order by abducting a child and fleeing that court's jurisdiction. In the 1980s, there were a couple of highly-publicized cases of this nature. One involved the child of a mother who had been imprisoned in the United States for refusing to allow her former husband unsupervised visits with their daughter in violation of a court order. Upon being released with Congressional assistance, the mother joined her child, who was then revealed to have been living in New Zealand. The mother and daughter stayed in that country until further Congressional action made it possible for her to return to the United States in 1997, without complying with the original court order or facing further contempt of court proceedings.

One reason refuge was found in New Zealand by parties fleeing such other countries as Australia and the United Kingdom, was that New Zealand did not accede to the Hague Convention on the Civil Aspects of Child Abduction until 1991.[1] The Convention is designed to ensure that, except in limited circumstances, questions of custody be determined by the court of a child's habitual residence and that, pending the outcome of such proceedings, an abducted child should be returned to that jurisdiction. Prior to 1991, a full custody hearing was generally required before the courts could order the return of a child to his place of habitual residence. The Convention creates a presumption in favor of return that did not previously exist in New Zealand law. The existence of this refutable presumption is sufficient to make New Zealand far less attractive to a parent looking to take a child abroad in violation of a custody order than it previously was, but it has not completely stopped the practice. In 1995, foreign authorities reportedly referred 44 new cases to authorities in New Zealand involving children abducted from parents who had had custody of them in foreign countries.[2] This indicates that the difficulties and expense of tracking down parties in New Zealand from Australia,[3] Europe, or North America still make it attractive to some parties who wish to disappear. In many cases, parents implicated in foreign custody abductions have argued that the courts should invoke the exceptions contained in the Convention and New Zealand law to refuse to order the child's return. New Zealand case law in this area will be detailed in Part III, *infra*.

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[1] New Zealand acceded to the Convention on May 31, 1991. It came into force in that country on August 1, 1991. The dates that New Zealand's accession was individually accepted by the other parties to the Convention are set out at http://hcch.net/e/status28e.html#nz.

[2] Tom Cardy, *Custody Abductions on Rise*, EVENING POST (Wellington) July 19, 1997, at p. 9. In this article, the Chief Family Court Judge is quoted as having stated that the number of foreign custody abductions would have been approximately four times higher had New Zealand not acceded to the Convention.

[3] New Zealand is reportedly the country most favored by abducting parents from Australia. Michael McKinnon, "New Zealand destination for most ex-spouses abducting children," Courier Mail (Queensland), May 23, 2002.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hague Convention of the Civil Aspects of International Child Abduction was incorporated in New Zealand law through the enactment of the Guardianship Amendment Act of 1991.[4] This statute was signed into law on April 14, 1991; and it was brought into force on August 1, 1991, through the issuance of a separate regulation.[5]

The Guardianship Amendment Act designates the Secretary to be the Central Authority for the purposes of the Hague Convention. The Secretary is the chief executive of the Department of the Courts and is directed to perform all the functions that a Central Authority has under the Convention. These include responding to foreign requests for assistance in securing the return of an illegally abducted child. The Secretary cannot be ordered by New Zealand's courts to pay costs for any proceedings in which he is a party or on behalf of private parties.[6] Forms for Hague Convention applications are contained in the Guardianship (International Child Abduction) (Forms) Rules, 1991.[7]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

New Zealand's Crimes Act contains one offense that relates specifically to child abduction. The section of the Act creating this offense states that:

> everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of 16 of the possession of the child, or with intent to have sexual intercourse with any child being a girl under that age, unlawfully (a) Takes or entices away or detains the child; or (b) receives the child, knowing that the child has been so taken or enticed away or detained.[8]

It is not a defense to this section to prove that the child consented to the abduction or that the person who enticed him thought that the child was at least 16 years old. However, it is a valid defense for the person charged with this offense to prove that at the time he took the child, he claimed in good faith a right to possession of the child.[9] How these terms are to be interpreted in this context is somewhat unclear. For that reason, it appears that charges of abducting a child under the age of 16 are seldom laid against a parent or guardian. However, there may be aggravated circumstances in which a parent could be convicted of this offense and be sentenced to a term of imprisonment under the Crimes Act.

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[4] 1991 N.Z. Stat. No. 19. The Act has republished in 38 R.S.N.S. at 659 (1998).

[5] 1991 S.R. No. 120.

[6] 38 R.S.N.Z. § 7.

[7] 1991 S.R. No. 121.

[8] Crimes Act, 1961, 1 R.S.N.Z. § 210 (1979).

[9] *Id.*

Custody orders in New Zealand are generally made pursuant to the Guardianship Act, 1968.[10] This statute does not contain a provision that makes it a specific criminal offense for a parent to refuse to observe or comply with a custody order. However, it does contain a section providing for the issuance by the Family Court or a District Court of a warrant to enforce a custody or access order. Under this section, any person who is entitled to the custody of a child under the Act or a court order can apply for an order to have a constable, social worker, or other named person to take possession of the child and deliver the child to him. The court order can be one issued in New Zealand or an overseas order that has been transmitted to the Secretary and registered with a local court. The court is given broad powers to decide whether a warrant should be issued. The statute provides that anyone who resists or obstructs a person in executing a warrant or who refuses to afford immediate entrance to any premises is liable to a fine of NZ$1000 (US$673).[11] However, this section is not the only provision that can be invoked to enforce a custody order. The Guardianship Act specifically preserves judicial powers that existed prior to its commencement.[12] This allows courts to enforce custody orders through separate contempt of court proceedings. The courts have broad powers to determine what types of sanctions should be imposed upon a person found to be in contempt. Imprisonment is one possibility.

B. Parental Visitation

The general rule in New Zealand is that the mother and father of a child are each guardians of that child until such time as one or both of them are removed from that role through a court order.[13] However, even in the absence of such an order, one parent can lose custody of his child. The Guardianship Act, 1968 provides that the courts may make interim or permanent orders with respect to custody, as is deemed appropriate, on applications from a father or mother, step-parent, guardian, or other person who has been granted leave to apply.[14] The Guardianship Act, 1968 does not create a presumption in favor of joint custody, but it does allow for the awarding of joint custody. New Zealand's courts have found that joint custody is, as a general rule, only appropriate when there is a high level of cooperation between the parties. In one reported case, the judge awarded joint custody to parties who, despite protracted litigation over their child, had remained "civilised." This judge also believed that joint custody would avoid a "disproportion of power" in favor of the child's mother.[15]

A parent who has been denied custody can apply for access rights. Such rights will normally be granted as being in the best interests of a child. However, the Guardianship Act, 1968 creates special rules for the granting of custody or access orders in cases involving allegations of violence against one or more of the parties. A parent who has used violence against the other parent or a child may be denied access depending on the nature and seriousness of the violence, the date it occurred, its frequency, and its likelihood of reoccurring. The courts are expressly empowered to make such orders as they see fit "in order to protect the safety of [a] child."[16]

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[10] 38 R.S.N.Z. 614 (1998).

[11] *Id.* § 19.

[12] *Id.* § 19A.

[13] *Id.* § 6.

[14] *Id.* §11.

[15] Mueller v. Mueller, [1997] N.Z.F.L.R. 597 (Fam. Ct.).

[16] Guardianship Act, 1968, 38 R.S.N.Z. § 16B (1998).

The penalties for hindering or preventing access in violation of an access order are more clearly set out in the Guardianship Act, 1968 than they are for a violation of a custody order, but they are not substantially different. A section of this statute states that a person who hinders or prevents access to a child is liable to a fine of NZ$1,000 or a punishment to be determined by the court for being in contempt.[17]

III. Court System and Structure - Courts Handling the Hague Convention

The Guardianship Amendment Act, 1991 provides that the duties, powers, and functions conferred on judicial authorities by the Hague Convention are to be exercised or performed in New Zealand by the Family and District Courts.[18] The former are divisions of the latter that have existed since 1980. Family Court judges are District Court judges. New Zealand has a Principal Family Court judge.

Appeals against Family Court orders and refusals to make an order can usually be made to the High Court without first requesting permission within a period of 28 days or within such further time allowed by the High Court upon an application filed within a month of the expiration of 28 days.[19] Orders and decisions of the High Court are usually final. An exception to this rule allows for the appeal of questions of law to the Court of Appeal with the leave of that body.[20] The Court of Appeal does not usually hear evidence in cases involving orders made by the Family or District Courts. The Guardianship Act, 1968 provided that decisions of the Court of Appeal were final.[21] This meant that final appeals to the London-based Judicial Committee of the Privy Council were not allowed even before the government enacted legislation to abolish such appeals in 2003. The Act that abolished Privy Council appeals replaced it with a new Supreme Court that is presently scheduled to begin hearing cases near the middle of 2004.[22] The Supreme Court will have jurisdiction to hear appeals in Hague Convention cases.

Although the primary purpose of the Hague Convention is to have questions of custody decided by the court of a child's habitual residence, it does not require parties to automatically return any child who has been abducted. Instead, it contains certain safeguards to allow Members to protect abducted children in limited circumstances. The section of New Zealand's Guardianship Amendment Act, 1991 that incorporates these exceptions in New Zealand law is section 13.

Section 13 begins by stating that a New Zealand court can refuse to order the return of an abducted child if the application is filed more than one year after his removal and the child is now settled in his new environment. It then provides that an application can also be refused if the person who filed it was not actually exercising custody rights or would not have been exercising custody rights if the child had not been removed. In these cases, the court may decide that the child had not been abducted in violation of the Convention.

The section 13 exception that has attracted the most judicial attention states that a New Zealand court can refuse to order the return of an abducted child if "there is a grave risk that the child's return …

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[17] *Id.* § 20A.

[18] 38 R.S.N.Z. § 8 (1998).

[19] Guadianship Act, 1968, 38 R.S.N.Z. § 31(2) (1998).

[20] *Id.* § 31B.

[21] *Id.*

[22] Supreme Court Act, 2003 N.Z. Stat. No. 53.

would expose the child to physical or psychological harm or … would otherwise place the child in an intolerable situation." Read broadly, these exceptions could be invoked to justify the courts refusing to order the return of an abducted child in a great many cases. However, New Zealand case law indicates that the exceptions have generally been read restrictively so as not to virtually undermine the country's adherence to the Hague Convention. The higher courts have been particularly sensitive to this potential problem in overruling Family Court judges who had rendered decisions in favor of parents who had abducted children in a number of difficult cases.

In *S v. S*, the High Court and the Court of Appeal both overruled a Family Court judge and ordered the return to Australia of children who had been abducted by their mother. This case involved a father who had allegedly abused the mother and had so intimidated her that she was psychologically unable to return to Australia for custody hearings. The appeal courts sympathized with the situation of the mother, but found that the Guardianship Amendments Act, 1991 and the Hague Conventions did not contain applicable exceptions. The children in question were not afraid of their father and wished to return to their home in Australia. Moreover, the appeal courts held that it was not enough to show that the children could suffer physical or psychological harm if they were returned; it was necessary to show that the courts and authorities of their habitual residence could not provide sufficient protection for the children. One judge stated that this might well be the case if a parent seeking the return of his children was "poised to strike" or if the country was in turmoil. As this was not found to be true in the case at hand, the Family Court's decision to refuse the return of the children was overturned. The appellate judges noted that a firm adhesion to the Hague Convention was needed in order to ensure that applications filed in other countries by New Zealand parents and authorities would receive favorable consideration.[23]

The case of *S v. S* is very similar to a 1996 case in which the names of the parties were not reported. This earlier case also involved an application from a foreign father for the return of children who had been abducted by their mother. The mother had opposed this application by contending that the father had sexually abused one of the children while he had custody of her. The Family Court judge who heard this application agreed that there was a grave risk that the child would be exposed to physical or psychological harm or would be placed in an intolerable situation if she was returned to her habitual residence in Denmark. On appeal, the High Court held that Family Court judges are not to treat applications for return of children as custody hearings. Instead, the courts must consider whether the foreign legal system contains adequate safeguards for children. In the instant case, the High Court found that the Danish legal system provides that, in family matters, the best interests of children are paramount and that Denmark would take steps to protect the child if there was a reasonable possibility that she would be sexually abused. The Court of Appeal agreed with these findings and cited Australian, Scottish, and American cases in support of its interpretation of the Hague Convention.[24]

Since the above cases were decided, the High Court has reviewed a number of applications for the return of allegedly abducted children who were habitually resident in Australia. In *KS v. LS* (No. 2)[25] *and P v. Secretary of Justice*,[26] the return was ordered. However, in *El Sayed v. Secretary of Justice*,[27] the

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[23] S v. S , [1999] 3 N.Z.L.R. 513.

[24] [1996] N.Z.F.L.R. 99 (C.A.).

[25] [2004] N.Z.F.L.R. 236 (H.C.).

[26] [2003]N.Z.F.L.R. 673 (H.C.).

[27] [2003] 1 N.Z.L.R. 349 (H.C.).

High Court reversed the decision of a trial judge to allow a child to stay in New Zealand on the ground that the child would face a grave risk of physical or psychological harm if he was returned to Australia. In reaching this decision, the judge found that the fact that Australia provides protection to children through its social services did not eliminate the risk in the instant case. However, the judge was careful to note that most cases in which such concerns are raised will not result in an exception being granted to allow a child to stay in New Zealand. Similar sentiments were expressed in *B v. C.*[28] In that case, a child habitually resident in the United Kingdom was allowed to stay in New Zealand. The major reason for this decision was that the child was a teenager who had indicated a strong preference to remain in the country.

The above cases demonstrate that New Zealand courts have applied the Hague Convention in aid of foreign parents who have had children abducted by former spouses, but they have also found that certain cases fall within the exceptions under the agreement. In the latter cases, the courts have tended to stress the unusual facts to avoid the impression that they do not take their obligations under the Hague Convention as seriously as was intended by its framers.

IV. Law Enforcement System

New Zealand's Guardianship Amendment Act, 1991 provides for the enforcement of orders for the return of a child who has been abducted. Under the applicable section, a Family Court or District Court judge can issue a warrant that authorizes a police officer or social worker to take possession of a child and deliver him to a person or authority who will arrange for his return.[29] A judge or the Registrar of the High Court, if no judge is available, can also issue orders to prevent children who are the subject of a Hague Convention application from being removed from New Zealand. To enforce such an order, a judge or the Registrar can direct that a child be taken into official custody and that any passports, tickets, and other travel documents be surrendered.[30]

V. Legal Assistance Programs

The Guardianship Amendment Act, 1991 provides that where an applicant for the return of an abducted child is not represented by a barrister or solicitor, "the Authority shall, where the circumstances so require, appoint a barrister or solicitor to represent the applicant for the purposes of the application."[31] Legal fees are then paid by the court. The Court can order a party to reimburse the Crown such amount as it deems appropriate. It appears that this is not usually done when the dispute involves questions of law. Legal aid can be applied for by parties who are unable to pay the legal costs of bringing an application for the return of an abducted child.

VI. Conclusion

Prior to 1991, several well-publicized cases gave New Zealand the reputation of being a country that at least sometimes harbored children who had been abducted in violation of foreign custody orders. However, New Zealand acceded to the Hague Convention of the Civil Aspects of International Child Abduction. The primary purpose of the Hague Convention is to ensure that, except in very special cases,

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[28] [2002] N.Z.F.L.R. 433 (H.C.).

[29] 38 R.S.N.Z. 659, s.26 (1998).

[30] *Id.* § 25 and Guardianship Act, 1968, 38 R.S.N.Z. 613, § 20 (1998).

[31] 38 R.S.N.Z. 659, § 23 (1998).

questions of custody are dealt with by the courts and authorities of an abducted child's habitual residence. The Hague Convention was incorporated in New Zealand law through the adoption of the Guardianship Amendment Act, 1991. That statute does not depart from the Convention in significant respects. Moreover, in interpreting the Guardianship Amendment Act, 1991, New Zealand's appellate courts have demonstrated a determination to support the legal regime it creates as being in the best interests of both foreign children who have been abducted and brought to New Zealand and New Zealand children who might be abducted and taken to foreign jurisdictions.

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PANAMA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Law No. 22 of December 10, 1993, approved the Hague Convention on the Civil Aspects of International Child Abduction on October 25, 1980.[1] The Convention applies to Panama as a result of accession.[2] Therefore, according to article 38 of the Convention, the accession has effect only regarding the relations between Panama and such contracting states as have declared their acceptance of the accession.[3] The Convention came into force between the United States and Panama on June 1, 1994.[4]

I. Domestic Laws and Regulations Implementing the Hague Convention

In compliance with article 6, paragraph 1, of the Convention,[5] Panama has designated the *Dirección General de Asuntos Jurídicos y Tratados* of the Ministry of Foreign Affairs as the Central Authority. According to the Political Constitution of Panama, the Convention became part of the legal order of the Republic upon its enactment, approval, and promulgation.[6] Panama is a party to the Vienna Convention on the Law of Treaties,[7] which states that "[e]very treaty in force is binding upon the parties to it and it must be performed by them in good faith."[8]

The Hague Convention application must be accompanied by the following additional documents which must be either in Spanish or translated to Spanish:

- a Hague Convention application
- birth certificate
- divorce certificate (if applicable)
- child custody agreement (if applicable)
- a copy of the requesting state applicable legislation on child custody, parental authority and rights, including visitation rights
- a photo of the abducted child and the abductor parent

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[1] Law No. 22 of Dec. 10, 1993 (Gaceta Oficial, Dec. 15, 1993).

[2] Hague Conference on Private International Law, Convention # 28 of 25 October 1980 on Civil Aspects of International Child Abduction, *available at* http://www.hcch.net/e/authorities/caabduct.html.

[3] Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980), art. 38.

[4] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *available at* http://travel.state.gov/hague_list.html.

[5] *Supra* note 3, art. 6.

[6] Constitución Política de la República de Panama (Editorial Publipan, Panama, 1993), art. 179, § 9, and 167.

[7] Vienna Convention on the Law of Treaties, with annex, 8 ILM 679.

[8] *Id.* art. 26.

- documentation proving the child's habitual residence in the requesting state together with additional documents of various nature such as medical, vaccines, school, etc.[9]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The competent courts to decide on cases related to the wrongful removal and retention of a child are the family courts [*juzgados seccionales de familia]* of the city where the child resides.[10] There are six family courts located in the judicial district of Panama City. The procedure involves assigning each case to any of the six courts of the judicial district that is governed by the Judicial Code of Panama. The same rules are applicable to the rest of the country.[11] Panama has not promulgated legislation implementing the Hague Convention. Therefore, courts directly apply the text of the Convention to proceedings in these types of cases.[12]

Child abduction by close relatives is a criminal offense punished with imprisonment from 2 to 6 years. However, parents are excluded from this provision.[13]

B. Parental Visitation

The competent courts to decide parental visitation include the *juzgados seccionales de familia* where the child resides.[14] This same court is competent in proceedings under the Hague Convention.

When there is no compliance with a custody agreement or a court resolution, or there is a violation of visitation rights, the Court may change its resolution or the terms of the agreement without prejudice to the criminal responsibility created by such conduct, which may be declared in contempt of court.[15] In deciding on custody, visitation rights, or relocation orders, the court issues its decisions based upon the best interest of the minor involved in the particular case.[16]

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[9] Sustracción Internacional de Menores (International Child Abduction), Ministry of Foreign Affairs, Republic of Panama, Nov. 26, 2003, *available at* http://www.mire.gob.pa/menores.php.

[10] Código de La Familia, special edition (Asamblea Legislativa, Panama, 1996), art. 752.

[11] Código Judicial (Editorial Jurídica Bolivariana, Panama, 1997), ch. II.

[12] Telephone interview with Carla Ramirez, an attorney and an officer at the Central Authority of Panama (Dec. 14, 1999).

[13] Código Penal de la República de Panama, Editorial Mizrachi & Pujol, Panama(1993), art. 212.

[14] Código de Familia, *supra* note 10.

[15] *Id.* arts. 329 and 321.

[16] *Id.* arts. 318, 321, 326, and 327.

III. Court System and Structure - Courts Handling the Hague Convention

The trial court is the *juzgados seccionales de familia*.[17] The court of appeals for these cases are the Tribunales Superiores de Familia.[18] It does not appear that any decisions have been issued by the Supreme Court on cases of child abduction under the Hague Convention.[19]

IV. Law Enforcement System

Final decisions of the court are enforceable immediately. If there is a refusal to comply with the court's final judgment, the court may issue an order of imprisonment and request the assistance of the police and the immigration authorities to prevent the obligated party from leaving the country and taking the child with him.[20]

Once the court issues a departure restriction order, it is immediately notified to the National Immigration Directorate, who in turn, issues an alert warning to all the airport and borders authorities in the country. In addition to the court, the Attorney General is the only other authority who may issues orders to prevent an individual from leaving the country.[21]

V. Legal Assistance Programs

The Panamanian Central Authority after receiving a Hague Convention case presents the case to the *Tribunal Superior de Familia*, which then refers the case to the appropriate *Juzgado Seccional de Familia.* In addition, the Central Authority is present at court hearings and provides assistance to the judge on the interpretation and implementation of the Hague Convention if necessary. The Central Authority is impartial. It does not represent the parties nor does it advocate for them. The *Fiscalia de Familia*, under the authority of the Attorney General (*Ministerio Publico*), represents the interest of the minor in court. Applicants are free to hire a Panamanian attorney to represent their interests in a Hague case.[22] However, Panama provides legal assistance to those foreigners who request it and prove that they do not have economic means to hire an attorney in Panama.[23]

VI. Conclusion

Although Panama has not promulgated specific legislation to implement the Convention, by law it may be enforced directly by the courts. The Central Authority provides assistance to the court when

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[17] *Id.* art. 752.

[18] *Id.* art. 755.

[19] *Supra* note 12.

[20] Telephone interview with Ianna Quadri, head of the Panamanian Central Authority (Dec. 16, 1999).

[21] Panamanian Central Authority answers to questionnaire on preventive measures by the Permanent Bureau of the Hague Conference on Private International Law, *at* ftp://ftp.hcch.net/doc.

[22] *Supra* note 20.

[23] *Supra* note 9.

needed to achieve full implementation of the Convention.[24] As of May 31, 2003, Panama had 9 abduction cases open.[25]

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November 2003

[24] Information on international child abduction and the Panamanian law is available in the website of the Panamanian Ministry of Foreign Affairs, in the link of the General Directorate of Legal Issues and Treaties (*Dirección General de Asuntos Jurídicos y Tratados*) http://www.mire.gob.pa.

[25] International Parental Child Abduction, U.S. Department of State, *available at* http://travel.state.gov/2003_June_Hague_Attach.html.

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POLAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention

The Republic of Poland ratified the Hague Convention on Civil Aspects of International Child Abduction (hereinafter the Hague Convention) on July 6, 1992, with reservations as to article 26, paragraph 3 of the Convention.[1] Pursuant to its provisions, the Convention came into force in Poland on November 1, 1992.[2] However, the publication of the text of the Hague Convention in *Dziennik Ustaw* (the official Polish gazette), as required by Polish law, was delayed for several years after its ratification. The Convention, together with its Polish translation, was published in Dziennik Ustaw No.108 on September 25, 1995, thereby removing any doubt concerning the Convention's binding effect on all Polish courts, government authorities, and citizens.

The Hague Convention is binding only between contracting states. In the Declaration on Accession of Poland to the Hague Convention, the Polish Ministry of Foreign Affairs declared that pursuant to article 38 of the Hague Convention, the following contracting states had expressed their acceptance of the accession of the Republic of Poland to the Hague Convention: Holland, the United States of America, Luxembourg, and the United Kingdom of Great Britain and Northern Ireland. Between the United States and Poland, the Hague Convention became binding immediately on November 1, 1992.[3] Information on the states that joined the Hague Convention can be obtained in the Department of Laws and Treaties of the Ministry of Foreign Affairs in Poland.

Due to the relatively short time span of the application of the Hague Convention by Polish courts, there are very few court cases available that have applied the Hague Convention. Generally accessible materials consist of the text of the two Polish Supreme Court decisions and an analysis of 12 district court decisions in a scholarly article by W. Skierkowska. There are relatively few scholarly legal publications on the topic of the Hague Convention. Except for several publications on various aspects of the Hague Convention, cited in this report, there are no comprehensive analyses of its application in the Polish legal system.

The Hague Convention uses different terminology than Polish domestic law, *e.g.*, "wrongful removal or retention of a child" (*bezprawne uprowadzenie lub zatrzymanie dziecka*), "rights of custody and of access" (*prawa do opieki i odwiedzin*), etc. Although these terms are defined in the text of the Hague Convention, their application in the Polish domestic legal system may cause some problems. During the short time since the application of the Hague Convention in Poland, neither jurisprudence nor

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[1] *See* Oswiadczenie Rzadowe z dnia 17 maja 1995 r. w sprawie przystapienia Rzeczypospolitej Polskiej do Konwencji dotyczacej cywilnych aspektow uprowadzenia dziecka za granice, sporzadzonej w Hadze dnia 25 pazdziernika 1980 r. [The Government Declaration of May 17, 1995, on the Accession of the Republic of Poland to the Convention on Civil Aspects of International Child Abduction, Done in The Hague on October 25, 1980, [hereinafter the Declaration], Dziennik Ustaw [Polish official gazette [hereinafter Dz.U.], No. 108, item 529 (1995). The text of the Hague Convention was published in Dz.U. No. 108, item 528 (1995).

[2] *See also* Ciszewski, J., Konwencja dotyczaca cywilnych aspektow uprowadzenia dziecka za granice [The Convention on Civil Aspects of International Child Abduction [hereinafter Ciszewski], 2 Przeglad sadowy [Court Review (Polish law review)] 23-31 (1994).

[3] The Declaration, para 5, *supra* note 1.

legal scholars with very few exceptions[4] have been able to develop an appropriate and satisfactory way of transferring these terms into the Polish legal system. This report, therefore, having a mainly informative character, does not attempt to undertake such a difficult task, except where it is absolutely necessary.

Other International Agreements

Aside from the Hague Convention, the Republic of Poland is also bound by other bilateral and multilateral agreements dealing with international child abduction.

Poland has signed bilateral agreements relating to recognition and execution of civil and family judgments dealing with child custody with various countries, including, but not limited to: France,[5] former Czechoslovakia,[6] Hungary,[7] Lithuania,[8] Byelorussia,[9] and the former Union of the Soviet Socialist Republic.[10] The Hague Convention provides that bilateral agreements between the particular contracting states have priority over the Hague Convention. The Hague Convention states the following in article 26:

> Nothing in this Convention shall prevent two or more contracting states, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

The Republic of Poland is also bound by other international agreements dealing with international child abduction, including, but not limited to, the Convention on the Rights of the Child,[11] the European Convention on Recognition and Execution of Judgments Concerning Child Custody and on Return to Custody,[12] and the Convention on the Appropriate Authorities and Law for Minors' Protection.[13]

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[4] *See* further in the text, *e.g.*, 1997 (unpublished) and 1998 Supreme Court decision, note 40, *infra*. *See also* 30-35 Holewinska-Lapinska, E., Konwencja Haska: Uprowadzenie dziecka za granice as "prawo do opieki" w prawie polskim [The Hague Convention: International Child Abduction and "the Rights of Custody" in Polish Law], Jurysta [Polish law journal] no. 10-11 (1999) [hereinafter Holewinska].

[5] Dz.U. No. 4, items 22 and 23 (1969).

[6] Dz.U. No. 39, items 210 and 211 (1989).

[7] Dz.U. No. 8, items 54 and 55 (1960).

[8] Dz.U. No. 35, items 130 and 131 (1994).

[9] Dz.U. No. 128, items 619 and 620 (1995).

[10] Dz.U. No. 32, items 147 and 148 (1958). Some agreements concluded by the USSR were confirmed by several FSU countries.

[11] Adopted by the General Assembly of the United Nations, Nov. 20, 1989, and ratified by Poland. *See* Konwencja o prawach dziecka, Dz.U. No. 120, items 526 and 527 (1991).

[12] Done in Luxemburg on May 20, 1980 [hereinafter the European Convention]. Ratified by Poland. *See* Europejska Konwencja o uznawaniu i wykonywaniu orzeczen dotyczacych pieczy nad dzieckiem oraz o przywracaniu pieczy nad dzieckiem, Dz.U. No. 31, item 134 (1996), correction: Dz.U. No. 32, item 196 (1997).

[13] Done in Hague on Oct. 5, 1961, [hereinafter the 1961 Hague Convention]. Ratified by Poland. *See* Konwencja o wlasciwosci organow i prawie wlasciwym w zakresie ochrony maloletnich, sporzadzona w Hadze dnia 5 pazdziernika 1961 r., Dz.U. No. 106, item 519 (1995). The 1961 Convention replaced the previous Convention on Minors' Protection, done in Hague on June 12, 1902, also ratified by Poland.

When applying the Hague Convention, Polish courts take into consideration the provisions of the Convention on the Rights of the Child:

> Speaking about the interpretation and application of the 1980 Hague Convention while taking into consideration the provisions of the 1989 Convention on the Rights of the Child, one should mainly consider such provisions of the latter which indicate that the primary and superior value in each proceedings relating to the child is "interes dziecka" ["the interest of the child"] (article 3). According to the resolution of seven justices of the Supreme Court[14] of June 12, 1992, III CZP 48/92; OSNCP No. 10, item 179 (1992) "the interest of the child" corresponds with the Polish term "dobro dziecka" ["best interest of the child"]. As provided by the Preamble to the 1980 Hague Convention "interes" ["interest"] in the meaning of "dobro" ["best interest"] of a child is "of paramount importance in matters relating to its custody." Therefore, the general directive for deciding parental conflicts resulting from exercising children's custody, particularly resulting from such situation as in this case when one parent leaves the present residence together with children, should be in the best interest of the children.[15]

In another decision, the Polish Supreme Court held:

> When the conditions described in the Convention happen (wrongful removal or retention of a child), its provisions concerning the return of a child should be implemented, unless the circumstances justifying refusal of return provided in article 13 of the Convention will be established, as interpreted and applied taking into consideration "dobro dziecka" ["the interest of a child"] defined in the Convention on the Rights of the Child…[16]

I. Domestic Laws and Regulations Implementing the Hague Convention

In Poland's Declaration of Accession to the Hague Convention (article 6), the Ministry of Justice was designated as the Central Authority obliged to discharge the duties imposed by the Hague Convention on the territory of the Republic of Poland.[17] An aggrieved party may apply to the Ministry of Justice and request it to perform its Central Authority duties, particularly those described in article 7 of the Hague Convention.[18] The aggrieved party may also bypass the Central Authority and apply directly to the judicial or administrative authority of a contracting state, pursuant to article 29 of the Hague Convention.

In order to help Polish judges in the application of the new Conventions and other international agreements ratified by Poland, the Polish Ministry of Justice and the Dutch Ministry of Justice signed agreements on mutual cooperation. Pursuant to these agreements, Polish judges may refer, free of charge,

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[14] By their own decision, resolutions adopted by a bench composed of seven justices of the Supreme Court may become a binding legal principle which has a precedence value. *See* arts. 13, 16, 21, and 22, Ustawa z dnia 20 wrzesnia 1984 o Sadzie Najwyzszym [The Law of Sept. 20, 1984 on the Supreme Court], consolidated text: Dz.U. No. 13, item 48 (1994), as amended.

[15] *See* decision, note 28, *infra*, OSNC No. 9, item 142 (1998) at 63-64. *See also* 16 Gronowska, B., Jasudowicz, T., O prawach dziecka, Wydawnictwo Comer, Torun 1994.

[16] Supreme Court decision of Mar. 31, 1999, SN I CKN 23/99.

[17] *Supra* note 1, ¶ 6. Ministerstwo Sprawiedliwosci, Al Ujazdowskie 11, 00-950 Warszawa, Poland. Tel. 628-44-31, Fax 628-73-68

[18] Such was the situation in the Supreme Court decision cited in note 28 *infra*, at 60.

questions concerning private international law to the International Legal Institute in the Hague, Holland.[19] Information on these services may be obtained in the Polish Ministry of Justice or directly at the International Legal Institute in the Hague.

A. The Constitution

When the Hague Convention was ratified, the Polish Constitution that was in force at that time did not define the place or implementation of international agreements in the domestic legal order. The present Polish Constitution[20] lists explicitly ratified international agreements as a source of universally binding law.[21] The Constitution provides that the ratification and denunciation of some categories of international agreements require prior consent granted by a statute. Such categories are enumerated in article 89 of the Constitution and include those concerning "freedoms, rights, or obligations of citizens, as specified in the Constitution" and "matters regulated by statute or those for which the Constitution requires a statute."[22] The Hague Convention falls within these categories.

The Constitution is based on principles of direct application of international agreements, the so-called transformation,[23] and their supremacy over domestic law. It states:

> 1. The ratified international agreement, after its promulgation in the Official Gazette (Dziennik Ustaw) of the Republic of Poland, constitutes a part of the domestic legal order and applies directly, unless its application depends on the enactment of a statute.
>
> 2. An international agreement ratified upon prior consent granted by a statute shall have precedence over a domestic statute if such a statute cannot be reconciled with the provisions of the agreement.[24]

Most international conventions ratified by Poland concerning human rights have precedence over domestic laws.[25]

The Hague Convention was ratified prior to the entering into force of the new Polish Constitution, at a time when there was no requirement of prior legislative delegation for its ratification. In such a situation, article 241, section 1 of the present Polish Constitution applies. It provides that some international agreements, relating to categories mentioned in article 89, section 1 of the Constitution, ratified by the Republic of Poland pursuant to previous laws and promulgated in *Dziennik Ustaw,* are

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[19] The address of the Institute is: Hoenstraat 5, 2596 HX's-Gravenhage, Netherlands. Tel.: 070-356 09 74, Fax : 070-330 71 82. *See* Konwencja o ochronie dziecka oraz Konwencja o uprowadzenia dziecka [The Convention on the Protection of the Child and the Convention on Child Abduction], 5 Przeglad sadowy 84, 84-88 (May 1995).

[20] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., [The Constitution of the Republic of Poland of Apr. 2, 1997], Dz.U. No. 78, item 438 (1997) [hereinafter Constitution].

[21] *Id.* art. 87, § 1.

[22] *Id.* art. 89, § 1.

[23] Banaszak, B., Prawo konstytucyjne [Constitutional Law], C.H. Beck, Warsaw (1999) [hereinafter Banaszak], at 126.

[24] *Supra* note 20, art. 91, §§ 1 & 2.

[25] 30 Holewinska, *supra* note 4.

treated the same as those ratified after prior legislative delegation.[26] The Hague Convention falls within this category.[27]

> The content of this provision [article 241, section 1] permits an assumption that, from the moment it came into force, it includes all international agreements ratified until this date. As far as the Hague Convention [on the Civil Aspects of International Child Abduction] is concerned, it permits an assumption that it constitutes a part of the domestic legal order and applies directly, provided that specific provisions of the Convention concerning the civil aspects of child abduction should be interpreted and applied, taking into consideration provisions of the Convention on the Rights of the Child, binding Poland, and adopted by the General Assembly of the United Nations on November 20, 1989 (Dz.U. No. 120, item 526 (1991)).[28]

According to the Polish law,[29] the Hague Convention is self-implementing, it applies directly, and its application does not require any implementing domestic laws. After its ratification and publication in the Polish official gazette, the provisions of the Hague Convention became part of the Polish domestic legal order automatically,[30] pursuant to the so-called transformation. Furthermore, pursuant to article 27 of the Vienna Convention on the Law of Treaties,[31] ratified by Poland on July 2, 1990,[32] a Party may not rely on its domestic law to justify its failure to comply with a treaty.[33]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

1. The Constitution

The Polish Constitution does not have any provisions referring directly to child abduction. However, its article 72 states:

> 1. The Republic of Poland ensures the protection of the rights of the child. Everyone has the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation, and demoralization.

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[26] *The Constitution*, Chapter XIII: Transitional and Final Provisions.

[27] Smyczynski, T., (Ed.), Konwencja o prawach dziecka-analiza i wykladnia [Convention on the Rights of the Child–Analysis and Interpretation], Poznan (1999), [hereinafter Smyczynski Konwencja].

[28] Polish Supreme Court decision of January 16, 1998, [hereinafter 1998 Supreme Court decision]. Case No. II CKN 855/97. OSNC No. 9, item 142 (1998) at 63.

[29] The Constitution, art. 91, § 1.

[30] *See supra* note 28, OSNC No. 9, item 142, summary at 59.

[31] Concluded in Vienna on May 23, 1969.

[32] Dz.U. No. 74, item 440 (1990).

[33] 17 Smyczynski Konwencja, *supra* note 27.

2. A child deprived of parental care has the right to care and assistance provided by public authorities.

3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, as far as possible, give priority to the views of the child.

4. The statute shall define the competence and procedure for the appointment of the Commissioner for Children's Rights.

2. Administrative Law

The administrative law provides that when a minor applies for a passport, the permission of both parents or a guardian is required, unless only one of the parents has parental authority. Any disagreement between the parents on that matter will be resolved by a court.

A Polish passport is not required from Polish citizens who cross the Polish border with the Czech Republic, the Slovak Republic, and the German Federal Republic. Similar rules apply appropriately for citizens of these three countries. A minor may cross these borders on grounds of a note on the identification card from a parent or a guardian. Polish law also provides that the appropriate authority may refuse a Polish entry visa when it is obvious that it would facilitate a child's removal or retention. The Office of the Children's Ombudsman has been created in order to coordinate the implementation of children's rights as established by domestic laws, government programs, international agreements, and recommendations of international organizations.[34]

3. Family Law

The whole concept of parental authority, as specified in articles 92-113 of the Family Code,[35] is intended to prevent wrongful removal or retention of children. It is based on an idea that neither parents nor children have any influence on the contents of the parental authority. All Family Code provisions relating to parental authority constitute peremptory norms, and parents may not "release" a child from their parental authority.[36]

The rights of custody (*prawo do opieki*) protected by the Hague Convention, as defined in its article 5, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The Hague Convention states in article 3 that "the rights of custody … may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state."

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[34] The Law on Children's Ombudsman, Dz.U. No. 6, item 69 (2000).

[35] Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekunczy, Dz.U. No. 9, item 59 (1964); amended: Dz.U. No. 45, item 234 (1975); Dz.U. No. 36, item 180 (1986); Dz.U. No. 34, item 198 (1990); Dz.U. No. 83, item 417 (1995); Dz.U. No. 117, item 757 (1998); Dz.U. No. 52, item 532 (1999); Dz.U. No. 122, item 1322 (2000); Dz.U. No. 128, item 1403 (2001); Dz.U. No. 83, item 772 (2003) [hereinafter the Family Code].

[36] 469 Ignatowicz, J., Kodeks rodzinny i opiekunczy z komentarzem [Family and Guardianship Code with a Commentary], Warszawa 1993.

The Polish Supreme Court in its decision No. I CKN 653/97 (unpublished) of October 16, 1997,[37] equated this right of custody with the "parental authority" specified in articles 92-113 of the Family Code. In scholarly legal writings, the opinion has been expressed that this "right of custody" constitutes a significant part of parental authority. However, it has been pointed out that in the Polish legal system "the right of custody" may arise only by operation of law or by reason of a judicial decision. It may not arise by reason of an administrative decision or by an agreement.[38]

The Family Code does not provide the definition of parental authority. It only states that "parental authority includes in particular a duty and right of care over a person and property of a child, as well as of raising a child."[39] Parental authority is defined in the scholarly legal writings as "the totality of rights and duties of parents toward a child intended to provide care over his person and property."[40] It is generally accepted among Polish legal authorities that parental authority includes the right to determine the child's place of residence.[41] The Civil Code[42] states:

> 1. The place of residence of a child under parental authority shall be the place of residence of his parents or of one parent who is entitled to exclusive parental authority or to whom the exercise of parental authority has been entrusted.
>
> 2. If both parents are equally entitled to parental authority and have separate places of residence, the place of residence of the child is with the parent with whom the child remains permanently. If the child does not remain permanently with either of the parents, his place of residence shall be decided by the guardianship court.[43]

In certain situations, the guardianship court may intervene in the implementation of parental authority.[44] The court may limit, suspend, or terminate parental authority. Parental authority may be limited when the best interests of a child are endangered, when the child is in danger of being demoralized, or due to a particular situation of the parents. A particular situation may be due to actual separation of the parents or other situation causing a limitation of trust in the implementation of their parental authority.

Actual separation of parents occurs when:

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[37] Also cited in the 1998 Supreme Court decision, *supra* note 28.

[38] 31- 32 Holewinska.

[39] Family Code, art. 95.

[40] Smyczynski, T., 134 Prawo rodzinne i opiekuncze [Family and Tutelage law], Wydawnictwo C.H. Beck, Warsaw 1997 [hereinafter Smyczynski Prawo].

[41] 372 Smyczynski Konwencja.

[42] Ustawa z dnia 23 kwietnia 1964 r., Kodeks cywilny [The Law of April 23, 1964, Civil Code], Dz.U. No. 16, item 93 (1964), as amended [hereinafter Civil Code].

[43] *Id.* art. 26.

[44] 216 Winiarz, J., Gajda, J., Prawo rodzinne [Family Law], Wydawnictwo Prawnicze PWN, Warszawa 1999 [hereinafter Winiarz].

1. The parents live apart due to a divorce or marriage annulment decree.[45] Pursuant to article 58, section 1, Family Code, the court issuing the divorce decree is obliged to determine parental authority over minor children of both spouses. This is one of the major duties of the divorce court.[46] The court may entrust only one parent with parental authority while limiting the other to specifically defined duties and obligations towards the child.[47]

2. The parents are still married but they live apart.[48]

3. Both parents of an out-of-wedlock child living apart have parental authority (acknowledgment of a child or paternity and parental authority established by a court.

The limitation of trust in proper implementation of parental authority occurs when both parents have parental authority but are not married,[49] only one parent is entrusted with parental authority,[50] or the child has been declared totally incompetent.[51]

As a rule, parental authority belongs to both parents.[52] However, parental authority may belong to only one parent if the other parent is deceased, unknown, or does not have full legal capacity; the other parent has been permanently or temporarily deprived of parental authority; or the fatherhood was established by a court decision and the court did not provide the father with parental authority.[53]

One of the most important provisions protecting children from wrongful removal or retention is article 100 of the Family Code which states:

> the guardianship court and other state authorities are obliged to provide help to parents when it is necessary for proper exercise of their parental authority. In particular, each parent may petition the guardianship court for return of a child removed by an unauthorized person.

The right to request the return of a child removed by an unauthorized person has its source in parental authority. Only a person entrusted with parental authority may request the return of a child. When a person's parental authority has been limited, he may pursue such a request only if his parental

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[45] Family Code, art. 58, § 1.

[46] Wytyczne Sadu Najwyzszego z dnia 18 marca 1968 r. [Supreme Court Directives of March 18, 1968], No. III CZP 70/66 (OSN 1968, item 77), point V.

[47] Family Code, art. 58, § 1.

[48] *Id.* art. 107, § 2.

[49] *Id.* art. 107, § 1.

[50] *Id.* art. 104.

[51] *Id.* art. 108.

[52] *Id.* art. 93, § 1.

[53] 207 Winiarz.

authority provides that the child resides with him.[54] However, the category of persons entitled to help under this article includes not only parents but also foster parents, legal guardians, or curators.[55]

An "unauthorized person" in the meaning of article 100 of the Family Code is any person who refuses the return of a wrongfully removed child. This category also includes a parent who retains the child in contravention of the court decision.[56] "Other state authorities" should include all state authorities, in particular police, the prosecutors' office, and state administration authorities.[57]

There are also other provisions of the Family Code which are meant to prevent the wrongful removal and retention of children. They include those regulating deprivation[58] and limitation of parental authority,[59] prohibition of personal contacts with the child by parents deprived of parental authority,[60] and supervision on exercising custody and release of the custodian.[61] Performing or permitting the wrongful removal of a child may be a triggering factor for the court to implement sanctions proscribed by these provisions.

The Permanent Bureau of the Hague Convention of October 25, 1980, on the Civil Aspects of International Child Abduction has requested all states party to the Hague Convention and some Non-Governmental Organizations to respond to the questionnaire. Polish government responses to the questionnaire[62] contain official information on the implementation of the Hague Convention by Poland. It states, among others:

> A guardianship court, in view of a threat of abduction or retention of a child abroad, may prohibit, by means of a provisional order (in a custodianship case), the child to leave the territory of Poland. Moreover, a guardianship court may also provisionally apply other preventive measures, which seem to be most effective in a given situation, in order to prevent abduction or retention (e.g., deposit). Such a decision is enforceable from the very moment of its issuance. A decision on prohibiting a child to leave Poland until the guardianship proceedings is concluded shall be transferred by a court to the Border Guards Headquarters, which is a unit responsible for the notification of the border check points.

The provisional prohibition of the removal of a child from Poland may be also adjudicated in divorce proceedings. A judgment in this kind of proceedings may be issued:

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[54] Gajda, J., Kodeks rodzinny i opiekunczy. Komentarz [The Family and Guardianship Code. Commentary], Wydawnictwo C.H. Beck, Warszawa 1999 [hereinafter Gajda], art. 100, comment 9.

[55] *Id.* art. 100, comment 8.

[56] *Id.* art 100, comment 10.

[57] *Id.* art. 100, comment 7.

[58] *Id.* art. 111.

[59] *Id.* art. 109.

[60] *Id.* art. 113.

[61] *Id.* arts. 165, 168, and 169.

[62] *See*: http://www.hcch.net/e/authorities/index.htm.

- upon a request by a parent who shall prove the existing risk of a child abduction,
- by a court acting ex officio.

In this case, a judgment will be also immediately enforceable, despite the possibility of being appealed.

> The Polish law admits the possibility of issuing by a guardianship court an emergency decision prohibiting a child to leave the territory of Poland or otherwise making it impossible to abduct or retain a child. The possibility of issuing by a guardianship court the aforementioned judgment can be also obtained out-of-hours, since there are additional duty hours held by judges in family courts. There is no need to appoint a hearing for this purpose.[63]

4. Civil Procedure

Article 100 of the Family Code constitutes substantive grounds for a request to return a child. Judicial proceedings in matters regulated in the Family Code are governed by the Code of Civil Procedure.[64]

5. Civil Law

Wrongful removal or retention of a child affects his dignity, freedom, personal inviolability, and the right to contact his parents and relatives. These rights constitute personal rights protected under articles 23 and 24 of the Civil Code. When, as a result of wrongful removal or retention, a child suffers bodily injury or health impairment, he may request damages and/or compensation on a tort basis, pursuant to article 444 of the Civil Code.

6. Criminal Law

Wrongful removal or retention of a child may constitute a crime and result in criminal prosecution and penalties defined in the Criminal Code.[65] Article 211 of the new Criminal Code[66] states the following:

> [w]hoever, contrary to the will of the person appointed to take care of or supervise, removes or retains a minor person under 15 years of age … shall be subject to the penalty of imprisonment for up to 3 years.

The purpose of article 211 of the Criminal Code is to protect legal institutions of care and supervision [opieki i nadzoru], and not to protect the freedom of a person wrongfully removed or retained. Removal constitutes the violation of the legal order of exercising the rights of care or supervision over a

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[63] *Id.* at A3 & A4.

[64] Ustawa z dnia 17 listopada 1964 r. Kodeks postepowania cywilnego [The Law of Nov. 17, 1964, Code of Civil Procedure] [hereinafter the Code of Civil Procedure], Dz.U. No. 43, item 296 (1964), as amended.

[65] Ustawa z dnia 6 czerwca 1997 r. Kodeks karny [The Law of June 6, 1997, Criminal Code] [hereinafter Criminal Code], Dz.U. No. 88, item 553 (1997) which came into force in 1998.

[66] In the former Criminal Code of 1969, the crime of removal or retention (kidnapping) of a minor was dealt with in art. 188.

minor.[67] The latter is protected by article 189 of the Criminal Code. According to scholarly legal writings, "wrongful removal" is the active removal of a minor from the care or supervision of authorized persons. "Retention," on the other hand, takes place when a perpetrator authorized to have temporary custody does not return a child to the permanent custodian.[68] Removal is an act, while retention constitutes a forbearance.[69]

The commission of a crime under article 211 does not require the use of threat, force, or fraud. Permission of a minor is immaterial and does not exclude the liability of a perpetrator;[70] it is enough that the perpetrator acted against the will of persons authorized to care for or supervise the child.[71] The category of "authorized persons" includes persons authorized by the Family Code, *i.e.,* natural and adoptive parents who have full parental authority, legal guardians, or foster parents. It also includes persons authorized to exercise care and supervision by other laws, *e.g.*, teachers.

Since the crime of kidnapping has to be committed "against the will of a person authorized to exercise care or supervision," usually it cannot be committed by a parent or legal guardian exercising parental authority. However, when one or both parents are divested of parental authority, or their parental authority has been suspended or limited pursuant to articles 107, 110, and 111 of the Family Code, then such parents may become perpetrators of the crime of kidnapping.[72] The fact that the perpetrator did not take a minor under his care but abandoned him or transferred him to a third person, is not a defense. Polish Criminal Code also penalizes attempts at, as well as aiding and abetting in, the wrongful removal or retention of a child.[73]

B. Parental Visitation

The "rights of access" protected by the Hague Convention "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."[74] Polish domestic law does not use the term exactly corresponding to the "rights of access." The "rights of access" have been translated in the Polish version of the Hague Convention as visitation rights (*prawo do odwiedzin)*. The latter term, however, does not have any term exactly corresponding to it in Polish domestic law. The closest term in Polish law to "rights of access" used by the Hague Convention, is "personal contacts with a child" (*osobista stycznosc z dzieckiem*) used in article 113 of the Family Code. Article 113 states the following:

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[67]Andrejew, I, Kodeks karny. Krotki komentarz [Criminal Code. A Short Commentary] [hereinafter Andrejew]. Panstwowe Wydawnictwo Naukowe. Warszawa 1986, art. 188, comment 1.

[68] 374 Wojciechowski, J. Kodeks karny - komentarz, orzecznictwo [Criminal Code--Commentary and Jurisprudence]. Warsaw 1997.

[69] Marek, A., Prawo karne. Zagadnienia teorii i praktyki [Criminal Law. Problems of Theory and Practice] [hereinafter Marek]. Wydawnictwo C.H. Beck. Warszawa 1997, note 836.

[70] Supreme Court decision of Dec. 18, 1992. Inf. Prawn. No. 7-9 (1992). *See also* Marek, note 836.

[71] 369 Smyczynski Konwencja, *supra* note 27.

[72] Supreme Court Resolution of Nov. 21, 1979, No. VI KZP 15/79; OSNKW No. 1 (1980), item 2. *See also* Andrejew, comment to art. 188; Marek, note 835 and 836.

[73]Pursuant to arts. 13-24, Criminal Code.

[74]*Supra* note 2, The Hague Convention, art. 5.

1. When an interest of a child so requires, a custodial court will prohibit parents divested of parental authority from personal contacts with a child.

2. In extraordinary situations, a custodial court may limit personal contacts with a child by parents whose parental authority has been limited, by placing a child with a foster family or in a custodial-educational facility.

In Polish scholarly legal writings, the right of parents to have personal contact with their children has its source in a close personal and emotional relationship with a child and does not depend on parental authority.[75] Even divesting parents of their parental authority does not deprive them of the right of personal contacts with their children. Only when the interest of a child is endangered, may the court prohibit parents deprived of parental authority from personal contacts with their child, pursuant to article 113 of the Family Code. Personal contacts include not only visitation rights, but also all other means of contact, *e.g.*, correspondence, telephone conversations. The Supreme Court of Poland has stated that:

> Entrusting one parent in a divorce decree or decree annulling the marriage with parental authority does not deprive the other of the right to personal contact with a child. Therefore, there is no need for precise definition of this right in a decree. Prohibition or limitation of personal contact of parents with the child may be declared only when their parental authority has been abrogated or limited and not when the divorce or annulment decree vests parental authority with one parent.[76]

III. Court System and Structure – Courts Handling the Hague Convention.

Judicial power in Poland has been handled mainly, but not exclusively, by the Supreme Court, courts of general jurisdiction, administrative courts, and military courts.[77]

The matters connected with the application of the Hague Convention are handled by the courts of general jurisdiction[78] and the Supreme Court.[79] Pursuant to article 1, section 2 of the Law on Courts, the following are courts of general jurisdiction: district, voivodship (regional), and appellate. Together with the Supreme Court, there are four court instances.[80] However, the Polish Constitution guarantees only two instances in judicial proceedings.[81] As a rule, district courts have subject matter jurisdiction in all

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[75] 163 Smyczynski Prawo, *supra*. *See also* 74 Krzeminski, Z., Rozwod [Divorce] [hereinafter Krzeminski]. Kantor Wydawniczy Zakamycze. Krakow 1997.

[76] Supreme Court decision of Sept. 30, 1980, Case No. IICR 277 (1980); Gazeta prawnicza No. 7-8 (1991).

[77] 169 Majchrowski, J., Winczorek, P., Ustroj konstytucyjny Rzeczypospolitej Polskiej [The Constitutional Structure of the republic of Poland] [hereinafter Majchrowski], Hortpress. Warszawa 1998.

[78] Organized pursuant to Ustawa z dnia 20 czerwca 1985 r. Prawo o ustroju sadow powszechnych [The Law of June 20, 1985, on Courts of General Jurisdiction], [hereinafter the Law on Courts], consolidated text: Dz.U. No. 7, item 25 (1994), as amended.

[79] Its organization and functioning has been based on The Law of Sept. 20, 1984 on the Supreme Court.

[80] See Courts of Law in Poland from Piasecki, K. Organizacja wymiaru sprawiedliwosci w Polsce [Organization of Justice Administration in Poland], [hereinafter Piasecki], PWSBiA. Warszawa 1995.

[81] *The Constitution*, art. 176, § 1.

cases except those which are transferred to voivodship courts.[82] Courts of general jurisdiction handle criminal, civil, family, and guardianship matters, as well as labor law and social security, except for those which are transferred by law to other courts. Different divisions specializing in particular cases, *e.g.*, criminal, civil, family, commercial, or labor and social security, may be created in courts of general jurisdiction.

The Law on Courts provides that a person who does not possess proficiency in the Polish language has the right to use his native language in court, as well as to be provided with a translator free of charge.[83] The Supreme Court handles annulments (*Cour de Cassation*). It has four Chambers: Civil, Criminal, Military and Administrative, Labor and Social Security Chamber. The Code of Civil Procedure gives subject matter jurisdiction for requests for return of a child to the custodial district court.[84] Territorial jurisdiction belongs to the court of the child's residence or stay.[85]

Judicial procedure for the return of a child may be initiated at the request of an authorized party or by the court's own motion.[86] The motion may be submitted by any parent provided that he has parental authority. A copy of a motion is delivered to the prosecutor who has to be informed of the date of the trial.[87] However, the prosecutor does not become a party to the proceedings unless he submits an official joinder.[88] Therefore, there is no requirement to serve him a copy of the court's decision.[89]

Article 579 of the Code of Civil Procedure contains some departures from general rules provided for some family matters in articles 568-578, as well as from rules for the non-contentious procedure provided in articles 506-525, namely: (1) the court's substantive decisions on return of a child may be made only after a trial; and (2) the decisions become effective and enforceable only after they become final. The latter constitutes a departure from a general rule provided in article 578 of the Code of Civil Procedure that substantive decisions become immediately effective and enforceable.

There is no departure from the general rule provided in article 577 that a custodial court may change its decision any time, even after it becomes final, when the interest of a person affected so requires.[90]

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[82] The Law on Courts, art. 3

[83] *Id.* art. 8.

[84] *The Code of Civil Procedure,* art. 568.

[85] *Id.* art. 569, § 1.

[86] *Id.* arts. 506 and 570.

[87] *Id.* art. 580

[88] *Id.* art. 60.

[89] *Id.* art. 517. *See also* Korzan, K., Postepowanie nieprocesowe [Non-contentious Procedure], Wydawnictwo C.H. Beck. Warszawa 1997, [hereinafter Korzan].

[90] *The Code of Civil Procedure*, art. 577.

IV. Law Enforcement System

As a general rule, judgments are enforceable only after they become final, i.e., when they are not subject to appeal. This rule has exceptions applicable to the return of a child which were discussed in part III of this report.

The Code of Civil Procedure contains a separate Chapter VI entitled, *The Enforcement of Judgments Concerning the Return of a Person Subject to Parental Authority or Care*, which contains articles 1089-1095(1). These special provisions regulating procedure for the return of a child are meant to avoid the negative impact that use of force could have on a child.

Pursuant to these provisions, the bailiff should use particular care and do everything in order to avoid any physical and moral damage to the child.[91] The forceful removal of a child, subject to parental or custodial authority and his return to the authorized person may take place only in the presence of the authorized person or his designee. The act of return of a child can not take place in absence of this person.[92] When performing his duties connected with the return, the bailiff is subject to strict court supervision.

V. Legal Assistance Programs

The Republic of Poland signed the Hague Convention with reservations to article 26, paragraph 3. As a result of this reservation, Poland is bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings only to the extent to which those costs may be covered by the Polish system of legal aid and advice.

VI. Conclusion

In its response to a questionnaire sent by the Permanent Bureau of the Hague Convention, the Polish government stated:

> There is a general feeling that the system of the existing legal regulations in Poland is comprehensive as far as this issue is concerned and it seems to be quite successful in preventing child abduction abroad. These provisions are generally applied in practice. Obviously whether they prove efficient or not in a given situation depends on a number of factual conditions.[93]

This evaluation is confirmed by a detailed analysis of the topic and description of the court cases, presented in this report, which did not detect any major problems with the application of the Hague Convention in the Polish legal system.

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November 1999
Updated February 2004

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[91] *Id.* art. 1092.

[92] *Id.* art. 1091.

[93] *See*, above: http://www.hcch.net/e/authorities/index.htm.

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HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction adopted on October 25, 1980, during the XIV Session of the Hague Conference on Private International Law,[1] was ratified by Portugal[2] on September 29, 1983, effective December 1, 1983. The Convention applies to all countries Portugal recognizes as parties thereto.[3]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Portugal is the *Instituto de Reinserção Social – Unidade Funcional de Convenções Internacionais* (IRS) of the Ministry of Justice.[4] The Organic Law on the IRS[5] provides for its competence and powers.

A. Return requested from abroad

The Central Authority has only administrative and informational competence, as established by Organic Law.[6] Courts decide the cases of parental kidnapping and the return and visitation schedules for abducted children.

The application for the return of an abducted minor to Portugal must be directed to the Portuguese Central Authority, which will, upon receipt of the return application, analyze and verify all the information and decide whether it complies with the requirements provided for under the Convention.

In order to apply for a child's return or parental visitation, the requesting parent must authorize

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[1] Portugal became a Member of the Hague Conference on July 15, 1955; *see* http://www.hcch.net/e/members/signrat_pt.html.

[2] Decree No. 33/83, *in* Diário da República [D.R.], No. 108, Série I, of May 11, 1983.

[3] Countries where the Agreement is effective with Portugal as of January 12, 2004: Argentina, Australia, Austria, Bahamas, Belarus, Belize, Belgium, Bermuda, Bosnia And Herzegovina, Brazil, Burkina Faso, Canada, Cayman Island, Colombia, Costa Rica, Croatia, Chile, China (Hong Kong Special Administrative Region only), China (Macau Special Administrative Region only), Cyprus, Czech Republic, Denmark (except the Faroe Island and Greenland), Ecuador, El Salvador, Estonia, Falkland Island, Finland, Fiji, Former Yugoslav Republic of Macedonia, France, Greece, Germany, Georgia, Guatemala, Honduras, Hungary, Iceland, Ireland, Isle of Man, Israel, Italy, Luxembourg, Malta, Mauritius, Mexico, Monaco, Montserrat, Netherlands (for the Kingdom in Europe), New Zealand, Nicaragua, Norway, Panama, Paraguay, Poland, Republic of Moldova, Romania, Saint Kitts and Nevis, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkmenistan, Turkey, United States of America, United Kingdom of Great and Northern Ireland, Uruguay, Uzbekistan, and Zimbabwe. *Available at* http://www.hcch.net/e/status/abdshte.html.

[4] Caveat No. 302/95 *in* Diário da República [D.R.], No. 241, Série I-A, of Oct. 18, 1995, and Order No. 12 019/2002, 2ª Série, of May 14, 2002, effective April 6, 2002, determines the competency of the Minister of Justice, Drª Maria Celeste Lopes Cardona for the *Instituto de Reinserção Social [IRS] – Unidade Funcional de Convenções Internacionais*, Ministry of Justice, located at Avenida do Almirante Reis, 101, 1150-013 Lisboa, Portugal, UE, Tel: (+ 351) 213 176 100, Fax: (+ 351) 213 176 171, E-mail: irs@irsocial.mj.pt, and web site www.mj.gov.pt.

[5] Decree-Law No. 204-A/2001 (*Lei Orgânica do Instituto de Reinserção Social*) *in* Diário da República [D.R.], No. 172, Série I-A, 1º Suplemento, of July 26, 2001.

[6] Organic Law, art. 3.1.b.

the Central Authority to take action, as it cannot act without prior approval of the requesting parent. Because the activities of the Central Authority are informational and administrative, a lawyer will be necessary for the judicial request, although the Central Authority may continue to provide its administrative assistance during the court proceedings. Those who cannot afford to hire a private lawyer and who qualify to obtain public funded assistance may obtain such legal aid.[7]

According to the official information submitted by the Central Authority, it received a total of 15 incoming applications in 1999.[8] Of these, 11 were incoming return applications, and 4 were incoming visitation applications.

At the national level, the Judiciary Police (*Polícia Judiciária - PJ*) is responsible for locating an abducted minor. When a child's domicile has not been located, the Central Authority will inform Interpol, the agency internationally charged with locating the abducted minor.

B. Return requested from Portugal

The requester must fill out an application for the child's return or parental visitation, which will contain all the essential information for the location of the taken minor, including the name of the child and the child's date of birth. The requester must submit the application to the Central Authority, which will analyze and decide whether the case meets all the requirements established under the Convention, so that it may take action.

If the Central Authority finds that an application meets all the requirements under the Convention, it will send the return or visitation petition to the Central Authority of the requested country, which will act under its own procedural norms. Under the Convention, the judicial tribunals of the requested country must order the immediate return of the minor to his country of origin. However, in cases when the Convention is not in effect between Portugal and the requested countries, Portugal can do nothing to facilitate or solve the problem. In fact, the only thing the requesting parent can do is to hire a private attorney in the foreign country to attempt to resolve the situation under its domestic law, with no assistance from the Central Authority of Portugal.[9]

The Central Authority[10] handled 27 new return applications in 1999, 19 of which were return applications, and 8 were visitation applications.

In 2001, the Central Authority was involved in 26 petitions, both for return and visitation schedule petitions. Three of these children were returned to the United States, five to England, another five to Switzerland, two to Germany, two to Venezuela, and another two to Mexico. Other children were returned to Spain, Greece, Canada, Denmark, Italy, the Netherlands, and Australia. From all of the requests, 14 were return petitions, and all the others were visitation schedule petitions. Four of these return requests were admitted; the other four were denied, and one of them, a visitation schedule, was arranged. Unfortunately, many of these requests have not been solved. Usually, the children's mothers

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[7] *See* topic "V. Legal Assistance Programs" of this Report.

[8] *See* ftp://ftp.hcch.net/doc/stats_pt.doc.

[9] Ana Margarida Carvalho, *Em busca dos filhos raptados,* Visão Magazine, No. 507, of Nov. 21, 2002, *available at* http://www.visaoonline.pt/paginas/Conteudo.asp?CdConteudo= 29868.

[10] *Supra* note 8.

are the responsible for taking them from their domicile in Portugal into a foreign country, and the majority of these children are under 10 years of age.[11]

i. Additional Multinational Efforts

Portugal is also a Member of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, adopted in Luxembourg,[12] on May 20, 1980, and ratified by Portugal[13]on March 18, 1983, effective September 1, 1983. The European Convention protects custody and access rights in international situations and provides prompt, non-bureaucratic assistance from Central Authorities designed by each Member State[14] in discovering the whereabouts and returning custody of a child improperly removed. Applications for the return of custody of a child may be made directly either to a court or to the Central Authorities of any Member State concerned.

Neither the Hague Convention, nor the European Custody Convention, precludes the application of the other, as it is clearly stated, respectively, in article 34 of the Hague Convention, and in article 19 of the European Convention. The two Conventions, therefore, complement each other in an effort to provide a multinational effective legal framework on the subject.

In addition, the Hague Convention concerning the Powers of Authorities and the Law Applicable in Respect to the Protection of Minors,[15] of October 5, 1961, was ratified by Portugal[16] on December 6, 1968, effective February 4, 1969.

ii. Additional Bilateral Efforts

Portugal has become a member of the Convention of Judicial Cooperation concerning the Protection of Minors between the governments of Portugal and France, approved by Portugal through Resolution No. 1/84,[17] effective October 1, 1984.

Also, Portugal approved through Resolution No. 6/94,[18] effective June 1, 1995, the Convention on Matters of Guardian and Visiting Rights between the governments of Portugal and Luxembourg.

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[11] *Supra* note 9.

[12] *See* http://conventions.coe.int/Treaty/en/Treaties/Html/105.htm.

[13] Decree No. 136/82, of Dec. 21, 1982, *in* Diário da República [D.R.], No. 293, Série - I, of Dec. 21, 1982.

[14] Member countries are, as of July 26, 2002: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, Turkey and United Kingdom.
Available at http://conventions.coe.int/Treaty/EN/searchsig.asp?NT= 105&CM= 8&DF= 26/07/02.

[15] *See* http://www.hcch.net/e/conventions/menu10e.html.

[16] Decree-Law No. 48.494/68, *in* D.G., No. 172, Série I, of July 22, 1968.

[17] *In* Diário da República [D.R.], No. 29/84, Série I, 3º Suplemento, of Feb. 3, 1984.

[18] *In* Diário da República [D.R.], No. 30, Série I-A, of Feb. 5, 1994.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Article 122 of the Portuguese Civil Code[19] defines a minor, as the one who has not yet reached 18 years of age. In article 124, the Code states that paternal power or guardianship concludes the minority incapacity. Additionally, article 85 of the same Code states that the minor's residence is the same as his parents, guardian, or the institution responsible for him.

Article 1887 of the Portuguese Civil Code establishes that a minor can neither abandon his parents' residence (or the one that his parents designate), nor can he be taken away from it. If one of these situations occurs, either one of the parents, or the person in charge of the minor, may appeal to the tribunal or to the competent authority for the child's return.

Article 249 of the Criminal Code of Portugal[20] punishes child abduction with imprisonment for up to 2 years, or a fine of up to 240 days, when the child is abducted by violent or coercive means. The same punishment is applied when the abductor refuses to return the minor to the custody of his parents, guardian, or other person with custody of the minor. The criminal procedure in these cases depends upon a complaint.

Article 179 of the Criminal Code establishes that if the parent or guardian of a minor is convicted of the crimes under articles 163 to 176 (which include sexual exploitation and trafficking of children), he may lose parental power or guardianship for a period of 2 to 15 years.

The paternal control over children is established under the Civil Code, articles 1885 to 1887. Portuguese domestic family law understands paternal control as an advantage for children's protection, not an advantage for the parents. The legislation, doctrine, and jurisprudence aim for both parents to always exercise equal paternal control, and to focus on the welfare of the minor. In fact, in the event of conflict between the parents, the decision of who will exercise the paternal control must be driven by the necessities of the minor, as well as his well being and harmonious development, as emphasized by the collected jurisprudences.[21] Yet, paternal power is irrevocable, as stated in article 1882 of the Civil Code.

Decree-Law 314/78,[22] created the Organization of Minors' Guardianship (*Organização Tutelar de Menores - OTM*), where a minor's guardianship rights, parental visitation and other minors' rights and procedures are established. The local framework also protects children by means of Complementary Law No. 147/99[23] (*Lei de Protecção de Crianças e Jovens em Perigo*), which provides for the protection of children and young people that are at risk; this legislation is regulated by Decree-Law No. 332-B/2000.[24]

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[19] *Código Civil*, Almeida e Leitão, Porto, Portugal, 1998. Also, *Código Civil Português, available at* http://www.mreis.pt/docs/cc.htm.

[20] *Código Penal e legislação complementar*, 10ª edição (revista e aumentada), Quid Juris Sociedade Editora, Lisboa, Portugal, 2002.

[21] *Ac. Rel. Porto of Nov. 11, 1999, Col. de Jur., V. 191;* and *Ac. Rel. Porto of Oct. 10, 1997, Col. De Jur., IV, 221; in* Ramião, Tomé d'Almeida, *Organização Tutelar de Menores – Anotada e Comentada – Jurisprudência e Legislação Conexa,* Quid Juris Sociedade Editora, Lisboa, Portugal, 2002, pp. 89/90.

[22] *In* Diário da República [D.R.], No. 248, Série I, of Oct. 27, 1978, with its respective posterior rectifications. Also see *supra* note 21, pp. 11-315.

[23] *In* Diário da República [D.R.] No. 204, of Sept. 1, 1999.

[24] *In* Diário da República [D.R.] No. 300, 1º Suplemento, of Dec. 30, 2000.

III. Court System and Structure – Courts Handling the Hague Convention

Portugal is a parliamentary democracy with legal system based on civil law. The Portuguese court structure is composed of the Supreme Court and the judicial courts, with the Supreme Court being the highest level on the structure and the judicial courts are of first and second instance. Courts of Appeal are, as a rule, courts of second instance, and District Courts, as a rule, of first instance. There are Courts of Appeal in the jurisdictions of Lisbon, O Porto, Coimbra, Évora, and Guimarães. There are also courts of first instance for specialized matters, as follows.

Decree-Law No. 246-A/2001,[25] in article 2, determines the Tribunals of Family and Minors (*Tribunais de Família e de Menores)* as the competent courts in Portugal for the effects of the execution of international conventions in which the IRS is the Central Authority. Therefore, cases where Portugal is the requested country and there is no voluntary return of the child may be appealed to the respective Court of Appeals, and, if admissible, to the Supreme Court after the decision is reached by one of the Tribunals of Family and Minors of Portugal.[26]

In 1999, the Central Authority released data,[27] which stated that only two Convention applications went to court, one of which was judicially refused, and the other was a return order. Portuguese courts handle the judicial cases involving the Hague Convention when Portugal is the requested state. In one judicial decision[28] involving the return of a minor to Canada under the Convention, the Portuguese judge decided to immediately return the child to Canada, with the respective judicial delivery of the child. On the appellate level, the Court of Appeals of Lisbon granted the right to appeal to the Portuguese parent in that return request, confirming the language of the Convention, which states that the local legislation of the requested state must regulate such issues.

Judges have all agreed that the best interest of the minors will prevail in each and all circumstances. For instance, a 1999 decision[29] established that it was in the best interests of a minor, who was 5 years old, to live with his father in Portugal, where both his father and mothers' family resided, rather than with the mother (and one uncle) in a foreign country, where the minor had only spent 8 months at the age of 2. In this case, the important facts were that the father would be the one who could provide for the best physical, intellectual, and emotional needs for the minor, and most of his family was in close proximity.

A. Case in Point

In 2003, the Supreme Court of Justice (*Supremo Tribunal de Justiça*) decided an interesting return case.[30] The case involved a child born in 1994 in Portugal, with habitual residence in Germany with the

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[25] Decree-Law No. 246-A/2001 *in* Diário da República [D.R.] of Sept. 14, 2001.

[26] *Id.* art. 1.

[27] *Supra* note 8.

[28] *Ac. Rel. Lisboa of May 02, 1989*, No. 0002087, Rel. Herlander Martins; *available at* www.trl.pt.

[29] *Ac. Rel. Lisboa of Jan. 14, 1999, Col. de Jur., I, 78, supra* note 21, at 89.

[30] *Supremo Tribunal de Justiça - STJ, NO.03B2507, Rel. Oliveira Barros, of Oct. 09, 2003*; *available at* http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/7be54c19b9d5a8dc80256dea0047319d?OpenDocument&Highlight= 0,raptio,internacional,menores.

mother. The parents were not married. The child went to Portugal for vacation to spend time with the father and grandmother (on the father's side), and did not return to Germany, as planned at the end of the vacation period. The child's father retained the minor in Portugal and informed the mother by telephone. The minor did not want to return to Germany and always expressed such desire. In April of 2002, the Public Prosecutor's Office filed a lawsuit for the regulation of paternal power in favor of the rights of the minor, as well as a judicial return of the child to Germany. In January 2002, the father had filed a lawsuit for the regulation of the paternal power in favor of the minor.

The lower court decision considered articles 1, 3, 4, 12 and 13 of the Convention and based its decision on article 13.b.2. The decision was made to not return the child, since the return, under the lower court understanding, would cause physical or psychological harm to the child. Additional factors in the decision were that his mother was in a drug therapy treatment in November of 2001 and that many of the people who testified expressed concerns about his life in Germany, where food was sometimes scant and there was usually no hot water available at home, etc. In addition, the minor demonstrated a well-integrated attitude with the family members in Portugal and was already enrolled in school there.

An appeal was brought before the Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*), which confirmed the lower court's decision, emphasizing that the minor, who was only 7 years old, but demonstrated high level of maturity, refused to return to Germany, where the mother would sometimes leave him alone at night, as well as physically abuse him. The final decision also ordered the notification of the Portugal Central Authority of such a verdict, since it was the designated administrative authority.

The main intention of the Hague Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to ensure their safe and prompt return to their habitual states of residence. The rationale behind the Portuguese court's final decision was to guard the child's physical and psychological welfare and protect the best interest of the child. In this manner, the decision invoked the exception of article 13.b of the Convention, where the judicial or administrative authority of the requested state is not bound to order the return of the child upon a risk or threat to the child's safety.

IV. Law Enforcement System

To locate children and to secure and enforce authorities' orders, the Central Authority, as well as the Judicial Courts, have requested the assistance of the Portugal Judiciary Police, as well as Interpol. They both have played an important role in the prevention and protection of children's rights.

The Central Authority reported in a 1999 Hague Country Report[31] that of the incoming return applications received in that year, 3 of them were voluntary returns, which, in percentage, signified 27% compared with a global norm of 18%. On the contrary, only 1 application resulted in a judicial return order. And overall, the return rate was low, only 36%, in comparison with the global norm of 50%. In that same year, and yet in accordance with the data released in such report, the Central Authority handled 42 new incoming and outgoing return and access applications in total.

More recently, according to the information submitted upon request by the Central Authority, the requests statistics are as follows: [32]

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[31] *Supra* note 8.

[32] Information directly gathered from the Portugal Central Authority for the Convention as of Jan. 2004.

Return Requests (outgoing)	**Return Requests (incoming)**
Total 44	**Total 54**
Visitation Requests (outgoing)	**Visitation Requests (incoming)**
Total 17	**Total 17**

In an effort to prevent international child abduction, the government of Portugal may require that parents or legal guardians traveling with minors show documentary evidence of their relationship to the minor and permission for the child's travel at any point when they are entering or leaving the country.[33] This is an important precautionary measure, because the majority of the international child abductions occur when one parent takes a minor without the consent of the other parent.[34]

Also, when a court orders a prohibition to leave the country, all cross-border authorities are advised of such a measure.

V. Legal Assistance Programs

Article 20 of the Constitution of Portugal[35] firmly states that the access to justice and to tribunals for the defense of one's legally protected rights and interests is assured to all, and that justice cannot be denied for insufficiency of funds.

The Portuguese Bar Association[36] and the state of Portugal provide legal assistance in the country. A legal aid petitioner must prove that he lacks the basic financial conditions to pay for private lawyers' fees or for the normal expenses of a judicial process and, thus, may benefit from legal assistance in accordance with Law 30-E/2000.[37]

The legal aid may be provided for any type of legal question or judicial battle, and it does not depend on the facts of the case, or the complexity of it. In accordance with the information received from the Central Authority, there is no difference in the application and benefit system of legal aid in the cases of international child abduction and parental visitation under the Convention. The benefit will be granted as long as the usual requirements of the above-mentioned legislation are met.

In fact, to benefit from legal aid available in Portugal, an application form must be filed, either digitally or in hard copy, and submitted to any public service attendance of the Services of the Social Security. The beneficiaries of legal aid in Portugal may be: (i) nationals and habitual residents of Portugal; (ii) citizens of any European Union Member State; (iii) foreigners that do not have habitual

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[33] *See* http://travel.state.gov/portugal.html.

[34] *Supra* note 9.

[35] De Sousa, Marcelo Rebelo and José de Melo Alexandrino, *Constituição da República Portuguesa Comentada*, Lex Editora, Lisboa, Portugal, 2000.

[36] *Ordem dos Advogados Portuguesa, Guia de Acesso ao Direito, available at* http://www.oa.pt/servicos/faqs.asp?idc= 8&scid= 159.

[37] Law No. 30-E/2000 *in* Diário da República [D.R.], No.292, Série I-A, 3º Suplemento, of Dec. 20, 2000. Also, additional legislation on the subject matter is: Ordinance No.150/2002 *in* Diário da República [D.R.], Série I-B, of Feb. 19, 2002, which establishes the legal fees for the professional acting under the legal assistance services, and Decree-Law No. 391/88 *in* Diário da República [D.R.], No. 248/88, Série I, of Oct. 26, 1988, which regulates the system of legal aid (called *apoio judiciário* in Portugal).

residence in Portugal, but reside in countries where the same legal aid is available to Portuguese residents (reciprocity principle).[38]

Also, under the Guide to Legal Access[39] of the Portuguese Bar Association, the legal aid may be required by: (i) the interested person; (ii) the Public Prosecution Service in favor of the interested person; (iii) the lawyer, representing the interested person; (iv) the patron named by the Bar Association or by the Solicitors Chamber, after request of the interested person.

A document from the Ministry of Justice of Portugal entitled "Questionnaire Concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance,"[40] addressed that:

> legal aid includes the exemption from courts costs and other expenses related to the proceedings, the postponement of the payment of the legal costs and the payment of the legal costs and the payment of lawyers' fees. This form of legal aid can be required at any stage of the proceedings, remaining in possible appeals and attached proceedings, with no regard to the merit of the initial process. Every habitual resident and any citizen of a European Union Member State with residence outside Portugal can benefit from legal aid and advice in the same conditions as Portuguese nationals. Citizens from outside the European Union with residence outside Portugal have the same rights regarding legal aid as do Portuguese nationals in their respective countries. In international cases the central authority provides information and assistance.

The Central Authority also informed that, as of January 2004, there is no current partnership or agreement available between the Central Authority and any other institution in Portugal with regard to legal assistance programs. However, under its administrative and informative roles, the Central Authority may promptly direct the interested persons to the available sources in the country.

A. Information Resources

There are not many detailed and substantial information resources on the subject matter available to the public in Portugal. Although the majority of the materials are in Portuguese only, it is important to point out the following:

The Library of the Central Authority has compiled some materials at http://www.gde.mj.pt/birs/birs.nsf?OpenDatabase on the matter of international child abduction and parental visitation, and the Office of Attorney General of Portugal, through the Secretary of Documentation and Comparative Law at http://www.gddc.pt/siii/tratados.html, provides for consultation on the texts of the International Treaties that Portugal has celebrated, from the year 1970 to 2004.

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[38] http://europa.eu.int/comm/justice_home/ejn/legal_aid/legal_aid_por_pt.htm. And for more information: *Direcção - Geral da Administração Extrajudicial* – Rua de Alcolena n º 1, P - 1400-004 Lisboa. Tel.: (+ 351) 21-304-1340 and Fax: (+ 351) 21-304-1349. E-mail: correio@dgae.mj.pt and web site: www.dgae.mj.pt.

[39] *Supra* note 36.

[40] ftp://ftp.hcch.net/doc/maint_pt.pdf.

The Association for the Defense of Children and Separated Parents: Parents Forever,[41] at http://www.geocities.com/paisefilhos/index2.html, is one of the NGOs with regard for the protection of children's rights. Its website contains information on parental abduction, international conventions, and local legislation. Founded in 1983, the Institute of Children's Protection[42] at http://www.iacrianca.pt, contributes to the development of children, acts in children's defense and promotes children's rights.

VI. Conclusion

It appears that the main concern for authorities in Portugal, when deciding a case on international child abduction, has been the welfare of the child. As a result, judicial decisions have applied the exception of article 13 of the Convention in the best interest of the child. By entering into additional multilateral and bilateral agreements to battle international child abduction, Portugal has shown its support of children's civil rights.

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January 2004

[41] *Pais Para Sempre – Associação para a Defesa dos Filhos e dos Pais Separados*, located at Rua Actor Vale, 26-2º C, 1900-025, Lisbon, Portugal.

[42] *Instituto de Apoio à Criança,* located at Largo da Memória, 14, 1349-045, Lisboa, Tel. (+ 351) 21-361-7889.

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SAINT KITTS AND NEVIS

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Saint Kitts and Nevis, (formerly named Saint Christopher and Nevis), acceded to the Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Hague Convention] on May 31, 1994. The United States accepted the accession of Saint Kitts and Nevis on March 13, 1995.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

Saint Kitts and Nevis has not yet enacted legislation to implement the Hague Convention.[2] Such legislation is necessary in order for the Hague Convention to have the force of law in Saint Kitts and Nevis since treaties are not self-executing in that country.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The Offenses Against the Person Act contains the offense of child-stealing. Under the relevant section of the Act, anyone who detains a child under the age of 14 with the intent to deprive his parent of lawful care or charge of him is liable to imprisonment for up to 3 years. However, this section does not apply to anyone who has claimed any right to "possession" of the child or a parent of the child.[3]

Saint Kitts and Nevis does not appear to have a law guaranteeing parental visitation rights. The Matrimonial Causes Act gives the Supreme Court broad powers to make orders for the custody, maintenance, and education of children in proceedings for divorce, nullity, or judicial separation.[4] The Probation and Child Welfare Board Act gives the Board the power to apply to the High Court to have parental rights vested in it if a child's parent or parents are unfit to care for the child or if they consistently fail to discharge their parental rights and duties without reasonable cause.[5] It appears that if the Board takes custody of a child, it can establish the conditions for visitation between the child and his parent or parents.[6]

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[1] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 1, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. For an online text, *see for example* www.hcch.net or the United States Department of State (DOS) Bureau of Consular Affairs website, *at* http://travel.state.gov/hague_childabduction.html.

[2] Information obtained from Ms. Karen Hughes, Department of Justice and Legal Affairs, Saint Kitts and Nevis.

[3] Offenses Against the Person Act, I Saint Christ.-Nevis-Anguilla Rev. Laws, ch. 56, § 51 (1961).

[4] Matrimonial Causes Act, I Saint Christopher.-Nevis-Anguilla Rev. Laws, ch. 50, § 25 (1961).

[5] Probation and Child Welfare Board Act, 1994, 1994 Saint Christopher and Nevis Laws, No. 6, § 6(2).

[6] *Id.* § 5.

III. Court System and Structure – Courts Handling the Hague Convention

Along with Antigua and Barbuda, Dominica, Grenada, Saint Lucia, Saint Vincent and the Grenadines, Anguilla, the British Virgin Islands, and Montserrat, Saint Kitts and Nevis is a Member State of the Eastern Caribbean Supreme Court (ECSC). The ECSC was established under the West Indies Associated States Supreme Court Order created by the United Kingdom[7] that was supplemented by domestic legislation.[8] The ECSC has two divisions. The High Court of Justice-Trial Division has permanent representation in each Member State. The Court of Appeal is an itinerant body that hears appeals from the High Court of Justice-Trial Division and the lower Magistrates' Courts. The Court of Appeal has four justices and the High Court of Justice–Trial Division has 13 judges.

The Judicial Committee of the Privy Council is the highest court of appeal for all British Overseas Territories and the former colonies that have chosen to retain that tribunal in their judicial hierarchies since attaining independence. At the present time, Saint Kitts and Nevis is still a participating state. However, Saint Kitts and Nevis has signed an agreement with other Caribbean states to create a new Caribbean Court of Justice. The Caribbean Community Secretariat hopes to have the Caribbean Court of Justice replace the London-based Privy Council by the end of 2004. Saint Kitts and Nevis is reportedly drafting implementing legislation.[9]

IV. Law Enforcement System

As was previously noted, Saint Kitts and Nevis has not enacted legislation to implement the Hague Convention. In acceding to the Convention, Saint Kitts and Nevis designated the Attorney General, or a designees of his choosing, to be the Central Authority.[10]

V. Legal Assistance Programs

Saint Kitts and Nevis does not appear to have a law establishing a legal aid program. In acceding to the Convention, Saint Kitts and Nevis declared that it would not be "bound to assume any costs resulting under the Convention from the participation of legal counsel or advisors or from court proceedings." The declaration made by Germany in accepting the accession notes that this reservation was apparently based upon the absence of legal aid in Saint Kitts and Nevis.[11]

VI. Conclusion

Since Saint Kitts and Nevis has not yet enacted legislation to implement the Hague Convention, the courts of that country have not yet been in a position to rule upon Hague Convention applications for

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[7] 1967 S.I. No. 223.

[8] West Indies Associated States Supreme Court (Saint Christopher & Nevis Act) 1975, 1975 Saint Christ.-Nevis Laws, No. 17.

[9] *"Caribbean Court of Justice Trust Fund revised agreement takes effect,"* BRITISH BROADCASTING SERVICE WORLDWIDE MONITORING, Feb. 24, 2004.

[10] *Supra* note 1.

[11] *Id.*

the return of an abducted child and there are no reported cases from the country in which the courts have ruled on any applications filed outside the Hague Convention.

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March 2004

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SLOVAK REPUBLIC

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction was signed by the Slovak Republic on December 28, 1992. It was approved by Parliament and ratified, and the instrument of ratification was deposited with the government of the Kingdom of the Netherlands on November 7, 2000, with the reservation according to article 42 of the Convention, that the Slovak Republic will not be bound to assume any costs referred to in article 26, paragraph 2, of the Convention, resulting from the participation of legal counsel or advisers or from Slovak court proceedings, except insofar as those costs may be covered by its legal system of legal aid and advice. The Convention entered in force for the Slovak Republic on February 1, 2001.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

In accordance with article 6, paragraph 1, the Slovak Republic has designated as the Central Authority, the Center for International Legal Protection of Children and Youth, Spitalska 6, Bratislava, Slovak Republic. The Center renders free legal aid to applicants in proceedings under the Convention before Slovak courts.

According to the Constitution of the Slovak Republic,[2] the Convention became part of the legal order of the Republic upon its approval by Parliament, its ratification, and its publication; the courts will apply it whenever called upon.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

For a decision relating to the wrongful removal and retention of a child, the competent court is the district court where the child resides by parental agreement, decision of the court, or any other reason.[3] This court is also competent in proceedings under the Hague Convention. The proceedings are governed by the provisions of the Code of Civil Procedure.

Child abduction may be prosecuted under article 216 (Abduction) of the Criminal Code,[4] which provides that whosoever takes away a child (a person under 18) from the care of the person who has custody of him will be punished by a fine or imprisonment of up to 3 years. A parent who, for example, takes a child abroad against the will of the other parent, pretending that it is only an excursion may be

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[1] Announcement of the Ministry of Foreign Affairs of Apr. 3, 2001, No. 119, Collection of Laws.

[2] Constitution of the Slovak Republic, No. 460, Sept. 1, 1992, Collection of Laws,No.135, arts. 7 (4-5) , 154c., Apr. 13, 2001,

[3] Code of Civil Procedure, No. 99, Dec., 1963, arts. 9, 88 (1)(a and c), 176-177.

[4] Criminal Code, No. 140, Law of Nov. 29, 1961.

prosecuted under article 209 (Abuse of rights of others) of the Criminal Code.[5] The punishment is a fine or imprisonment of up to 2 years.

B. Parental Visitation

For a decision relating to parental visitation, the competent court is the district court of the place where the child resides by parental agreement, decision of court, or any other reason.[6] This court is also competent in proceedings under the Hague Convention. The proceedings are governed by provisions of the Code of Civil Procedure.

III. Court System and Structure – Courts Handling the Hague Convention

General trial courts in civil matters are the District courts; one is located in each territorial district. Appeals against their decisions go to the Regional courts, which also have specified trial jurisdiction. Further appeal against decisions of the Regional courts, as a court of appeal, goes to the Supreme Court, as well as appeals against their decisions in their trial jurisdiction. A further appeal against decisions of the Supreme Court, as a court of appeal for the decisions of the Regional courts, goes to another Senate of the Supreme Court. Trial courts in child-return proceedings, visitation, and enforcement of related orders under domestic Slovak law, as well under the Hague Convention, are the District courts.[7]

In criminal matters, the structure is identical; however, because the Supreme Court, as a court of last instance, deals only with petitions alleging violation of law by lower courts and prosecutors, the Supreme Court in the exercise of its appellate jurisdiction is the final court of appeal.[8]

IV. Law Enforcement System

The District courts enforce their decisions. They are immediately enforceable. With regard to decisions relating to child return, visitation, and related matters, the court may first request the obligated party to carry out the court decision voluntarily and call upon the pertinent municipal or district office of Legal Protection of Children for its assistance. If there is no result, the court may impose successive fines of 2000 crowns each (US$1= 33 crowns) on the obligated party. Acting in cooperation with the above referred to offices, the court may order the immediate enforcement of its decision by the proper state organs (court bailiffs and the police). The court acts appropriately according to the circumstances of the case. The court applies the same rules in proceedings under the Hague Convention.[9]

V. Legal Assistance Programs

General care and protection of children, both socially and legally, are regulated by chapter 2 of the Family Code and are entrusted to the Office of Legal Protection of Children within the regional, the district, and municipal administration created by social security legislation. The Office supervises the

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[5] *Id.*

[6] *Supra* note 3.

[7] *Id.* arts. 7-12.

[8] Code of Criminal Procedure, Law No. 141, Nov. 29, 1961, Collection of Laws, No. 120, arts. 16, 252, 266, Apr. 5, 2001.

[9] *Supra* note 3, arts. 272-273 b.

healthy development of children and their education and protects their legitimate interests, including property interests. Any person may contact the office in these matters and request assistance. The Office cooperates with the Center for International Legal Protection of Children and Youth.[10]

VI. Conclusion

The Slovak Republic is in full compliance with the Hague Convention. The compliance is insured by the Central Authority of the Slovak Republic, the Center for International Legal Protection of Children and Youth, which holds the power of implementation and which exercises its legal powers on behalf of the Ministry of Justice in matters pertaining to the Convention.

Prepared by George E. Glos
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January 2004

[10] Family Code of Dec. 4, 1963, No. 94, Collection of Laws, Consolidated Text of June 15, 1983, No. 66, Collection of Laws, as amended, arts. 27, 41-50. Law of May 19, 1998, No. 195, Collection of Laws, on Social Assistance, as amended by Law of Oct. 30, 2003, No. 453, Collection of Laws, on Offices of State Administration in Social Matters and Family, arts. 66-84.

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SOUTH AFRICA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

In 1996, South Africa ratified the Hague Convention on the Civil Aspects of International Child Abduction of 1980. Without the benefit of the Convention, it was usual for a child abducted from his parent in South Africa to remain in a foreign country up to 2 years before being returned, often at enormous legal expense.

Dullah Omer, Justice Minister, praised the Convention in that the international cooperation would offer important relief to the custodian parent whose child has been abducted by the other parent.[1]

I. Domestic Laws and Regulations Implementing the Hague Convention

A. The Law

The South African Parliament passed the Hague Convention on the Civil Aspects of International Child Abduction Act in November 1996.[2] The Act, which entered in force on October 1, 1997, made the provisions of the Convention part of the domestic law of South Africa by incorporating it in full.[3]

However, because of the two reservations taken by South Africa, the country is not bound to assume any costs or expenses arising from court proceedings unless such costs are covered by the South African legal aid system. In addition, it does not accept applications and documents in French, in spite of it being one of the official languages of the Convention.

To fulfill the requirement of the Convention, the Law designates the Chief Family Advocate[4] as the Central Authority.[5] In writing, he may delegate his powers to any Family Advocate.[6] Specific contact information was provided to the Permanent Bureau of the Hague Conference on private international law on July16, 2002.[7]

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[1] Africa News Service of Jan. 27, 1998.

[2] Act No.72 of 1996 *in* STATUTES OF THE REPUBLIC OF SOUTH AFRICA CLASSIFIED AND ANNOTATED FROM 1910 191 (Durban, 1967-).

[3] Reg. 65 of 1997 *in* REPUBLIC OF SOUTH AFRICA GOVERNMENT GAZETTE, No. 18322, Oct. 1, 1997, p. 1.

[4] The Chief Family Advocate is appointed by the Minister of Justice under the provisions of the Mediation in Certain Divorce Matters Act, 1987.

[5] *Supra* note 2, art. 3, at 191.

[6] *Id.* art. 4.

[7] The Chief Family Advocate, Saambou Building, Private Bag X81, The Chief Family Advocate PRETORIA 0001, Republic of South Africa, telephone number: + 27 (12) 321 0590, telefax number: + 27 (12) 321 7729, mail address: mingoatje@justice.gov.za; contact designated person is Mrs Barbara HECHTER, Advocate, *see* http://www.hcch.net/e/authorities/caabduct.html.

Article 5 of the Law authorizes the Minister of Justice to make regulations to give effect to additional provisions of the Convention. Furthermore, such regulations may prescribe fees and provide for the expenditure that is incurred due to the application of the Convention.

The Minister can also prescribe a penalty of imprisonment for a period not exceeding 12 months or of a fine for any contravention or failure to comply with the regulations.[8] The Law also requires the regulations to be tabled in Parliament within 14 days of publication in the Government Gazette. Any one of these regulations or any of their provisions may be repealed by a resolution passed by both houses of Parliament during the session in which such a regulation has been tabled.[9]

B. Regulation

The Minister of Justice issued the regulation required by the Act, and it also took effect on October 1, 1997.[10] It regulates certain practical aspects of the Chief Family Advocate's duties that are imposed by the Convention.

The Chief Family Advocate is authorized to appoint a Family Advocate or any persons to assist him in discharging his duties that are imposed by the Convention. The appointment must be in writing and should contain the conditions of the appointment. However, in urgent cases an appointment may be given orally with a confirmation in writing made subsequently.[11]

When a person who has the right to custody applies to the Chief Family Advocate for assistance under the provisions of the Convention, the application constitutes authorization to perform all the duties imposed on him by the Convention. The Chief Family Advocate or the person designated by him may appear on the applicant's behalf in any proceeding to give effect to the provisions of the Convention.[12]

If the applicant does not want to appoint a legal representative and does not qualify for legal aid, "the Chief Family Advocate or a Family Advocate shall appear on behalf of an applicant in any court proceedings that may be necessary to give effect to the provisions of the Convention."[13] Any person who obstructs the Chief Family Advocate or a person designated by him to carry out the duties he is charged with by the Convention may be fined or sentenced to imprisonment for a period up to 1 year.[14]

If an application for the return of a child or for the right of access to a child is successful, the Chief Family Advocate may recover the expenses or costs incurred by the Advocate or persons assisting him. The fee for the Chief Family Advocate or Family Advocates is 50 *rand* (US$7.50) per hour and a maximum amount of 300 *rand* (US$45) per day.[15] If the person who is assisting a family Advocate is not

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[8] *Supra* note 2, art. 5.

[9] *Id.* at 193.

[10] *Supra* note 3, reg. No. 1282 of 1996, at 2.

[11] *Id.* § 3, at 3.

[12] *Id.* § 2.

[13] *Id.* § 5.

[14] *Id.* § 4.

[15] *Id.* § 6.

an officer in the public service, such as a tracing agent, the fee for locating the child is 280 *rand* (US$41.90) plus expenses.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Custody and Parental Visitation Rights

Under South African law, custody of children vests in both parents, unless they are divorced or separated. Courts must settle the custody issue before they can grant a divorce.[16]

Parents may conclude a custody agreement, which has to satisfy the court to be incorporated in the divorce decree. In the absence of such an agreement, the court makes the custody order by taking into consideration the best interests of the child. A custody order does not deprive the non-custodian parent of all his rights. He is entitled to reasonable access, unless the court finds that it is in the child's best interest to deny it.

The non-custodian parent can obtain access to his child by an arrangement with the custodian parent. In the absence of an agreement, the court can make an order regarding visitation rights and lay down its particulars. The access order may be given when the high court is granting a divorce decree or when a parent applies for it.[17]

B. Parental Child Abduction

If a non-custodian parent abducts his child, he may be held in contempt of court. A custodian parent whose child has been abducted may apply to the court for the child's return. "In such a case a court may order that the child be returned to the custodian spouse or it may order that the sheriff take possession of the child in order to deliver it to the custodian spouse…"[18] At present, South Africa does not have a special penalty for parental abduction.

C. Obstruction of Parental Visitation

If a custodian parent obstructs the visitation rights of the other parent in any way, he may be held criminally responsible and may be liable to a fine not exceeding 200 *rand* (US$30) and/or to imprisonment for a period not exceeding 1 year.[19] A custodian parent is required to notify the other parent of any change in his residential address in writing. Otherwise he may be liable to a fine not exceeding 100 *rand*.[20]

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[16] *Supra* note 2, Act 70 of 1979, § 6(1) at 425.

[17] W. A. Joubert ed., 16 THE LAW OF SOUTH AFRICA, 170-172 (Durban, 1998).

[18] *Id.* at 176.

[19] *Supra* note 2, Law No. 93 of 1962, § 1(1), at 181.

[20] *Id.* § 1(3).

III. Court System and Structure – Courts Handling the Hague Convention

A. Court System and Structure

The South African court system consists of general courts and special courts. General courts are the Constitutional Court, the Supreme Court of Appeal, the High Courts including any high court of appeals, and the Magistrate Courts. Special courts include the labor courts, land claims courts, family courts, tax courts, water Courts, and equality courts.

The Constitutional Court consists of a President, Deputy President, and nine Members. This Court is the highest court on constitutional matters. The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice, and as many Members as determined by an act of Parliament to meet the need of the Court. It is the highest court of appeal except for constitutional matters.[21]

The High Court may decide on any matter that is not assigned to another court because of its nature or the amount involved. However, "the judge president…may at any time direct that a matter be heard by a full court consisting of as many judges as he may determine."[22] The Magistrate Court is a lower court with only a limited jurisdiction. The High Court is the court of first instance that will hear cases when brought under the provisions of the Convention. It is also the court that determines the custody of minor children and the visitation rights of the non-custodian parent.

B. Court Decisions

LS v. AT and another[23]– Decision was rendered on December 4, 2000 to return a child to Canada.

1. Facts

The mother was born in South Africa and the father in Italy. They were married in South Africa in June 1989, and lived for some years in Italy; in July of 1997, they emigrated to Canada, and resided in British Columbia. In July 1999, a consent paper was made an order of the Supreme Court of British Columbia, granting the mother sole custody of the child and the father visitation rights. Following their divorce in May 2000, the parties consented that the issues of custody and visitation would be further investigated and that the mother (the defendant) would be allowed to travel to South Africa with the child for a 1 month period. The parties further agreed that the father would have sole custody of the child in the event that the child was not returned to British Columbia. The mother and the child left for South Africa and did not come back. Upon the father's request the British Columbia court ordered the mother to deliver the child to the father who gained sole custody and guardianship and to arrest the mother if she breached the order. In addition, the court requested that the South African family advocate ensure the prompt return of the child to British Columbia.

2. Decision of the Constitutional Court

The Court rejected the claim that the Hague Convention contradicted the South African constitutional principle that a child's best interests are paramount in every matter concerning the child.

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[21] *Supra* note 2, Law No. 108 of 1966, §§ 167, 168, at 1291.

[22] *Supra* note 2, at 103.

[23] 2001(2) BCLR 152 (CC); 2000 SACLR Lexis 90.

The Court held: "the purpose of the Convention is … to ensure, save in the exceptional cases provided for in article 13 (and possibly in article 20), that the best interests of a child whose custody is in dispute should be considered by the appropriate court. It would be quite contrary to the intention and terms of the Convention were a court hearing an application under the convention to allow the proceedings to be converted into a custody application … . The Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of custody." The Court further concluded that the facts were "insufficient to support a finding that the return of the child to British Columbia involves the grave risk of the harm referred to in article 13 of the Convention."

The Court ordered the return of the child to Canada under the condition of several undertaking taken by the parties, including the mother having de facto custody pending the final adjudication and determination of the Supreme Court of British Columbia on the issues of custody, access, and care.

IV. Law Enforcement System

As explained above, in the absence of voluntary compliance with a court order in regard to the return of an abducted child, the court may order the sheriff to take possession of the child in order to deliver him to the custodian parent. Denial of visitation rights is an offense in South Africa, and the offender may be prosecuted to force him to comply with the court order. In addition, the penalties prescribed by the regulation for obstructing the Chief Family advocate helping the return of a child or securing visitation rights under the Convention is a serious deterrent.

V. Legal Assistance Programs

The Legal Aid Act[24] establishes the Legal Aid Board with the objective of rendering legal aid to indigent persons and providing legal representation at state expense.[25] The Act does not define an indigent person. However, the Board lays down "a means test" which it revises from time to time.[26] The Board appoints legal aid officers who work under the supervision of the Director of Legal Aid. When an application for legal aid is made to one of the legal aid officers, he considers whether an applicant qualifies for aid under the guideline established by the Board. Qualified applicants are referred to an attorney whose fee is paid by the state.

VI. Conclusion

The Hague Convention was ratified by South Africa because of the enormous legal expense and time spent for the return of an abducted child to his custodian parent in South Africa. In the opinion of the South African Justice Minister, international cooperation due to the Convention would offer important relief to such parents.

South Africa has taken full advantage of the Convention. There has been a considerable number of outgoing applications for the return of the abducted children to South Africa. However, the number of incoming applications has been small. The *LS v. AT* decision summarized above reflects the commitment of the South African Constitutional Court to implementation of the law in that case. A study

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[24] *Supra* note 2, Act. No. 22 of 1969, at 343.

[25] *Id.* § 3.

[26] *Id.* § 3(d), at 343(1).

of future additional court decisions will be necessary to reach a general conclusion on the South African courts approach to enforcement of the law implementing the convention.

South Africa was well aware of the advantages of the Convention when it ratified it. However, it has tried to reduce its financial burden by taking reservations to court costs and language. Thus, expenses arising from court proceedings must be born by the applying parent unless they are covered by the South African legal aid system, and all submitted documents must be in English or Afrikaans, so that there will not be any translation costs.

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SPAIN

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention) adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Spain[1] on May 28, 1987 and came into force on September 1, 1987.[2]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Hague Convention in Spain is the *Direccion General de Politica Legislativa y Cooperacion Juridica Internacional* of the Ministry of Justice.[3] It was not until 1996, when Organic Law 1/1996[4] on the Legal Protection of Minors, which partially amends the Code of Civil Procedure,[5] was passed that Spain had a specific implementing legislation for the Hague Convention.[6] Before that time, the Hague Convention was applied, but with great difficulty, due mainly to the lack of implementing legislation, but also because the designated Central Authority also serves as the Central Authority for other international instruments. Therefore, its workload exceeds its capacity.[7]

Since the Hague Convention is a self-executing treaty, implementing legislation was not strictly necessary from the international legal point of view, but the lack of regulations on, for example, which was the competent court to make the return order or the procedure for the summary return mechanism proved to be one of the major obstacles in the Hague Convention application in Spain.[8]

A. Return Requested from Abroad

Under the rules established in 1996 by Organic Law 1/1996, which has been inserted in the Code of Civil Procedure,[9] it has been determined that for Hague Convention applications the competent judge to return a child who was wrongfully removed or retained, is the lower courts of the place where the child

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[1] BOLETIN OFICIAL DEL ESTADO (B.O.E.) AUGUST 24, 1987, JUNE 30, 1989 AND JAN. 24, 1996.

[2] *Id.* last ¶.

[3] *Id.*

[4] Organic Law 1/1996 of January 15, 1996 in B.O.E. Jan. 17, 1996.

[5] ENJUICIAMIENTO CIVIL, LEY Y DISPOCIONES COMPLEMENTARIAS, 4th Edition concordada y anotada, Tirant Lo Blanch, textos legales, Valencia, 2002.

[6] C. Gonzalez Beilfuss, *International Child Abduction in Spain*, in INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, Vol. 15, No. 3, Dec. 2001, 330.

[7] *Id.*

[8] *Id.*

[9] *Supra* note 5, arts. 1901-9.

is located or is retained.[10] This means that it will not be possible to commence judicial proceedings in Spain until the child is located.[11]

Under the provisions of the Hague Convention, the Central Authority must take all necessary measures to locate the child. The National Police will provide assistance thereto. Any information, as well as recent pictures of the abductor and the child, will be of great help for the police search. The judicial proceedings may be initiated by the individual, institution, or body holding custody rights over the child or by the Spanish Central Authority, entity, or individual representing the petitioner.[12] The Central Authority usually acts through the *Ministerio Fiscal* and *Abogados del Estado* (state's attorney),[13] who represent the state in civil and administrative matters. Spain, therefore, assumes the expenses of the legal representation, even if the requesting state made the reservation under art. 26 of the Hague Convention. If, however, the applicant decides to name a private attorney, the Central Authority will provide assistance thereto, but with no responsibility as to the outcome of the case.[14]

In case the applicant decides to act through the Central Authority instead, a power of attorney will have to be given for his or her legal representation in case it is necessary to initiate judicial proceedings.[15] Because Spain was not responsible for the creation of the reservation of art. 24 of the Hague Convention, the documentation required in these proceedings may be submitted in Spanish, French, or English. But, if the requesting country objects to the use of French or English, all documents need to be translated into Spanish.[16] The judge must decide the case within 6 weeks from the date the judicial proceedings started.[17] Considering that the Spanish courts suffer from an enormous overload of work, as well as a scarcity of resources, this deadline has not always been met.[18]

Proceedings start with a petition that must contain all the documents required by the Hague Convention. The judge will then summon the alleged abductor to a hearing which must take place during the following 3 days. In this hearing, the abductor will be asked whether or not he agrees with the return of the child.[19] If the abductor agrees to return the child voluntarily, the judge will order his return to the custody holder and decide on which party will have to pay for the expenses of the proceeding.[20]

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[10] *Id.* art. 1902, ¶ 1.

[11] *Supra* note 6.

[12] *Supra* note 5, art. 1902, ¶ 2.

[13] *Id.* art. 1902, ¶ 3.

[14] *Supra* note 6, at 331.

[15] *Id.*

[16] *Id.*

[17] *Supra* note 5, art. 1902, last ¶.

[18] *Supra* note 6, at 331.

[19] *Supra* note 5, art. 1904.

[20] *Id.* art. 1904 a).

If however, the abductor is opposed to the return of the child, his reasons will be examined in an oral hearing which must take place in the next 5 days.[21] The judge may examine the child and request a psychological assessment or other reports that he deems necessary, but all evidence must be produced within the 6-day period following the hearing. After 3 days, the judge must decide whether or not to return the child. This decision may only be appealed once, and the appeal must be resolved within 20 days and does not suspend its enforcement. [22]

B. Return requested from Spain

When the Spanish Central Authority is requesting the return of a child who has been taken to a country that is party to the Hague Convention, the return or visitation petition documents are translated as appropriate upon their receipt and sent to the competent Central Authority abroad.[23] The petition must include all the information available to locate the child, including identifying information concerning the child and the person who has taken the child, the child's date of birth, the reasons for claiming the return, and information on the presumptive domicile of the child. Once all documents have been submitted, the Central Authority will locate the child, either directly or through the competent authorities, and try for a friendly solution to the case. If this is not possible, judicial proceedings will be instituted to return the child to Spain or to reinstate the effective visitation schedule.[24]

The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority and the procedural norms applied by the competent courts. This procedure is generally free. However, some countries do require the intervention of a private attorney, such as Argentina, Germany, and the United States.[25] If the petitioner cannot afford to pay, he may provide evidence to qualify for free legal advice and become eligible for such assistance abroad.[26]

The Spanish Central Authority, as requesting authority, will follow up on the proceedings abroad and will keep the petitioner informed at all times about the case.[27]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The crime of "Child Abduction by Parents" was created and inserted in the Criminal Code by Organic Law 9/2002 of December 10, 2002.[28] Until the passage of this law, there was no criminal penalty

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[21] *Id.* art. 1907 a).

[22] *Id.* art. 1908.

[23] *See* http://www.mju.es/cooperacion_juridica/g_sustmenores.htm at 3.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] ORGANIC LAW 9/2002 of Dec. 10, 2002, in B.O.E. Dec. 11, 2002.

for parental child abduction as such. However, in a number of cases the courts applied different criminal charges, such as kidnapping and illegal detention in cases of parental abduction.[29]

Under the new provisions of the Criminal Code,[30] any parent who, takes his minor child without justification will be punished with imprisonment for a term of 2 to 4 years and will be disqualified from having legal custody of his children for 4 to 10 years.[31] The Criminal Code also provides for specific definitions and qualifiers for the crime of abduction,[32] as:

1. the taking of a minor from the place of his residence without the consent of the parent with whom the child regularly resides, the institutions, or individuals with custody[33]
2. the retention of a minor in serious violation of a judicial or administrative decision establishing such a right
3. the taking of a minor abroad when the minor's return depends on conditions requested by the abductor (In this case the punishment will be 3 to 4 years imprisonment.)

If the abductor communicates the location of the child within 24 hours, agrees to return the child immediately, and complies thereto, or if the absence of the minor is less than 24 hours, the abductor will be exempt from punishment.[34] If the return is performed without any communication ,but within 15 days of the abduction, the punishment is imprisonment of 6 months to 2 years.[35]

Punishment for this crime will be also applicable to the relatives of the minor or the abductor parent, up to the second grade of relationship of blood or marriage.[36]

Law 9/2002[37] also added two provisions to the Civil Code[38] by providing that in cases of nullity, separation, or divorce proceedings, when there is a risk that children may be abducted by either of his parents or a third person, precautionary measures may be taken by the court if they are considered necessary, particularly:

- prohibiting the child's exit from the country without court authorization

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[29] A. Alonso Carvajal and N. Chamorro Alonso, El Secuestro Interparental de Menores en los Matrimonios Mixtos, *available at* http://www.derecho-familia.com.

[30] E. Gimberant Ordeig y otros, CODIGO PENAL con Concordancias y Jurisprudencia, Tecnos, Madrid, 2003.

[31] *Id.* art. 225, *bis.1*.

[32] *Supra* note 28, art. 225, *bis*.2.

[33] *Id.* art. 225, *bis*.2.1.

[34] *Id.* art. 225, *bis*.4.

[35] *Id.*

[36] *Id.*

[37] *Id.* arts. 5 and 6.

[38] X. O'Callagan Munoz, CODIGO CIVIL, 3rd Edition, La Ley, Madrid, 2003, arts. 103.1 & 158.3.

- prohibiting the issuance of a passport to the minor, or if already issued, prohibition of its handling by the parents
- submitting to prior judicial authorization to any change in the minor's domicile[39]

However, it is not clear how efficient some of these measures will be. For example, within the European Union, individuals may travel with their DNI (National Identification Document), and there is no need to have a passport. Also the law fails to establish the punishment for violation of these measures.[40] The same measures may be taken by the courts *ex-oficio*, upon a request of the *Ministerio Fiscal*, a relative of the child, or the child.[41]

III. Court System and Structure – Courts Handling the Hague Convention

When Spain is the requested country and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be the lower courts where the child is located or where he is being retained.[42] The case may be appealed only once to the respective Court of Appeals and must be decided within a maximum of 20 days and does not suspend its enforcement.[43]

Court decisions have evolved since the Hague Convention was adopted in 1987, especially after the passage of Law 1/1996, which provided for a specific procedure applicable to Hague Convention cases. In an early decision of March 28, 1994,[44] the *Audiencia Provincial de Zaragoza* decided that the removal of the child from his habitual place of residence in the United States was not wrongful, because there was no breach of custody rights. This decision was based on the U.S. court decision assigning the custody of the child to the father only after the removal of the child. This decision has been considered by some authors, as a wrong application of the Hague Convention, because the decision did not address the situation of the minor at the time of the wrongful removal of the child.[45] Following a trend shared by other countries, there are some cases in which the fact that a person or entity had the right to object the change of residence, it has been interpreted as a right of custody under the Hague Convention terms.[46]

In another decision[47] the judge decided that, since Norwegian law requires both parents to consent to any change of residence, there had been a breach of the father's custody rights. Despite this decision,

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[39] *Id.* art. 103.1, last ¶.

[40] *Supra* note 38 at 178.

[41] *Id.* art. 158.3.

[42] *Supra* note 10.

[43] *Supra* note 22.

[44] Auto de la Audiencia Provincial de Zaragoza (Seccion 2da) of March 28, 1994, in REVISTA ESPANOLA DE DERECHO INTERNACIONAL, 1995, 1, comments by C. Gonzalez Beilfuss, in *supra* note 6, at 333.

[45] *Id.*

[46] *Id.*

[47] JUZGADO DE PRIMERA INSTANCIA NO. 5 LAS PALMAS OF GRAN CANARIA of October 27, 1999 in *Supra* note 6 at 333.

during the custody judicial proceedings, the mother was assigned the care of the children and afterwards took them to Spain.[48]

In another case,[49] which caused a great uproar in the requesting country (Israel), a 1-year old girl, was taken by her mother, a Spanish citizen, from Israel to Spain. The mother was always the primary care giver of the child. The parents were separated before the child was born, and therefore, the relationship with her father was very limited. The lower court decided that, since the mother had always been the care giver and when the removal took place, she was not prevented from doing so, the removal was not wrongful. This decision, however, was reversed on appeal, based on the fact that according to Israeli law, the parents shared the custody of the child, and as such, both had the right to determine the child's permanent residence. This case is an example of the way the return mechanism under the Hague Convention operates, since many applicants do not pursue the custody of the child, but only wish to protect their rights of access by securing the child's place of residence in the requesting state.[50]

Concern over access rights in cases of children born out of wedlock is especially widespread in Spain. Under Spanish Law both parents, even unmarried, have custody rights over their children. In some countries these rights are not assigned automatically. In a 1999 Spanish decision[51] the judge decided that the removal of a child was wrongful, because Italian law attributes joint custody to unmarried parents, provided they cohabited.

Most of the cases that have been decided by the courts deal at least with one of the exceptions to the return of the child provided for by articles 12, 13, and 20 of the Hague Convention. The most frequently used are the exceptions of article 12, if more than 1 year has passed from the date of the wrongful removal or retention, and article 13 b, which provides that the return of the child may be refused if the individual or entity who opposes the return establishes that there is a serious risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This basis for refusal may very easily tempt the court to slip into considering the dispute on its merits. This is the reason for its frequent use by legal counsel and is the reason why it is argued in most cases that reach the courts. There are, however, an increasing number of cases in which Spanish courts correctly interpret the provision in a restrictive way.[52]

In a 1999 decision[53] the court decided that the fact that because the child's illness (neuro dermatitis) improved with the weather in Lanzarote (Spain) did not mean that the girl would suffer a serious risk if returned to her habitual residence in Germany.

Spanish courts have also had to deal with the issue of how to separate the child from the abducting parent. The courts have been inclined to be too technical instead of focusing on the post-return period.

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[48] *Supra* note 6, at 333.

[49] AUTO AUDIENCIA PROVINCIAL DE BARCELONA OF APR. 21, 1997, SECCION 1, REVISTA GENERAL DEL DERECHO, 1998, 3116-3119 in *supra* note 6, at 333.

[50] *Id.* at 334.

[51] JUZGADO DE PRIMERA INSTANCIA NO. 5 MALAGA of Dec. 30, 1999 in *supra* note 6 at 335.

[52] *Supra* note 6, at 337.

[53] JUZGADO NACIONAL DE PRIMERA INSTANCIA OF LAS PALMAS DE GRAN CANARIA of Nov. 27, 1999, in *supra* note 6 at 337.

In a 1998 decision[54] the court reversed a lower court decision, which refused to order the return of a 4-year old girl to the United States, because a court appointed psychologist concluded that the child would suffer if separated from the abducting mother. The appellate court held that the mother did not prove that the degree of suffering was going to be intolerable.

The exception to the return based on article 20 of the Hague Convention allows the refusal of the return if it would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. Article 20 was used in the case mentioned earlier, in which the abducting mother had always been the sole care giver and, since the parents were separated before her birth, the father only visited the child while they were still in Israel. The Appellate Court did, however, find that father and mother shared custody in Hague Convention terms, when the removal took place, and therefore, the removal was wrongful. However, it refused to order the return, because this was against Spanish *public order* as defined in article 20. After the removal, the father obtained a divorce decision declaring the mother a "rebellious wife." The Spanish court interpreted that this declaration would result in the severing of all contact between mother and child if the child were returned to Israel. It decided that, since the decision was not based on the best interest of the child, but on the desire to punish the mother, a return would be against the fundamental principles of Spanish Law. This decision was appealed before the Spanish Constitutional Court, and it was rejected.[55]

The post-return period is another particularly difficult issue if, as happens quite often, the left-behind parent obtains a decision granting him custody of the child from the courts in the requesting state after the wrongful removal or retention occurred. In such cases, the enforcement of a return order does not serve to restore the situation, unilaterally altered by the abductor, but rather the contrary.[56]

IV. Law Enforcement System

Both the Central Authority and the courts have requested assistance from the police and Interpol to locate children and secure the enforcement of authorities' orders. According to the Spanish Central Authority, during 1999, Spain received 36 incoming return and 6 incoming access applications, for a total of 42 incoming applications. Spain made 27 outgoing return and 9 outgoing access applications in that year, for a total of 36 outgoing applications. Altogether, therefore, the Central Authority for Spain handled 78 new applications in 1999.[57]

Of the 36 incoming return applications, 7 were rejected; 10 resulted in a voluntary return; 8, judicial returns; 4, judicial refusals; 3 were withdrawn; and 4 are pending. From 6 incoming access applications, 1 access was voluntarily agreed upon; 3 were judicially granted; 1 is pending; and 1 was withdrawn. The reasons for rejection of return petitions were that in one case the child was located in another country and in four other cases the child was not located.[58]

Spain has received applications for return from 14 contracting states, with the United Kingdom and Wales comprising one quarter of all applications. The United States made proportionally fewer

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[54] AUDIENCIA PROVINCIAL DE MALAGA of October 28, 1999 in MINORIDAD Y FAMILIA, 4 , No. 14, Delta Editora, ¶ na, 2000 at 119.

[55] *Supra* note 6 at 340.

[56] *Supra* note 6 at 341.

[57] *See* http://www.hcch.net/e/members/no_es.html.

[58] *Id.*

applications to Spain. Compared with other European states, Spain received more applications from Latin American States, 5 out of 36 applications.[59]

Compared with other countries, Spain was slower in reaching judicial decisions, but faster to reach voluntary agreements. Voluntary returns occurred in an average of 69 days compared with the average of 84 days in other countries. Judicial returns and refusals took an average of 124 and 202 days compared with the averages of 107 and 147 days in other countries.[60]

V. Legal Assistance Programs

The Spanish Central Authority provides *pro bono* legal assistance during Hague Convention proceedings before the courts in Spain through a body of attorneys called *Abogados del Estado.*[61] The attorney will only represent the requesting parent for the Hague Convention proceeding purposes, but not in custody or divorce proceedings. This attorney is a staff of the Ministry of Justice.[62]

VI. Conclusion

The following entities provide current information in their webpages:

The Central Authority, Ministerio de Justicia, Direccion General de Politica Legislativa y Cooperacion Juridica Internacional, Subdireccion General de Cooperacion Juridica Internacional, Servicio de Convenios.

C/ San Bernardo 62
Madrid 28071
Fax 913904457
http://www.mju.es/cooperacion_juridica/g_sustmenores.htm.

Asociacion para la Recuperacion de Ninos sacados de su Pais

http://www.recuperacion-menores.org/.

Derecho de Familia

http://www.derecho-familia.com/prensa.html.

The Hague Convention has proved to be one of the more successful instruments in force to deal with the complexities of parental child abduction. Even with its weaknesses, it has considerably improved the process to return internationally abducted children. The Hague Convention is working reasonably well in Spain. Spanish courts have finally understood the true nature and objectives of the Hague Convention.

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[59] *Id.*

[60] *Id.*

[61] *Supra* note 13.

[62] E. Perez Vera, *Algunas Consideraciones sobre la Aplicacion en Espana del Convenio de la Conferencia de la Haya sobre los Aspectos Civiles de la Sustraccion Internacional de Menores del 25 de Octubre de 1980* in REUNION DE EXPERTOS GUBERNAMENTALES SOBRE SUSTRACCION INTERNACIONAL DE MENORES POR PARTE DE UNO DE SUS PADRES, Instituto Interamericano del Nino, SIM/doc.9/02 August 12 and 13 of 2002, Montevideo, Uruguay.

There are more decisions that adopt a non-nationalist approach in addressing this issue. At present, Spanish courts have shifted their focus towards considering the opinion of the child and the psychological reports. There are an increasing number of decisions in which the interests of the child are prioritized, and the children are returned to their place of residence, while exceptions in the Hague Convention are interpreted in a more restrictive way.[63]

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[63] A. L. Calvo and others, DERECHO INTERNACIONAL PRIVADO, VOL II, 2nd Edition, Editorial Comares, Granada, 2000, at 173.

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SWEDEN

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "the Hague Convention" or "the Convention") was adopted on October 25, 1980, and entered into force on December 1, 1983. Sweden decided to ratify the Convention on February 2, 1988, and acceded to the Convention by signing and depositing a ratification instrument on March 22, 1989. Previously, Sweden lacked general regulations to effectively address foreign decisions related to child custody. The Swedish legislators acceded to the Convention, because of the increasing interaction across state borders and an expectation of that this tendency would continue to grow.[1] The Convention became effective in Sweden on June 1, 1989[2] and concurrently entered into force between Sweden and the United States. The Hague Convention is in force between Sweden and 58 other states.[3]

I. Domestic Laws and Regulations Implementing the Hague Convention

Sweden has implemented the provisions of the Convention through a domestic Act,[4] "On Recognition and Enforcement of Foreign Decisions Concerning Custody, etc. and on the Return of Children"[5] (hereinafter "the Implementation Act"). This Act addresses Sweden's obligations to both the Hague Convention and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. Paragraphs 2 through 4, 13 through 21 and paragraph 23 of the Implementation Act are applicable vis-à-vis state parties to both documents. However, paragraphs 11, 12 and 22 specifically address the Hague Convention. It should be noted that for Swedish courts and Swedish authorities, only the Swedish Implementation Act, and not the Hague Convention, is binding.[6]

A. The Swedish Central Authority

The designated Central Authority for the purposes of the Convention is Sweden's State Department for Foreign Affairs. The State Department is tasked to receive and transmit applications, cooperate with

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[1] The motives, a source of law and used for interpretation, are published in the preparatory works; Governmental Bill, Proposition 1988/89:8, pp. 13-14.

[2] The Convention is published in Sweden's Agreements with Foreign States (SVERIGES ÖVERENSKOMMELSER MED FRÄMMANDE MAKTER), SÖ 1989:7; and in the preparatory works in the Swedish, English and French languages at *supra* note 1, at 95-123. Sweden has made a reservation with respect to the Hague Convention art. 26, § 2.

[3] Governmental Announcement 2002:706 (Regeringens tillkännagivande (2002:706) i fråga om konventionen d. 25 oktober 1980 om de civila aspekterna på internationella bortföranden av barn (Haagkonventionen)). The Convention only applies to children abducted or retained after June 1, 1989. Sweden additionally has separate agreements on the topic of child abduction with the Nordic countries that are applicable in parallel with the Hague Convention (*supra* note 1, at 23).

[4] In Sweden, transformation is the normal technique to make international treaties effective.

[5] SFS 1989:14 (as amended by SFS 1993:212, SFS 1994:1447, SFS 2001:465 and SFS 2001:397).

[6] The Convention can be used for interpretation purposes. For a reference to an outline in English of Swedish law and accepted legal sources, *see generally* Strömberg Stig (ed.), *An Introduction to Swedish Law* (2d ed. 1991).

Central Authorities in other states, further cooperation with concerned authorities in Sweden and elsewhere, and fulfil other functions pursuant to the Convention.[7]

Upon receipt of an application, the State Department first attempts to locate the child by checking official records,[8] and if necessary contacting the police for assistance in the search. To this date, there have been no failed attempts in locating an abducted child. After locating the child, the State Department will ask the applicant if he is willing to agree to an out-of-court settlement. If an out-of-court solution is not feasible, the applicant is put in contact with a Swedish lawyer to assist him with filing a judicial petition, and during subsequent court proceedings.

The State Department reports that it received a total of 72 Hague Convention applications during 2002, and 14 applications between January 1, 2000 and March 1, 2004, regarding children abducted from the United States to Sweden. Out of the latter 14 applications, 6 applications were withdrawn; 6 children were returned; and in one case the child was not in Sweden. In another case, the first level administrative court refused a petition for return based on the fact that several years had passed since the abduction. The applicant did not exercise his custody rights at the time of the abduction and had for a number of years not attempted to establish any contact with the children.[9]

B. Return Requested From Abroad

The main content of the Hague Convention is included in paragraphs 11 and 12 of the Implementation Act. The paragraph 11 provides that a child who has been brought illegally to Sweden, or who is illegally retained in Sweden, will be returned, upon request, to the person from whom the child was abducted, if the child was a habitual resident, immediately before the abduction or the retention, in a state that is party to the Hague Convention. The subsequent section of the paragraph provides that an abduction or retention is wrongful if it was carried out in defiance of the guardian's right to care for the child, according to the laws of the state where the child was a habitual resident immediately. The guardian must have exercised this right at the time the child was abducted, or should have exercised this right had the child not been abducted or retained, and additionally did not accept that the child was taken away.[10]

Pursuant to article 4 of the Hague Convention, although not explicitly provided for in the Implementation Law,[11] the abduction or the retention of a child is not illegal if the child was a habitual resident in Sweden before the abduction or the retention.[12] Hence, in each particular case, a court of law first needs to determine the state of the child's habitual residence in order to determine if paragraph 11

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[7] Decree on the Recognition and Enforcement of Foreign Decisions Concerning Custody, etc. and on the Return of Children, SFS 1989:177. Within the State Department, it is the Department for Consular Affairs and Civil Law that deals with cases relating to the Hague Convention. They can be reached around the clock at + 46-(0)8- 405 1000, or via their e-mail address registrator@foreign.ministry.se.

[8] Sweden has a well developed system with "personal numbers," (similar to social security numbers). These personal numbers are commonly documented in matters regarding schools, medical care, employment, etc.

[9] Communications with officials at the State Department, on file with author.

[10] See also *supra* note 1, at 42.

[11] *Supra* note 5, ¶ 11, § 2, interpreted *e contrario*.

[12] *See*, e.g., *supra* note, at 40; and for case law the Supreme Administrative Courts rulings in case nos RÅ 1995 ref 99 (In a case involving an American father and Swedish mother, the court found that the child had taken habitual residence in Sweden); RÅ 1996 ref 52 (same); and RÅ 2001 ref 53 (In a case involving a Swedish father and a British mother, the court found that the child, retained in Sweden, had its habitual residence in Sweden).

is applicable. To this effect, a Swedish court of law will make an independent examination of the objective and the subjective circumstances surrounding the case. Objective circumstances include the time spent in Sweden, as well as social and other personal or professional relations to Sweden, and as compared to other countries. Due consideration is given to the intent to stay in the country, and for a child, the habitual residence of his guardian is given significant consideration.[13] The habitual residence of a parent who only is entitled to parental visitation is, however, of less significance.[14] The fact that the child may have been abducted and forced to change habitual residence does not necessarily impede the court from finding that the child has acquired a new habitual residence.[15]

If the court finds that paragraph 11 is applicable in a particular case, a judicial petition could still be denied on four alternative grounds, as defined in paragraph 12. According to the first ground, a petition for the return of a child can be refused in a case where more than 1 year has passed since the time of the illegal abduction or retention *and* the child has settled in his new environment. This corresponds with article 12, section 2 of the Hague Convention. Secondly, if there is a grave risk that the child would be physically harmed or psychologically damaged, or if the child otherwise would be placed in an intolerable situation, a petition can be denied. This provision is consistent with article 13 b, section 1 of the Convention. Third, and in accordance with article 13 b, section 2 of the Convention, a petition can be refused if the child opposes being returned *and* the child has reached such an age and maturity that his views should be taken into consideration. In case law this age has been set at 12, but even when the child has reached the age of 12, the court will, with the assistance of the social authorities, make an independent evaluation of the child's level of maturity.[16] This section corresponds with general Swedish regulations on the return of abducted children.[17] Finally, in conjunction with article 20 of the Hague Convention, a petition can be refused if an order for the return of a child would be incompatible with domestic fundamental principles for the protection of human rights and fundamental freedoms. In Sweden, the pertinent rights and freedoms are primarily found in chapter 2 of the Constitutional Act.[18]

Article 21 of the Hague Convention on access rights appears not to have been incorporated into Swedish law, and disputes over enforcement of such issues will be tried according to general Swedish family law.[19]

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[13] See reasoning by the Supreme Administrative Court in case no RÅ 2001 ref 53. The court stated herein that in general, a small child must be considered to have the same habitual residence as his guardian. If the guardian however acquires a new habitual residence, the habitual residence of the child does not automatically change if the move was carried out against the will of the other parent, not later ratified by the opposing parent or considerable time has passed since the abduction.

[14] See reasoning by the Appellate Administrative Court in case no. RÅ 1996 ref. 52.

[15] *Compare supra* note, at 36 and 40 *with* the Governmental Bill, Proposition 1973:158, at 78 ff. *See also* judgement by the Supreme Administrative Court in case no RÅ 2001 ref 53.

[16] *Cf* judgement by the Supreme Administrative Court, case no RÅ 2002 ref 1, where a 12 year old boy communicated that he did not want to return to his mother in Great Britain, and instead remained in Sweden with his father, with whom he previously had not lived for any great length. The court asked the social authorities to evaluate the sincerity and seriousness of the boy's will. The social authorities came to the conclusion that the child was old and mature enough to make a considered expression of will. Nonetheless, the Supreme Administrative Court found that the child did not possess the insights necessary to make a deliberated decision and ordered that the child be returned to his mother in Great Britain.

[17] Parents and Children Code SFS 1949:381 (as amended), ch. 21, ¶ 5; and below.

[18] KK 1974:152, *reprinted in* SFS 2003: 593.

[19] According to the legislature, a foreign court order on parental access does not fall under ¶ 11. S*upra* note 1, at 40. The reason to not incorporate art. 21 of the Hague Convention remains unknown. Suggestively, Sweden did not want to uphold and enforce visitation schedules that otherwise would be considered unacceptable and as not in the best interest of the child.

C. Return Requested from Sweden

If a parent has abducted a child who was permanently residing in Sweden to a foreign country, a civil district court can on the request that the legal custodian of the child issue a declaration that the child has been illegally abducted or retained.[20] If both parents have custody of the child, and if one of the parents has abducted the child or is retaining the child abroad, the court may also declare that this act is illegal. However, it is not necessary that the act be illegal according to Swedish Criminal Law.[21]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Sweden is essentially a civil law, statute-driven country with one single applicable body of law for the entire country. Central provisions regarding children are found in the Parents and Children Code, and for all purposes with respect to custody, living arrangements, and parental access it is paramount that all orders or measures are taken and executed "in the best interest of the child."[22]

Married couples have joint custody of a child from birth until the child reaches the age of 18. An unmarried mother is given sole custody of the child. If the parents marry later, both of them obtain custody of the child from that point in time, unless a court previously entrusted custody to one or two specially appointed custodians. If only one of the parents has custody of the child and the parents wish to have joint custody, the court will, on their application, make an order in accordance with their request, unless joint custody is manifestly incompatible with the best interest of the child. Alternatively, the parents may obtain joint custody by filing a request with the tax authority. If parents who share custody divorce, there is a presumption that they will continue to exercise joint custody of the child; however, the question of with whom the child will be living often gathers overriding attention. Moreover, joint custody entails that all major decisions regarding the child will be made collaboratively, for example, one parent needs the consent of the other parent to travel abroad with the child, and both parents will have access to information from schools and the authorities. Joint custody additionally entails that parents can decide, out-of-court, on visitation rights and where the child will be residing as long as the arrangements are compatible with the best interest of the child. In contrast, a parent granted sole custody independently decides on all matters regarding the child, including living arrangements.

If the parents do not agree, for instance on the issue of where the child will be living, or in case one parent wants to change the current accords on custody against the other parent's will, he must file a judicial petition with a court of law, which must then decide whether the custody henceforth will be joint or solely granted to either party. Since 1998, it has been possible for the court to decide on joint custody against the wishes of one of the parents. Frequently the courts task the social authorities to conduct mediation talks between the parents before rendering a decision in cases in which the parents do not agree on custody, visitations rights, or the residence of the child.

With respect to access rights, a child is entitled to visitation with both parents.[23] There is no contrasting right for parental access to a child. If the parents do not live together, the parent with whom the child is residing has a responsibility to facilitate access to both parents, including sharing costs that

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[20] *Supra* note 5, ¶ 23.

[21] Concerning child abduction as a criminal offense, *see infra* ¶¶ IV.

[22] *Supra* note 17. *See* in particular ch. 6: "On custody, living arrangements and parental access".

[23] *Id.* ¶¶ 15-15b. Despite this legal-technical construction, it is the parent and not the child that possesses the right to file a petition for parental visitation.

might arise in this connection. The willingness to facilitate access to both parents can be taken into account by a court of law when deciding the issue of custody. If there is an indication that a parent might abduct a child while exercising parental visitation, the court may proscribe that the parent is only allowed to meet with the child in the presence of another person or only in Sweden.[24]

Whereas the Hague Convention only deals with the civil aspects of child abduction, abducting a child can constitute a crime in Sweden.[25] The Swedish Penal Code, chapter 7, On Crimes against the Family, paragraph 4, states that the separation of a child under the age of 15 from his legal guardian constitutes a criminal act, referred to as "arbitrary conduct concerning a child." The objective is to counter the misuse of custody and visitation rights and,[26] in the best interest of the child, to guarantee the child contact with both parents. Hence, the scope of the provision further encompasses cases where the parents share joint custody and cases where a parent, who has been granted certain custody or visitation rights, imposes these rights in a matter not provided by law. Remedies range from fines and up to 1 year in prison, or in the case of gross crimes, imprisonment from 6 months up to 4 years.[27]

III. Court System and Structure – Courts Handling the Hague Convention

A. The Swedish Court System

A peculiar feature of the Swedish court system is that Sweden has two parallel court systems, one general or civil system and one so-called administrative system. Each system has a first level court, an appellate or review level court, and a Supreme Court, as last resort.[28] The general courts decide questions of custody, parental visitation, divorces, and similar matters. Petitions for a declaration of illegally abducted or retained children, paragraph 23 of the Implementation Act, are heard by the civil courts. Indictments for child abduction as a criminal offense are also tried within the general system. In contrast, cases according to chapter 21 of the aforementioned Parents and Child Code are handled by the administrative court system, and petitions based on the Implementation Act, paragraph 11, are likewise tried within the administrative court system. Hence, the competent court to hear a petition for the return of a child is the first level court in the district where the child is residing. An alternative forum is the first level administrative court in the district where the child is temporarily staying, or if the whereabouts of the child or the abductor is not known, the first level administrative court in Stockholm.

An application must be made in writing, duly signed; include contact details of the parties and their legal representatives; and must set forth the applicant's request and the legal basis for the request. It must also include a certified copy of the decision or judgment that is the basis for a judicial petition in accordance to the Hague Convention. The application also must contain the name of the concerned child, the date of birth, and present whereabouts of that child.[29]

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[24] Governmental Bill, Proposition 1992/93:139, 26-29.

[25] Abducting a child can also fall under the general provision on kidnapping and confinement as regulated in ch. 4 of the Penal Code, and this provision prevails over the provision on arbitrary conduct concerning a child. With respect to the latter crime, the prosecutor may only indict in cases in which prosecution is called for in the public interest.

[26] *See* the unofficial comment of the Swedish penal law, Lena Holmqvist *et al.*, *Brottsbalken – En kommentar* (supplement 10, 2003).

[27] The Swedish Penal Code SFS 1962: 700 (as amended), ch. 7, ¶ 4.

[28] The right to appeal is in certain cases restricted, and petitions for appeal need normally to be filed within 3 weeks.

[29] S*upra* note 5, ¶ 14 and Regulation on the Recognition and Enforcement of Foreign Custody Decisions, etc. and the Return of Children SFS 1989:177, ¶ 6. For general requirements, *see* Law on Procedural Matters in Administrative Courts SFS 1971:291 (as amended).

B. Court Proceedings in Return Cases

A petition based on paragraph 11 of the Implementation Act is heard by a panel consisting of one professional judge and non-legally trained judges, "lay-judges" (normally local politicians), each with one vote. As a point of departure, cases before civil courts are usually tried based on information presented at an oral hearing, whereas cases in the administrative court system are often decided without any oral hearing. The Implementation Act, however, states that the administrative court will hold oral hearings before rendering a judgment. The hearings are conducted in Swedish, and if considered necessary, with the assistance of certified interpreters provided by the court. The Central Authority can help translate documents to be presented in court.

Courts have a responsibility to make sure that the cases they hear are thoroughly examined and, although it rarely happens, courts are empowered to seek evidence *ex officio*, and independently of the evidence the parties have presented. As part of the courts' responsibility to thoroughly examine their cases, the Implementation Act prescribes that there is a presumption that the court will hear the child and his wishes before deciding a case. This can be done either at an oral hearing or the court can order the social authorities to ask the child his wishes out of court (i.e. usually before a hearing and often in an informal and relaxed setting, such as at the child's home, and without either parent present to ensure that the child is not pressured). The court may also request that the social authorities assist in investigating other matters, as the court deems necessary.[30]

The court may, before it decides a case on its merits, assign a member of the local social authorities' board, a civil servant with the social authorities, or any other person the court deems fit for the assignment, to mediate between the parties for the purpose of reaching an out-of-court settlement of the dispute. The assigned person is obliged to report back to the court on the outcome within no more than 2 weeks.[31]

Pursuant to articles 2 and 11 of the Hague Convention, and as stated in paragraph 15 of the Implementation Act, return cases should be handled speedily. If a case had not been decided within 6 weeks from the time a petition was filed, the court must on the request of the applicant, or a representative of the applicant, state the reasons for this delay. In order to ensure a speedy handling, if the court finds that assigning a mediator would prolong the process unnecessarily and mediation attempts will likely be unsuccessful, the court is not obligated to appoint a mediator.

IV. Law Enforcement System

The enforcement mechanism provided for in the Implementation Act is influenced by, and concurs to great extent with, those available in a purely domestic setting.[32] If the abducting parent does not respect a court order to hand over of the child, courts are provided with two enforcement mechanisms, the imposition of monetary fines and the assistance of the police. Courts are given great leverage to independently decide when to act and what course of action to take, including proscribing both in conjunction.

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[30] Such matters could, *e.g.*, be the objective and subjective circumstances surrounding the habitual residence of the child. In general, the social authorities are responsible for the welfare of all persons, including children, residing within their area of authority. Even in cases where the persons are not permanently living in the area and only passing by, the social authorities are required to care for their welfare.

[31] *Supra* note 5, ¶ 16, § 2. The court may in exceptional cases prolong the time assigned. The paragraph corresponds with domestic regulations in the Parents and Children Code; *supra* note 17, ch. 21.

[32] The Implementation Act and Parents and Children Code, ch. 21 should regarding international child abductions be read together.

With respect to monetary fines, when delivering a judgment for the return of a child, the court can oblige the taking parent to hand the child over within a specific time period or at a certain date and time, failing which the parent is to pay a monetary penalty (an administrative fine). The court will set a sum that it deems appropriate considering the circumstances in the case. Monetary penalties can, however, be a less suitable enforcement mechanism, as they allow the parties to prolong the judicial proceedings considerably. A court injunction of monetary penalties can be appealed independently of the judgment on the material issue. After the petition for appeal has been settled, the court imposes the fine by delivering a separate decision, and that decision, in turn, can be separately appealed. Additionally, a court injunction, as generally any court order, needs to "gain legal force," which normally takes three weeks, before a court can hand down a decision to impose the court order. In summary, monetary penalties are not a reliable means to ensure the prompt enforcement of court orders.[33]

In cases in which the court assumes that a monetary penalty will not have the desired effect, the court may decide that the child will be handed over with the assistance of the police. As a practical matter, a pediatrician, child psychiatrist, or child psychologist should be present during the hand over, and the police have a general obligation to carry out their assignments as mildly and as compassionately as possible with due regard to the best interest of the child.[34]

If there is an imminent risk that the child will be abducted abroad or that a forthcoming court order for the return of the child will be obstructed, the court may order that the child be taken into custody immediately and placed with the applicant or other relatives for example. In practice, the hand over will normally be carried out with the assistance of the social authorities, and the court can issue further instructions on access rights in conjunction with the decision.[35]

If court proceedings have not been initiated, or if an imminent abduction of a child is brought to the attention of the police, the police are empowered to interlocutory take charge of the child. In this instance, the child could be placed under the care of the social authorities or placed at a children's hospital. It is not recommended that the child be placed with the petitioning parent. Further, the police will consult the social authorities and a medical doctor if possible, and promptly inform the administrative court, which will establish if the measure will be endorsed or lifted. As an alternative and less intrusive measure to taking the child into custody, the police may request that the child's passport be surrendered.[36]

Neither courts, nor the police can order that a non-cooperating parent be arrested or imprisoned.

V. Legal Assistance Programs

There is no administrative or other fee for filing an application with State Department for Foreign Affairs. However, in its decision or judgment the court may oblige one party to assume the other party's

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[33] A few years after the adoption of the Implementation Act, a review was made, which highlighted this problem and proposed increased leverage for courts to request the assistance of the police, *see* the preparatory works; Departementserien 1992:39, and in particular 22-23.

[34] For example, the police should avoid drawing unnecessary attention to the operation, and therefore, not wear police uniforms or use marked police cars.

[35] *Supra* note 5, ¶ 19.

[36] *Supra* note 24, at 36.

expenses incurred in connection with the case.[37] Included herein are lawyers' fees, expenses with respect to witnesses and translation of documents, and travels expenses to attend hearings. There is a public program for legal aid, which can cover, upon request, expenses for such fees as legal counsel and expenses that the court has obliged the party to pay. It is possible for a non-Swedish citizen, not residing in Sweden, to request be included in the program. The program also covers legal expenses for Swedish citizens abroad.[38]

VI. Conclusion

Sweden has been a participant to the Hague Convention for some 15 years and now has in place detailed regulations, a fair amount of guiding case law and administrative routines. The material content of the Hague Convention is indeed integrated into Swedish family law, and its application is influenced by family law principals such as "in the best interest of the child," a preference for parental cooperation, and an inclination for voluntary and out-of-court settlement of family disputes. In this respect, Sweden's potentially biggest problem is the forced return of a child when the taking parent is not willing to comply with a court order. Swedish family law does not provide for an institutional equivalent to a contempt of court sanction; however, considering the statistics of settlements in return cases between the United States and Sweden and an otherwise functioning and effective family law, the practical entailments of this absence appear to be of less magnitude.

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April 2004

[37] See decision by the Supreme Administrative Court, case no. 8516-1999, decided on Sept. 9, 2002.

[38] The Legal Aid and Advice Act SFS 1996:1619 (as amended).

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HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

With a ratification date of October 11, 1983,[1] Switzerland was among the first countries to adopt the Hague Convention on the Civil Aspects of International Child Abduction[2] (hereinafter the Hague Convention), and it appears that Switzerland has applied the Convention with the same directness of purpose with which it was adopted. The Swiss practice has been characterized by a relative large number of outgoing and incoming requests,[3] and the latter have led to a predictable case law[4] and a consistent legal literature[5] that interprets the Convention according to its primary purpose of effecting a speedy return of the child. Recently, however, a few "hardship cases" in which the courts ordered the return of children to potentially troublesome environments have caused the Swiss government to work toward a modification of the Hague Convention that would permit the courts to place more emphasis on the best interest of the child when deciding on a return request.[6]

I. Domestic Laws and Regulations Implementing the Hague Convention

A. Statutory Law – Implementation in General

There is no implementing act at the federal level and there appear to be none in the 26 cantons. The only federal provision is contained in the organizational regulation of the Federal Cabinet, and it

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[1] Bundesbeschluss, June 21, 1983, AMTLICHE SAMMLUNG DES BUNDESRECHTS [AS] 1694, art. 1, lit. (b). Effective date: January 1, 1984 [Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] no. 0.211.230.02].

[2] The Hague, Oct. 25, 1980, TIAS 11670.

[3] In 1997, it was stated that Switzerland received a total of between 60 and 80 incoming and outgoing requests per year [H. Kuhn, *"Ihr Kinderlein bleibet, so bleibet doch all,"* 6 [ARCHIV FÜR JURISTISCHE PRAXIS (AJP) 1093 (1997)] and in 2002, it was stated that the number of received requests had risen to 113 requests in 1998, 103 requests in 1999 and again in 2000, and 102 in 2001. About half of these requests were from other countries, and it appears that in more than one half of these incoming requests the return of the child was effected [C. Schmid, *Neuere Entwicklungen im Bereich der internationalen Kindesentführungen*, 11 AJP 1325 (2002)]. In 2002, according to the Federal Department of Justice, 46 requests were received, most of them from European neighbouring countries; 6 of these were for visitation rights. Of the 53 outgoing requests (21 of them for visitaiton right), 8 went to the United States [*Mütter entführen Kinder eher als Väter,* SDA – BASISDIENST DEUTSCH, May 27, 2003, LEXIS/NEWS].

[4] *Infra* notes 12, 13, 44, and 45, and the accompanying text.

[5] Kuhn *supra* note 3; Schmid *supra* note 3. N. Rusca-Clerc, *La Convention de La Haye sur les aspects civils de l'èvement international d'enfants du 25 octobre 1980*, 6 AJP 1072 (1997); F. Abt, *Der Ordre-Public Vorbehalt des Haager Übereinkommens über die zivilrechtlichen Aspekte internationaler Kindesentführung,* 6 AJP 1079 (1997); Bernard Deschenaux, L'ENLÈVENEMENT INTERNATIONAL D'ENFANTS PAR UN PARENT (Berne, 1995).

[6] Several parliamentary motions [among them, Nationalrat 03.3235 Motion Leuthard – Kindeswohl und Haager Abkommen, May 8, 2003, *available at* http://www.ofj.admin.ch (last accessed April 2, 2004)] caused the Federal Cabinet to promise that it would work toward a modification of the Hague Convention that would allow more consideration for the best interest of the child in hardship cases [Eidgenössisches Justiz- und Polizeidepartement, Medienmitteilung, Sept. 19, 2003, *available at* http://www.ejpd.admin.ch, (last accessed Mar. 30, 2004)].

lodges the Central Authority within the Federal Justice and Police Department.[7] It can be deduced from the statistical figures on requests and on their resolution that the Central Authority has shown some vigor in the exercise of its responsibilities. Moreover, its representatives appear to have consistently worked toward educating the legal professions, in particular, judiciary in the cantons, about the dominant purpose of the Hague Convention, which in Switzerland is viewed as the speedy return of the child.[8]

According to Central Authority representatives, one third of the Hague Convention return requests can be resolved easily, and another third after some concerted efforts on all parts. The remainder of the cases are likely to generate multiple court decisions.[9] Moreover, it appears from the Swiss perspective that visitation rights are not easily enforced under the Convention.[10]

B. Implementation by the Courts

In the years 2002 and 2003, it appears that the Federal Court decided a total of four Hague Convention cases in which the return of the child had been requested,[11] and the outcome in all these cases was in favor of the return. In two of the decisions,[12] a constitutional complaint against a judicial return order was dismissed, thus upholding the lower court's return orders. In the two other cases[13] the refusal of the lower courts was rescinded, and the cases remanded.

These decisions rely on earlier Swiss and German case law in their interpretation of the purposes of the Hague Convention, yet these legal principles are applied in a manner that shows much respect for treaty law. A common thread found in the Court's reasoning is that exemptions from the governance of the Convention must be interpreted narrowly. Thus, the Court held that financial hardship or lack of familiarity with the language or the environment in the country of return are not a grave risks within the meaning of article 13 paragraph 1, letter (b) of the Convention; it also held that children can be expected to return to a jurisdiction even if violence of the father has been alleged, on the strength of the thought that the child need not live with the father until the custody issue has been decided.

Other recurring themes in the Court's reasoning are that the risk of grave harm to the child must be proven, not merely alleged, in order for the exemption to be applicable, and that the abducting mother should not benefit from her lawless conduct. The exercise of custody within the meaning of the Convention has also been found to exist in the case of a claiming father who merely had visitation rights.

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[7] Organisationsverordnung für das Eidgenössische Justiz- und Polizeidepartement, Nov. 17, 1999, SR no. 172.213.1, as amended, art. 7 ¶ 7. The address of the Central Authority is: Zentralbehörde zur Behandlung internationaler Entführungen, Bundesamt für Justic, Bern 3003 Switzerland. Telephone: 43 .31.322.4139 Fax: 43.31.322.7864.

[8] Schmid *supra* note 3; Kuhn *supra* note 3.

[9] Between 1998 and 2002, 60 court decisions were issued in 36 cases dealing with the return of the child. Of these, 54 were issued by cantonal authorities, and six of these were issued by the Federal Court. During the same period, only one decision dealt with visitation rights [Schmid *supra* note 3].

[10] *Id.*

[11] This, at least, is the result of a search on the Federal Court's website [www.bger.ch (last accessed Mar. 30, 2004)]. This number is not necessarily complete because the Federal Court appears to be under no obligation to publish all decisions.

[12] Bundesgericht [BGer, Federal Court] decision, Apr. 23, 2003, docket no. 5P. 128/2003/min; BGer decision, April 11, 2002, docket no. 5P. 65/2002/bnm.

[13] BGer decision, March 27, 2003, docket no. 5P. 71/2003 /min; BGer decision, Nov. 18, 2002, docket no. 5P. 310/2002 /zga.

In favor of a speedy return are also statements of the Court that limit the necessity for psychological testimony and for the interrogation of children of a tender age. According to the Court, no benefit can be gained from questioning children below the age of 6.

These most recent decisions of the Federal Court appear to be in keeping with the previous practice of the Swiss courts, which have denied the "grave harm" exception when: the depressive mood of the claiming parent may have been caused by a fight between the parents; the child had to be cared for in child care facility in the country of return; the claimant was in financial distress; an unfavorable custody decision (from the viewpoint of the abductor) can be expected after the return of the child; the return would deprive the child of a familiar environment or the company of the mother; the abducting parent submitted expert testimony on the best interest of the child; the requesting parent had been violent against the abducting parent; and other similar situations arise. Conversely, the risk of grave harm was found to exist when the father had a serious drug problem and the authorities of the country of residence had not ordered protective measures for the child, and when the health of the child did not allow him to be moved.[14]

By the year 2003, however, the "toughness" of the Swiss courts, particularly the Federal Court, in brushing aside arguments of the abducting parent, led to a fair amount of public opinion against the Hague Convention, which in turn caused the Parliament to urge the Federal Cabinet to work toward a change in the Convention.[15]

II. Domestic Laws regarding Child abduction and Parental Visitation

A. Child Abduction

1. Civil Provisions

There appear to be no specific provisions in federal law on the consequences of child abduction within Switzerland. If a divorce is pending, the Swiss Civil Code gives the family courts the power to order provisional custodial measures, upon request of one of the parents, to take care of the situation until a custody decision is made in the divorce proceeding.[16] Provisional decisions on custody and visitation must be guided by the best interest of the child, taking into account, in particular, the desirability of continuity in the child's environment.[17]

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[14] All described by Schmid, *supra* note 3, in reliance on cantonal decisions.

[15] *Supra* note 6 and accompanying text; *infra* note 46.

[16] Schweizerisches Zivilgesetzbuch [ZGB, Swiss Civil Code], Dec. 10, 1907, SR no. 210, as amended, art. 137.

[17] I. Schwenzer, PRAXIS KOMMENTAR SCHEIDUNGSRECHT 416 (Basel, 2000).

2. Custody

In January 2000, a reform of the Civil Code[18] went into effect that has introduced the possibility of joint custody after a divorce and also for unmarried parents. Although the court, without further prompting, still awards custody to the better-suited parent, joint custody can be awarded when both parents petition for it and are in agreement on the division of child care and financial support and when the court finds this agreement reconcilable with the best interests of the child.[19] According to these principles, parents are qualified to exercise joint custody if each of them qualifies for sole custody.[20]

Joint custody decisions are made by the courts, and they spell out in great detail the amount of care that each parent gives to the child and the amount of financial support for which each parent is responsible. In custody decisions, the parents, the child, and the youth protection agencies have hearing rights, but the decision is made by the court acting *ex officio.*[21] Custody decisions at time of divorce must be made by the divorce court, and this court retains jurisdiction over changes in custody. However, guardianship authorities, which can be considered as quasi-judicial or administrative agencies, still retain some rights of intervention, although one of the purposes of the 2000 family law reform was to centralize decisions on guardianship in the courts.[22]

Swiss case law indicates that the Swiss courts live up to the prohibition of article 16 of the Hague Convention by refusing to issue custody decisions in unresolved requests for the return of the child.[23]

3. Criminal Provisions

According to article 220 of the Swiss Criminal Code,[24] it is a criminal offense to take a child away from someone with custody rights or to refuse to return the child to the person who has custody, yet the offense is prosecuted only upon request of the person whose custodial rights were breached. The offense is punishable with imprisonment of between 3 days and 3 years or a fine of up to 40,000 Swiss Franks (US$31,318). The courts have refused to apply the provision to minor transgressions, such as an abuse of visitation rights,[25] and penalties tend to be mild.[26]

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[18] Schweizerisches Zivilgesetzbuch, Änderung, Jun. 26, 1998, AS 1999 at 1118.

[19] ZGB, as amended art.133.

[20] Schwenzer, *supra* note 17, at 358.

[21] *Id.*

[22] *Id.* at 381.

[23] *Infra* note 42, and accompanying text.

[24] Schweizerisches Strafgesetzbuch [Swiss Criminal Code], Dec. 21, 1937, SR no. 311.0, as amended.

[25] S. Trechsel, SCHWEIZERISCHES STRAFGESETZBUCH 757 (Zürich, 1997).

[26] In one recent case, the Federal Court upheld a decision of the Appellate Court of Zürich in which a mother was convicted of taking the child away in breach of the custody rights of the father, for which she was sentenced to 27 days in prison, suspended by a two year probationary period. [BGer decision, July 2, 2002, docket number 6S. 681/2001 /pai].

B. Parental Visitation

The family law reform of the year 2000 replaced the term "visitation rights" with the term "rights of personal contact" in order to emphasize that children, as well as parents, are the beneficiary of these rights. If there is joint custody, visitation is regulated as described above (sub-chapter on custody). If one parent has sole custody, then the other parent may petition the guardianship authority[27] to determine the extent and the circumstances of personal contact, and this determination is entirely dependent on the circumstances. Parents owe each other a duty of good conduct, and they are not allowed to influence the child against the other parent.[28]

In the Swiss practice, visitation rights are rarely enforced by coercive means, even though theoretically enforcement would be possible. According to Swiss legal doctrines, coercive enforcement of visitation rights would not be in the best interest of the child.[29]

III. Court System and Structure – Courts Handling the Hague Convention

The Swiss court system is still remarkable for its decentralization, even though the federal influence has been increasing in recent years. Each of the 26 Swiss cantons organizes its own court system and enacts its own procedural laws.[30] The cantonal courts apply federal law, which includes the bulk of criminal and civil law, and legal uniformity is achieved to some extent through the Federal Court, which is available for most actions as the court of last resort, either as the ultimate appellate instance or by adjudicating constitutional complaints.[31]

The Federation has a long tradition of encroaching upon the procedural independence of the cantons by scattering jurisdictional, procedural, and evidentiary provisions throughout various acts and codes dealing with substantive laws.[32] A good example of this practice are the jurisdictional provisions on custody and visitation that are included in the 2000 reform of family law.[33] It appears that these provisions have increased the role of the courts of ordinary jurisdiction in matters relating to the law of parent and child, while still leaving much room for the role of guardianship offices and related quasi judicial bodies.

An even more organized approach toward unifying procedural law has been the drafting of a Swiss Code of Civil Procedure that has entered the lengthy and cumbersome Swiss legislative process[34] and the

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[27] The determination is to be made by the court if the decision is to be made during a custody proceeding [ZBG, art. 275].

[28] ZGB, arts. 273 and 274.

[29] T. Sutter and D. Freiburghaus, KOMMENTAR ZUM NEUEN SCHEIDUNGSRECHT 385 (Zürich 1999).

[30] F. Desmontet, INTRODUCTION TO SWISS LAW 268 (Zürich, 1995).

[31] Bundesgesetz über die Organisation der Bundesrechtspflege [OG, Federal Administration of Justice Act], Dec. 16, 1943, SR 173.110, as amended.

[32] R. Frank *et al.*, KOMMENTAR ZUR ZÜRCHER PROZESSORDNUNG 15 (Zürich, 1997).

[33] *Supra* note 18.

[34] Vernehmlassungsverfahren, Vereinheitlichung des Zivilprozessrechts, July 8, 2003, BUNDESBLATT at 4843.

enactment of a Federal Act on Jurisdiction in the year 2000.[35] The latter became effective in January 2001, and it provides a federal framework of rules for local jurisdiction in civil cases. However, not all proceedings involving children fall under this federal act. Whereas custody decisions resulting from a divorce may be governed by its article 15, giving jurisdiction to the local court of the spouses' residence, proceedings dealing with the protection for children and with guardianship are exempt from the Act and remain governed by cantonal provisions.

Hague Convention proceedings also appear to be exempt from the governance of the Federal Local Jurisdiction Act, because Hague Convention proceedings are not perceived as being civil proceedings by Swiss authorities and case law. Instead, they are considered to be acts of mutual assistance of an administrative nature.[36]

In Switzerland, Hague Convention requests are handled by a wide variety of judicial and quasi-judicial institutions in the first instance. These include justices of the peace, guardianship offices, and even local administrative authorities in a few cantons, while in the majority of the cantons president of the local court or a single judge at such a court handles first instance Hague Convention proceedings. Given the divergence in adjudicating authority, it is not surprising that the type of proceeding employed also varies, with some of the cantons using summary proceedings for the first instance adjudication of a contested request.[37]

There is more uniformity at the appellate level. The cantons have one or several appellate courts and these decide Hague Convention requests in the second instance.

The court of last resort is the Federal Court [Bundesgericht]. However, due to the allegedly administrative nature of the Hague Convention requests, the Federal Court does not decide Hague Convention appeals in a regular third instance proceeding that would be available for a civil judgment. Instead, the Federal Court reviews Hague Convention decisions only in response to a constitutional complaint, that is, either a complaint that a constitutional principle has been violated, or that a treaty has been violated. According to the latest practice of the Federal Court, facts are not reviewed in a constitutional complaint.[38] This is a change from the practice a few years ago when new facts could be reviewed in a complaint that alleged treaty violations.[39] The Court's refusal to review the facts or consider new pleadings may be one of the reasons why constitutional complaints about Hague Convention requests often are dismissed by the Court.[40]

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[35] Gerichtsstandsgesetz, [GestG, Act on Local Jurisdiction in Civil Matter] March 24, 2000, SR 272, as amended, effective date Jan. 1, 2001.

[36] BGer decision Apr. 23, 2003, docket no. 5P. 128/2003/min.

[37] Deschenaux, *supra* note 5, at 30.

[38] BGer decision, Apr. 23, 2003, docket no. 5P. 128/2003/min and earlier cases cited therein.

[39] H. Walder-Richli, ZIVILPROZESSRECHT 469 (Zürich, 1996); OG art. 84.

[40] *Supra* note 38.

IV. Law Enforcement

Enforcement of an order to return a child may be hindered by a court decision holding that such a course of action would not be in the best interest of the child.[41] This happened in a case that occupied the Swiss courts for at least 5 years. The father, a U.S. citizen, requested the return of the child in September 1996, and this request resulted in a final decision of the Federal Court of August 6, 1997, that upheld the return order.[42] Two attempts at execution failed in October 1997. The father petitioned again for execution in November 1998, and this time he was rejected in all three instances, with the Federal Court holding that the lower courts were justified in denying execution due to the changed circumstances caused by the lapse of time.[43] In the meantime the mother petitioned the Zürich appellate court to revise its judgment and to deny the return of the child, so that the mother could file for a custody decision. Two Zürich instances rejected this appeal, and the Federal Court denied a constitutional complaint in October, 2001,[44] thus leaving the parties in limbo, with the mother not being able to obtain a proper custody decision and the father not being able to effect the return of the child.

The case shows that Hague Convention proceedings that are carried through three instances take a certain amount of time, and that enforcement decisions again give opportunity for court decisions through several instances. Ultimately, enforcement may be denied, even if a return order was valid and had become final.

In a more recent case, however, it appears that the Swiss authorities enforced a return order in August 2003, following a Federal Court decision in November of 2002.[45] This, in turn, contributed to a grassroots movement for an amendment of the Hague Convention, so the courts could take the best interest of the child into consideration.[46]

V. Legal Assistance Programs

Not having made a reservation according to article 42 of the Hague Convention, Switzerland lives up to the Convention's article 26 by not charging any court fees for contested Hague Convention requests and also by providing free attorney services. In the Swiss view, the granting of legal assistance to all requesters speeds up the process and frees the Swiss judge from determining the poverty levels of the foreign countries. However, on the principle of reciprocity, Switzerland limits this free service to indigent requesters, if they come from a country that has made a reservation to article 26 of the Convention. In

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[41] BGer decision, Sept. 13, 2001, docket no. 5P. 160/2001.

[42] The Federal court dismissed the constitutional complaint against the decision of the Zürich appellate court [BGer decision, docket no. 5 P. 127/1997, 123 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS II 419.]

[43] *Supra* note 41.

[44] BGer decision Oct. 16, 2001, docket no. 5P. 477/2000/ZBE/bnm.

[45] BG decision, Nov. 18, 2002, *supra* note 123 and accompanying text. In this case, the return of the children to New Zealand was enforced four years after the children had left New Zealand. The mother had originally abducted the children to her native Germany. When the German courts ruled for the return of the children, she fled to Switzerland where the courts again ruled for the return. Public opinion was upset about the case because the New Zealand court had, for some time limited the fathers' visitation rights due to propensity for violent conduct [*infra,* note 46].

[46] R. Eigenmann, *Zwei Kinder müssen zurück ins Ungewisse*, TAGES-ANZEIGER 12 (August 29, 2003).

these cases, Switzerland provides free services only to those qualifying for legal assistance, and this determination is made according to the applicable cantonal provisions.[47]

The cantonal legal assistance provisions usually specify that the court will grant legal assistance for the court costs and for the services of an attorney, for any procedural steps of the party that are not obviously futile or inadmissible,[48] to the extent that the poverty of the party necessitates assistance. Income levels are set through cantonal regulations. In the canton of Bern, the income threshold currently appears to be a monthly gross income of 1,430 Swiss Francs (US$1,096), which, however, may be subject to judicial adjustments.[49] There appears to be, however, much variance in the cantonal provisions and the cantonal practice, and it has been suggested that the Swiss courts frequently deny legal assistance retroactively, in the judgment, by stating that the complaint was spurious.[50]

The Federal provisions for legal assistance are similar to the cantonal ones,[51] and it appears that the Federal court also applies stringent criteria in granting legal assistance and, when these are not met, readily denies legal aid when dismissing a case with costs.[52]

VI. Conclusion

It appears that Switzerland has been applying the Hague Convention frequently and consistently and that the Swiss practice has stressed the return of the child as the primary purpose of the Convention, while establishing some case law principles on the circumstances that justify a refusal. Considering the rich diversity of legal and ethnic cultures found in Switzerland, the straightforwardness of the Swiss legal practice is even more remarkable. Much of the credit for this model approach toward administering and adjudicating Hague Conventions requests goes to the Central Authority and the Federal Court. However, the admittedly weak points within this system of implementation appear to be enforcement of returns by coercive means, which appears to be accomplished in some but not all the cases, and the enforcement of visitation rights, for which the Convention is not specific enough, according to Swiss authorities.

The Swiss approach in ruling for the return of the child in cases that may impose some hardship on the child or the returning parent appears to be influenced by two factors. One of these is the dislike of lawlessness, specifically the consideration that a kidnapper should not benefit from his (or, in most

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[47] Schmid, *supra* note 3, at 1336.

[48] For the Canton of Bern, Zivilprozessordnung für den Kanton Bern, July 7, 1918, BERNISCHE SYSTEMATISCHE GESETZESSAMMLUNG no. 271.1, as amended, Arts. 77 - 82 (a); for the Canton of Zürich, H. Walder-Richli, *supra* note 39, at 385.

[49] Kanton Bern, Appellationshof, Kreisschreiben No. 18 (Jan. 21, 2002).

[50] V. Bueller, *Recht bekommen ist oft eine Frage des Portmonnaies, available at* www.selezione.ch/justiz, (last accessed Mar. 26, 2004).

[51] OG art. 152.

[52] *Supra* note 44.

cases, her) actions. The other appears to be a certain rectitude and willingness to honor agreements, even if it is difficult to do so. It may be typical of the Swiss understanding of treaty obligations that the return of children in a difficult case calls for attempts to change the treaty,[53] rather than subterfuge in expansive treaty interpretations in adjudicating the individual case.

Prepared by Edith Palmer
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April 2004

[53] *Supra* note 6.

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UNITED KINGDOM

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The United Kingdom has actively implemented the Hague Convention on the Civil Aspects of Child Abduction into its national laws. It has been compliant in pursuing cases under the spirit of the Convention to ensure the safe return of children to their country of habitual residence; however, when the courts have felt that such return would be detrimental to the child, they have utilized the exemptions within the Convention to ensure that the interests of the child are protected.

The abduction of children, i.e., taking them away without the consent or authority of persons who have the lawful right to care for them, has long been considered kidnapping, a common law criminal offense, that is also committable by parents. In recent years, aided by quick and affordable means of travel, an international dimension has been added to the problem of children being wrongfully taken across state frontiers, away from their country of habitual residence.

Acts of local abduction within a country are dealt with by state courts, and the rights of the parties are determined according to the legal test of what is in the "best interest of the child" concerned. The problem is felt more acutely when a family dispute arises among parents of diverse national origins, who reside in one country, and a parent takes a child to the country of his origin to seek protection under its laws. In such cases, the rights of the parent from whom the child has been abducted cannot effectively be enforced in domestic courts. Courts are traditionally hesitant to cede jurisdiction to another country when litigants are present within their own jurisdiction. Reflecting their own cultures, the courts may decide the test of the best interest of a child based on their own notions of family relations.

Increasing concerns about international abductions have led to the formulation of international agreements to combat the problem. At least two such major agreements have been reached in order to deter international child abduction and to provide for the quick return of a wrongfully removed child to his home country. These agreements provide civil law remedies, but do not deal with any criminal aspects of child abduction.

I. Domestic Laws and Regulations Implementing the Hague Convention

The United Kingdom ratified the Hague Convention on the Civil Aspects of International Child Abduction on August 1, 1986, when the Child Abduction and Custody Act 1985 came into effect.[1] Section 1 of the Act grants the Convention the force of law in the United Kingdom, and section 2 authorizes the issuance of Orders in Council specifying the contracting states to the Convention.[2] The Convention applies only to children under the age of 16 and only in cases in which the child who has been wrongfully removed or retained had been habitually resident in a contracting state. Under the Act, a removal or retention is considered wrongful under the law of habitual residence when it occurs in breach

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[1] The Child Abduction and Custody Act 1985, ch. 60 [hereinafter the Act]. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter "the Convention] is set out in Schedule 1 of the Act. The Act also ratified the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody and Children, signed at Luxembourg on May 20, 1980. The European Convention is outside the scope of this report.

[2] The Child Abduction and Custody (Parties to Conventions) Order 1986, S.I. 1986, No. 1159, as amended.

of custody rights, which were exercised or would have been exercised but for the removal or retention. A removal that is not in breach of domestic law may nevertheless be 'wrongful' under the Convention.[3] In a case where a person has custody pursuant to an interim order of a foreign court, this in itself does not justify the child's removal from the foreign jurisdiction, particularly when another person had been granted access to a child under the order.[4] The court is bound to order the return of a child if the application is brought within 12 months of the wrongful removal or retention. For applications made after the 1 year period, the court must still order the child's return, unless it is demonstrated that the child is now settled in its new environment.

A contracting state is required to set up a Central Authority, which must undertake several measures, including to:

- discover the whereabouts of the child
- prevent further harm to the child
- secure the voluntary return of the child or bring about an amicable resolution of the issues
- initiate judicial proceedings with a view to return of the child
- provide legal aid and advice
- make necessary and appropriate administrative arrangements to secure the safe return of the child[5]

The Act establishes the following Central Authorities within the United Kingdom:

- In England & Wales - the Lord Chancellor,[6] whose duties in this regard are carried out by a Child Abduction Unit ("CAU")[7] under the administrative control of the Official Solicitor of the Supreme Court, an independent, semi-judicial authority
- In Scotland - the Secretary of State, whose functions in this regard are carried out by the Scottish Court Administration[8]

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[3] In *Re F (A Minor: Abduction, Custody Rights Abroad)*, [1995] Fam. 224, a mother who was not in breach of domestic law in removing her child from Colorado was nevertheless held to be in breach of the father's right of custody. In relation to unmarried fathers and their rights of custody, a Practice Note delineating those rights discusses court decisions that expand the concept to include more than strictly legal rights: *Practice note: Child Abduction and Custody Act 1985*, 142 Sol. J. 114 (Feb. 6, 1998).

[4] *Re E (A Minor: Abduction)* [1989] 1 FLR 135 (CA).

[5] Convention, art. 7.

[6] Recent constitutional changes have seen the replacement of the Lord Chancellor's Department with the Department for Constitutional Affairs.

[7] The address is: Lord Chancellor's Department, Child Abduction Unit, 81 Chancery Lane, London, WC2A 1DD. Telephone: 44 0171 911 7047/7094. Fax: 44 0171 911 7248, *available at* http://www.offsol.demon.co.uk/cauopefm.htm.

[8] Scottish Executive Justice Department, Hayweight House, 23 Lauriston Street, Edinburgh EH3 9 DQ. Tel: 44 131 229 9200. Fax: 44 131 221 6894, available at website: http://www.scotland.gov.uk/who/dept_justice.asp.

- In Northern Ireland - the Northern Ireland Court Service, as designated by the Lord Chancellor[9]

The Act does not provide specific guidance on how a Central Authority is to proceed in undertaking the measures set out in article 7, and, although section 10 of the Act authorizes rules of court being made, no such rules have been issued.

There is no specified form for making an application to a Central Authority; an application will be accepted in any form provided it includes sufficient details, including:

- the identity of the applicant, the child, and the person alleged to have removed or retained the child
- the date of birth of the child, if available
- the grounds on which the claim for return of the child is made
- all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be[10]

The website for the Central Authority in England and Wales contains an application "questionnaire" that also requests information on the circumstances surrounding the removal of the child from the United Kingdom and the subsequent retention overseas, as well as any court proceedings that are underway or that have already taken place.[11]

When a Central Authority receives an application for the return of an abducted child, a solicitor (general attorney) who has experience in child abductions matters is assigned the case. The solicitor will take the applicant's (now the client's) instructions; assemble the evidence, if necessary with the help of the Central Authority; and file affidavits of facts on the relevance of the foreign law. A decision of a judicial or administrative authority outside the United Kingdom may be proved by an authenticated copy of the decision; a copy is deemed to be a true copy unless the contrary is shown.[12] The solicitor is also responsible for applying for legal aid under the state program providing assistance to those seeking legal services, based on the merits of the case and a means test (*see* below for further details). The solicitor will also instruct a barrister (litigation attorney) to represent the applicant at the court hearing.

The solicitor may also obtain an ex parte court order to protect the child immediately, including an order for the surrender of passports, and for prohibiting the removal of the child from the jurisdiction of the court or a particular location. If the whereabouts of the child are not known, an order will be sought that either authorizes a search for the child or requires the disclosure of information from a person who is believed to have any relevant information.[13] It is generally not necessary for an applicant seeking the return of a child to attend the hearing.

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[9] Northern Ireland Courts Service, Legal Advisor's Division, Windsor House, 5 Bedford Street, Belfast BT2 7LT. Tel: 44 2890 328594. Fax: 44 1232 439 110.

[10] The Convention, *supra* note 1, art. 8.

[11] The Office of the Solicitor to the Supreme Court and the Public Trustee, *Application (Questionnaire) for Return of a Child, available at,* http://www.offsol.demon.co.uk/cau_questionnaire_return.doc.

[12] The Act, *supra* note 1, § 7.

[13] *Id.* § 24A.

Article 13 of the Convention provides for certain defenses to an application that, if successful, grants a court the discretion not to order the return of the child. The defenses arise in cases in which the person having the care of the child was not actually exercising the custody rights at the time of removal; the removal or retention was consented to by the applicant parent, or where he had subsequently acquiesced to it; the return would pose a grave risk of physical or psychological harm to the child or place him in an intolerable situation; or the child objects to being returned, and has reached an age or degree of maturity at which it is appropriate to take account of those views.[14]

The United Kingdom has not adopted article 20 of the Convention, which provides that the return of a child "may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." The article was omitted as it was considered unnecessary given the other defenses and because at that time it had no clear meaning in English law. The United Kingdom has since enacted the Human Rights Act 1998,[15] which incorporates the European Convention on Human Rights into domestic law. However, an amendment to incorporate article 20 of the Hague Convention was rejected.[16]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The common law offense of kidnapping may be committed by a parent who takes away by force or fraud his own unmarried child under the age of 18, without lawful excuse and without the child's consent.

Under the Child Abduction Act 1984,[17] it is an offense for a person connected with a child under the age of 16 to take or send the child out of the United Kingdom without the appropriate consent. A "person connected with the child" is considered to be a parent, a reputed father,[18] a guardian, a person who has a residence order with respect to the child, or a person who has custody of the child. "Appropriate consent" can be given by each of the following: a child's mother, a child's father, if he has parental responsibility for the child; a guardian; a special guardian; anyone with a residence order or custody; or a person who has the leave of the court. No offense is committed if a person who has a residence order takes or sends the child out of the United Kingdom for less than 1 month, or in the case of a special guardian, less than 3 months.[19]

The maximum penalty under the 1984 Act is 7 year's imprisonment. However, prosecutions can only be brought with the consent of the Director of Public Prosecutions and are relatively rare.

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[14] Re: T (Abduction: Child's Objections to Return) [2000] 2 FLR 192 (CA).

[15] Human Rights Act 1998 Ch. 42 (Eng.).

[16] 583 Parl. Deb., H.L. (Nov. 27, 1997).

[17] Child Abduction Act 1984, ch. 37 (Eng.).

[18] Re C (Child Abduction) (Unmarried Father: Right of Custody) [2003] FLR 252 (Fam).

[19] *Supra* note 17, § 1(4).

The Children Act 1989,[20] section 8, makes provisions for the issuance of a contact order, a prohibited steps order, or a residence order; all are referred to as "a section 8 order," and impose an automatic prohibition on taking the child out of the United Kingdom. Such orders can be made ex parte, if necessary. In case of a contact order, if it is feared that the child may be abducted by the person exercising contact, the order may be varied to provide for the contact to be supervised. A child may also be made a ward of the High Court,[21] which prohibits his removal from the United Kingdom.[22] In such cases, a passport issued to a child may be required to be surrendered.[23]

An order preventing the removal of a child from the United Kingdom may be enforced by requesting the police to issue a "Port Stop"at points of departure.

B. Parental Visitation

Under the Children Act 1989, married parents have joint and equal parental responsibility over a child up to the age of 18 years. The Family Law Act 1996,[24] section 11, lists factors that a court must take into account in proceedings for a divorce or separation order. With regard to children of marriage, the court must treat the welfare of the child as paramount and have particular regard for:

> the general principle that, in the absence of evidence to the contrary, the welfare of the child will be best served by (i) his having regular contact with those who have parental responsibility for him and with other members of his family; and (ii) the maintenance of as good a continuing relationship with his parents as is possible…[25]

With regard to living arrangements, a court may issue a residence order in favor of two or more persons who do not live altogether.[26] The residence order may specify the periods during which the child is to live in the different households concerned. This order introduces an element of "time sharing," which is a feature of joint custodial arrangements in other countries.

The court may also issue an order requiring a parent with whom the child lives to allow him to visit or stay with the other parent.[27] The authority for a contact order is based on a presumption of reasonable contact in favor of parents and certain other individuals. The order is subject to the principle of welfare of the child and the courts' power of intervention. However, the power to deprive the child and parent of contact is not exercised lightly, and there must be sound justification for doing so. The fact

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[20] Children Act 1989, c. 41 (Eng.).

[21] Supreme Court Act ,1981, c. 54 (Eng.), § 41.

[22] Family Law Act 1986, ch. 55 (Eng.), § 38.

[23] *Id.* § 37.

[24] Family Law Act 1996, ch. 27 (Eng.).

[25] *Id.* § 11(4)(c).

[26] *Supra* note 22, at § 11(4).

[27] *Id.* § 8.

that contact arrangements may be difficult to operate, or that the child or the parent would prefer not to have contact, does not by itself provide justification for refusing it.[28]

In a great majority of divorces, however, the parties themselves work out the arrangements informally for the custody of children and rights of contact.

III. Court System and Structure – Courts Handling the Hague Convention

A. Family Proceedings Generally

Jurisdiction in family matters and matters relating to children is vested in three levels of courts: the High Court, the county courts, and magistrates' courts. The lowest level of proceedings is conducted in the magistrates' courts by lay persons assisted by a legally qualified clerk. In major metropolitan areas, legally qualified stipendiary magistrates sit in these courts. A number of proceedings, such as the issuance of care and supervision orders, parental contact, etc., must be commenced in magistrates' courts. Divorce and matrimonial matters must be commenced in a county court in which decisions are made by a district judge or circuit judge. The highest level of family proceedings is the Family Division of the High Court, which consists of specialist family judges. There is a selective divorce jurisdiction in the High Court, which has exclusive jurisdiction to issue an order making a child a ward of the court. Cases with an international aspect are most appropriately heard in the High Court.

Hearings in family matters are notionally adversarial, and a combative or hostile approach in cases involving children is discouraged by the court. The welfare of the child is paramount, and the court will restrict evidence that detracts from this focus. Although it is usual to present oral evidence with a chance to cross examine on contentious facts, affidavits or statements in advance are relied upon to a great extent in cases involving children. Moreover, such hearings are "in chambers," with parties and their lawyers present, but without public access. Thus, confidentiality is protected and publicity is actively discouraged.[29]

B. Under the Convention

All applications for the return of children wrongfully brought into the jurisdiction of the court are dealt with in London by a judge of the Family Division of the High Court.[30] The Clerk of the Rules, a Court official responsible for listing cases, ensures that they are listed for hearing very quickly, sometimes in 2 days. The court exercises control over the progress of the case; the litigants are not allowed to let the case "drift," and adjournments are limited to a maximum of 21 days.

The application brought in the High Court should be initiated by originating summons in a prescribed form,[31] but in emergencies applications may be made ex parte. The time limited for

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[28] ANDREW BAINHAM, CHILDREN: THE MODERN LAW 128 (2d ed. 1999).

[29] ANNE-MARIE HUTCHINSON AND HENRY SETRIGHT, INTERNATIONAL PARENTAL CHILD ABDUCTION 180 (1998).

[30] The vesting of jurisdiction in a single high level court avoids the problem of a large number of courts having potential jurisdiction to hear Convention applications.

[31] Family Proceedings Rules 1991, S.I. 1991/1247, ¶ 6.2.

acknowledging service of an originating summons is 7 days or such further time as the court may direct.[32] The plaintiff may lodge an affidavit in support of the application and serve a copy on the defendant, and the defendant may reply again by lodging an affidavit and serve a copy on the plaintiff within 7 days after service of the originating summons. The hearings are heard and determined by a judge in chambers unless the Court otherwise directs.[33] The Court may give interim directions as it thinks fit for the purpose of securing the welfare of the child or for preventing changes in circumstances. Thus, the Court may direct that the child is to reside with a specified person or at a specified place while the application is being considered.

Hague Convention hearings are usually conducted on written evidence and submissions made by lawyers. Oral evidence is taken in only a minority of cases. A foreign applicant may instruct a solicitor to bring proceedings without approaching the Central Authority as an intermediary. Judgments and orders are usually given at the end of the final hearing, but in difficult cases judgment may be reserved for 14 days or less.

IV. Law Enforcement System

The mandate in article 12 of the Convention "to order the return of the child forthwith" is considered to be binding, and the Court returns the child speedily, once a decision has been made. In many instances, children leave the country within 7 days of the hearing. In enforcing the return, the Court makes frequent use of undertakings, voluntary promises made formally in writing by parties, given to the Court. These amount to binding orders, and their breach may result in imprisonment for contempt. The undertakings are meant to regulate and mitigate the effects of a return until a hearing is held in the requesting state, and to ensure that conditions are met without which a return would be impossible. "The English court is often concerned to ensure that the *voluntary but binding* nature and effect of these undertakings is understood and accepted in countries to which the children are returned."[34]

The orders made by the High Court are enforceable by the Tipstaff, a court official who can seek help from the police. Failure to comply with an order of return is also a civil contempt punishable by imprisonment for up to 2 years, sequestration of property, or a fine. The Court also uses the Tipstaff to find missing children and seize passports and travel documents.

V. Legal Assistance Programs

The Legal Aid Act 1988[35] allows anyone, whether within the jurisdiction or not, to apply for legal aid for instituting civil legal proceedings in which such assistance is available. The Legal Aid Board applies merits and means tests to determine whether a litigant has reasonable grounds for taking or defending an action and whether he meets the financial eligibility criteria. The United Kingdom has made a reservation under article 42 of the Hague Convention that requires Central Authorities not to impose any charges in relation to applications submitted under the Convention. However, free legal aid, not subject to the merits and means tests, is available to applicants seeking the return of a child under articles 3 and 8. The expenses of returning the child are not available from public funds, however, the applicant may

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[32] *Id.* ¶ 6.6.

[33] *Id.* ¶ 6.8.

[34] *Supra* note 24, at 186.

[35] Legal Aid Act 1988, c. 34 (Eng.).

request "that an order for travel costs be." Legal aid is also available, subject to the two tests, to those seeking rights of access under the Children Act 1989, section 8.

Applications for legal aid by non-United Kingdom residents are made to the Legal Aid Board.[36] In 1998, a spokesman for the Lord Chancellor's Department made the following policy statement in response to a question in the House of Commons on the availability of legal aid to overseas litigants in child abduction cases:

> It is the Government's policy that any person whose case is accepted by the Central Authority under the Hague or European Child Abduction Conventions will receive legal aid. This is because of the vital importance of cases affecting the residence of children litigated before the English and Welsh courts. The availability of legal aid in other countries is not considered. The award of legal aid to foreign nationals is perfectly proper under the terms of the existing legal aid scheme.[37]

B. Recent Changes

The legal aid system went through a substantial change in 2000, when the Legal Aid Act 1988 was largely repealed by the Access to Justice Act 1999,[38] which replaced the Legal Aid Board with a Legal Services Commission. As required by the 1999 Act, the Legal Services Commission has produced a Funding Code that sets out criteria under which it determines funding for individuals.[39] This guide states that legal aid, on a non means, non merits basis, is still available for individuals that apply under the Hague Convention to the Lord Chancellor's Child Abduction Unit for the return of, or contact with, an abducted child.[40]

VI. Conclusion

The High Court places a very heavy emphasis on the purposive intent of the Hague Convention to return children wrongfully removed from their habitual residence jurisdiction. The approach is practical, based on the facts of each individual case, including an examination of the implications for the child of a return or a refusal and the likely outcome of litigation thereafter. The Court considers the Convention to provide "a high and reliable standard of justice and protection for children."[41]

Several studies bear out the successful working of the Convention. Since the coming into force of the Convention in England and Wales, in 2000, there have been a total of 1,314 cases, of which 668

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[36] Legal Aid Board, 29/37 Red Lion Street, London, WC1R 4PP.

[37] 307 PARL. DEB., H.C. (6th ser.) c.712wa (1998).

[38] Access to Justice Act 1999, c. 22 (Eng.) [hereinafter the 1999 Act].

[39] *Id.* and see also: FUNDING CODE, *available at,* http://www.hmso.gov.uk/si/si2000/70248902.htm.

[40] THE FUNDING CODE: DECISION MAKING GUIDE AT 20.24, *available at,* http://www.legalservices.gov.uk/old_docs/lsc/pdf/manual6/2b-consult-dec01-release6.pdf.

[41] *Supra* note 29, at 185.

resulted in the return of children.[42] An examination of applications dealt with in 1996, found that while the United States handled 653 applications, England and Wales was the next most active Convention jurisdiction, making 206 and receiving 166 applications.[43] Of the incoming applications, which involved 271 children, 94% were for the return of the child or children, while only 6% concerned access. In the vast majority of the cases, the abductor was one of the child's parents, with most often the mother being the abductor. Among the incoming cases that were completed by the time of the study, 43% were resolved by a court ordering the child's return and only 5% of the cases resulted in a judicial refusal to return the child; 21% had not been completed, 8% resulted in a voluntary return, and 6% of the applications were withdrawn. The authors were able to conclude:

> The Hague Convention is generally considered to be a success, a fact evidenced by the growing number of countries signing the Convention.… None of our evidence suggests that the reputation of the Hague Convention is in any way undeserved: applications are dealt with speedily (England and Wales appears to have the most expeditious system for dealing with Convention applications; in our sample the average length of a completed application here was 6.5 weeks compared to an average of 11.5 weeks among "outgoing" cases), and relatively few result in refusals to return children.[44]

An earlier study of the cases determined under the Convention also showed that the United Kingdom, along with the United States, is adhering to the spirit of the Convention by refusing to liberally construe its limitations and exceptions:

> "[J]udicial authorities in both countries are consistently demonstrating to parents that an international abduction will no longer aid them in obtaining a favorable custody decree. In decisions to date, the courts in the United States and the United Kingdom have fostered and served the Convention's most important goal deterring international child abduction.[45]

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November 2003

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[42] 343 PARL. DEB., H.C. (5th Ser.) 93 W (2000).

[43] International Child Abduction - *The English Experience*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 127 (1999).

[44] *Id.* at 147.

[45] Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved*? 2 GLOBAL LEGAL STUDIES JOURNAL (Spring 1995), *available at,* http://www.law.indiana.edu/glsj/vol2/no2/todd.html. *See also* Re: T (Abduction: Child's Objections to Return) [2000] 2 FLR 192 (CA).

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VENEZUELA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention) adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Venezuela[1] on July 19, 1996 and came into force on January 1, 1997.[2] At the time of ratification, Venezuela made a declaration under article 24 of the Convention requiring that all communications addressed to the Central Authority be translated into Spanish.[3] Venezuela also made a declaration concerning article 26, stating that it is not obliged to provide for legal counsel in Convention proceedings.[4]

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Venezuela is the *Dirección General de Relaciones Consulares* of the Ministry of Foreign Affairs.[5] A statute on the *Ley Organica de Proteccion del nino y del adolescente (LOPNA)*[6] provides that the state must protect children and adolescents against their illegal abduction within the country or abroad.[7] However, there is no specific national implementing legislation of the Convention, and therefore, the LOPNA procedural rules apply to Convention related return or visitation petitions. The *Tribunales de Proteccion del Nino y del Adolescente* (TPNA) (Minors Court) with jurisdiction where the child is located will have competence to decide cases under the Convention.[8]

A. Return Requested from Abroad

Under the provisions of the LOPNA,[9] it has been determined that the competent judge to provide for the return of a child, or to enforce visitation rights under the Convention, is the *TPNA* where the child is located or being retained, consisting of the *Sala de Juicio,* that will decide in first instance, and then a

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[1] GACETA OFICIAL (G.O.) July 19, 1996.

[2] LEY DE DERECHO INTERNACIONAL PRIVADO of August 6, 1998, LIBRO HOMENAJE A GONZALO PARRA-ARANGUREN, VOL II, Tribuna l Supremo de Justicia, Caracas, 2001, at 425.

[3] *Supra* note 1, final provisions.

[4] *Id.*

[5] REGLAMENTO ORGANICO DEL MINSTERIO DE RELACIONES EXTERIORES, in G.O. December 22, 1999, art. 15.8.

[6] LEY ORGANICA DE PROTECCION DEL NINO Y DEL ADOLESCENTE, LOPNA, in G.O. October 2, 1998.

[7] *Id.* art. 40.

[8] *Id.* art. 177.

[9] *Id.*

Corte Superior that will decide at the appellate level.[10] The *Sala Civil* of the Supreme Court hears the cases as the court of last resort.[11]

Under the provisions of the Convention, the Central Authority is required to take all necessary measures to locate the child. The National Police will provide assistance thereto. If an agreement between the parties is not reached at the administrative level with the intervention of the Central Authority, a *Fiscal* (public defender),[12] will be appointed to intervene in the judicial proceedings. However, since Venezuela has made a declaration stating that it is not obliged to provide free legal counsel in Convention proceedings, if applicant decides to name a private attorney, the Central Authority is not required to pay for such expenses.[13]

B. Return requested from Venezuela

When the Venezuelan Central Authority is the requesting party, under the return or visitation petition, the documentation is translated as appropriate and sent to the competent Central Authority abroad.[14] The Venezuelan Central Authority must provide guidance and orientation to the petitioners. Once all documents have been submitted, the Central Authority will follow up on the petition abroad and try to reach a friendly solution to the case. If this is not possible, judicial proceedings will be instituted to return the child to Venezuela or to reinstate the effective visitation schedule. Venezuela will not provide legal assistance for judicial proceedings abroad.[15]

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The LOPNA provides that in cases of divorce, separation, nullity of marriage, or if the parents of a child are residing in different places, both parents will decide who will have the custody of a child 7 years of age or older.[16] Children younger than 7 years of age must live with the mother, unless she does not have parental authority or it is in the best interest of the child, for reasons of health or safety, to be separated from the mother either temporarily or permanently.[17] In case of disagreement, the judge will decide on the custody of the children.[18]

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[10] *Id.* art. 175.

[11] *Id.* art. 176.

[12] *Supra* note 6.

[13] *Supra* note 4.

[14] Statements by legal counsel of the Central Authority, Dra. Maria Cristina Barroso.

[15] *Supra* note 3.

[16] *Supra* note 6, art. 360.

[17] *Id.*

[18] *Id.*

Parents assigned parental authority have the custody of their children; they are civilly, administratively and criminally liable for their compliance with its enforcement.[19] In case of a disagreement on any aspect of the custody arrangement, either parent may petition a change or clarification of the custody terms before the judge of the *Sala de Juicio*. The court will decide after hearing from the parties and the child and after trying to solve the case through conciliation. This decision may not be appealed.[20]

With regard to visitation rights, the LOPNA provides that the parent who abducts or retains a child whose custody has been assigned to the other parent or a third person, is judicially obligated to return the child and will be liable for the damages caused by his wrongdoing. The abductor must reimburse all the expenses incurred in securing the return of the child.[21]

In these cases, the LOPNA provides that whoever abducts or illegally retains a child from his legal guardian, will be sanctioned with imprisonment of 6 months to 2 years. In addition, the abductor will be liable for all travel related expenses to return the child to his residence.[22]

III. Court System and Structure – Courts Handling the Hague Convention

When Venezuela is the requested country and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be the lower courts of the place where the child is located or where he is being retained.[23] The case may be appealed only once to the respective Court of Appeals and must be decided within a maximum of 20 days; the appeal does not suspend its enforcement.[24]

According to the Venezuelan Central Authority, since the Convention came into force recently, there is not much experience under the Convention, and its application has not been as widespread as expected. More information about it needs to be provided in order to increase its application, it is stated.[25]

A case involving children whose residence was in the United States is illustrative. After the divorce of their parents, the mother traveled with the children on vacation to Venezuela, but they did not return. The father claimed that although the taking of the children was legal, their retention in Venezuela was not, because such an action violated his rights of custody of the children under U.S. law, where the children were habitually resident.[26] Although the mother petitioned a Venezuelan court for sole custody of the children, the court decided under the Convention return petition and ordered the immediate return

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[19] *Id.* art. 359.

[20] *Id.*

[21] *Id.* art. 390.

[22] *Id.* art. 272.

[23] *Supra* note 10.

[24] *Supra* note 22.

[25] *Supra* note 14.

[26] *Supra* note 2, at 421.

of the children to their country of residence. It concluded that, unless the Convention is considered inapplicable, Venezuelan courts are not competent to decide on the actual custody of the children, because their legitimate place of residence was the United States. However, the return could not be executed, and the minors remained in Venezuela.[27]

IV. Law Enforcement System

The National Police and Interpol are responsible for assisting in the location of children and securing the enforcement of the orders of the authorities.

According to its records, as of 2004, the Venezuelan Central Authority has received 19 incoming return and 3 incoming access applications, for a total of 22 incoming applications. Venezuela made 32 outgoing return and 10 outgoing access applications so far in 2004.[28]

Venezuela has received applications for return from Argentina, Bonaire, Canada, France, Italy, Mexico, the Netherlands, Portugal, Spain, and United Kingdom, but the majority come from neighboring Colombia. Venezuela has requested returns from Australia, Chile, Colombia, France, Italy, Mexico, Peru, Portugal, and the United Kingdom, but the most requested countries are Ecuador, Spain, and the United States.

V. Legal Assistance Programs

The Venezuelan Central Authority provides legal assistance during Convention proceedings before the courts in Venezuela through a body of attorneys called, *Fiscales.*[29] However, Venezuela has declared under article 26 of the Convention that it has no obligation to provide free legal counsel in Convention proceedings.[30] Further information is available on the website of the Central Authority:

Ministry of Foreign Affairs
Dirección General de Relaciones Consulares-Asuntos Especiales
Torre Ministerio de Relaciones Exteriores
Conde a Carmelitas Piso 6
Caracas 1010
Venezuela
http://www.mre.gov.ve/consular/servicio.htm

VI. Conclusion

The application of the Convention in Venezuela is recent and has encountered a number of difficulties due to the lack of expertise in the courts, lawyers, and the public at large and the lack of resources to implement a comprehensive program to promote and inform the population. The website of the Central Authority lacks statistics and basic informational tools, such as online forms that could be

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[27] *Id.* at 422.

[28] *Supra* note 14.

[29] *Supra* note 13.

[30] *Id.*

easily downloaded throughout the country. However, this situation is in a process of change, and there are several proposals to improve it in the near future.[31]

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[31] *Supra* note 14.

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ZIMBABWE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Convention on the Civil Aspects of International Child Abduction of October 25, 1980,[1] emanated from the Final Act of the 14th Session of the Hague Conference on Private International Law. The draft Convention from this Conference was then submitted to governments of participating countries for accession and adoption. It was modeled on the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children of 1980.[2]

Zimbabwe was member of this Hague Conference. At the time of the Conference, Zimbabwe was just emerging from a neo-colonial status then known as Rhodesia and later, Zimbabwe Rhodesia. To turn the country from minority white rule to independence, a Constitutional Conference held at Lancaster House in London from September to December 1979, ushered in the new independent Republic of Zimbabwe.[3] In order to render the Convention applicable to Zimbabwe, the President of the country on May 24, 1996, declared that consistent with article 2 of the Convention on contracting states, the Child Abduction Act, 1995, to which the Convention was attached as an integral part of this law would become effective as the law of Zimbabwe on June 1, 1996.[4] On August 2, 1996[5] and June 6, 1997,[6] respectively, Zimbabwe published a list of countries which it considers its contracting partners with respect to the Convention. These include the following: United States, United Kingdom of Great Britain and Northern Ireland, Luxembourg, Netherlands, New Zealand, Mexico, Australia, Chile, Cyprus, Ireland, Norway, Argentina, Germany, Italy, Switzerland, and Spain.

I. Domestic Laws and Regulations Implementing the Hague Convention

Zimbabwean implemented the Hague Convention on the Civil Aspects of International Child Abduction through the Child Abduction Act, No. 12 of 1995.[7] This law became operative on June 1, 1996.[8] The Child Abduction Act is a short piece of legislation of 13 sections with a long schedule or annex, which is the text of the Convention. The Act is enabling legislation, and hence, the Convention can be, and currently is, enforced as an integral part of Zimbabwean national law. In Zimbabwe, therefore, national law is the Convention itself.

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[1] 19 I.L.M. 1501-1505 (July-Nov, 1980).

[2] *Id.* at 273.

[3] *Id.* at 387-408.

[4] *Infra* notes 7 & 8.

[5] Stat. Ins. 154, 1996. *Supp.* to *the Zimbabwean Gazette* of Aug. 2, 1996 at 869-870.

[6] Stat. Ins. 127, 1997. *Supp. to the Zimbabwean Gazette* of June 6, 1997 at 863.

[7] 1 Stat. L. of Zimbabwe, Ch. 5:05 (rev. 1996).

[8] Stat. Ins. 80, 1996, *Supp. to the Zimbabwean Gazette* of May 24, 1996 at 525.

The Convention requires that a Central Authority handle matters relating to this instrument. This role in Zimbabwe is performed by the Secretary in the Ministry of Justice, Legal, and Parliamentary Affairs according to section 2 of the Child Abduction Act. However, the President of the country enjoys discretionary powers to designate any other ministry of the government to fulfill this role.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Section 10 of the Child Abduction Act requires that the High Court may declare that the removal of any child from or his retention outside Zimbabwe was wrongful within the meaning of article 3 of the Convention on an application for the purposes of article 15 of the Convention by any person who appears to the court to have an interest in the matter.

B. Parental Visitation

The Children's Protection and Adoption Act, 1972 as amended,[9] the Guardianship of Minors Act as amended,[10] and the Matrimonial Causes Act, 1986 as amended,[11] are relevant to article 16 of the Convention. This article gives priority to decisions relating to the return of a child over decisions concerning child custody. According to section 11 of the Child Abduction Act, 1996, the reference in article 16 of the Convention to decide on the merits of the rights of custody means issuing, altering, or evoking appropriate orders for the custody of the child in terms of the three above-mentioned pieces of legislation.

III. Court System and Structure – Courts Handling the Hague Convention

The primary court for matters arising under the Convention is the High Court of Zimbabwe. The High Court enjoys jurisdiction to deal with applications and other proceedings with respect to the Convention, consistent with section 6 of the Child Abduction Act. According to section 9 of the Child Abduction Act, the Court is also vested with the power to issue interim directions and other temporary orders to secure the welfare of the child or to prevent changes pertinent to the determination of issues involved in the case.

The High Court of Zimbabwe used to sit in two divisions, the Appellate Division and the General Division.[12] On August 28, 1981, the Appellate Division was named the Supreme Court of Zimbabwe, and the General Division was reconstituted as the High Court of Zimbabwe, as required by the High Court Act of the same date.[13] Currently, the Supreme Court is organized under the Supreme Court Act, also of

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[9] 1 *Stat. L. of Zimbabwe*, Ch. 5:06, 223-247 (rev. 1996).

[10] *Id.* ch. 5:08, 253-256 (1996).

[11] *Id.* ch. 5:13, 277-280 (rev. 1996).

[12] *See generally*, R. Redgment, *The Legal System of Zimbabwe in* MODERN SYSTEMS CYCLOPEDIA (R. Redden ed., 1990) at 200.25; *see also*, ZIMBABWE: A COUNTRY STUDY, 199 (1982).

[13] 1 Stat. L. of Zimbabwe, Ch. 7:06, 417-429 (rev. 1996).

August 28, 1981.[14] The Supreme Court of Zimbabwe constitutes the ultimate court of appeal for the country. It does not exercise original jurisdiction. Below the Supreme Court and High Court are the Magistrates Courts administered under the provisions of the Magistrates Courts Act, 1932 as amended [15] and the Local Courts established under the Customary Law and Local Courts Act, which traces its history to the Customary Law and Primary Courts Act, No. 6 of 1981.[16] Local Courts apply customary law in civil cases only. Appeals lie to Magistrates Courts from Local Courts. Magistrates Courts enjoy both civil and criminal jurisdiction. Appeals are directed to the High Court from Magistrates Courts.

A. The High Court

According to the High Court Act of 1981 as amended, cited above,[17] the court is organized in terms of composition, original jurisdiction in civil and criminal matters, powers of review, appellate jurisdiction in both civil and criminal matters from the Magistrates Courts, and appeals from the High Court to the Supreme Court.

The doctrine of judicial notice in matters of proof as espoused by article 14 of the Convention has been adopted by Zimbabwe. In any proceedings of the High Court of Zimbabwe under the Convention, a document purporting to be an authenticated copy of a decision or determination of a court or judicial authority outside Zimbabwe is admissible on its face value as presented to the court. However, this fact does not preclude any other inquiry the court may wish to make regarding any document presented to it, whether such a document be local or foreign.

IV. Law Enforcement System

The High Court under the above-mentioned provisions enjoys the power to issue orders, as well as see to their execution by the nation's law enforcement agents, pertaining to the return of the child under the Convention, visitation by the parent who was left behind, and the determination of the custody of the child. These powers of the High Court as contained in the High Court Act are further reinforced by the provisions of the Child Abduction Act itself. Sections 9 to 11 confer on this Court the power to issue interim orders, declaratory orders, and any others deemed relevant to enforce the Convention. The nation's law enforcement assets for purposes of enforcing the Convention include the Sheriff's department, consistent with the provisions of sections 19-22 of the High Court Act and the Zimbabwe Republic Police under the Police Act, 1995 as amended.[18] Section 3 of the Preservation of Constitutional Government Act, 1963 as amended,[19] further enables law enforcement agents to pursue a matter upon a resolution of Parliament initiated by the Ministry of Home Affairs declaring that any provision of law of Zimbabwe is of extra-territorial effect.

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[14] *Id*. ch. 7:13, 485-492 (rev. 1996).

[15] *Id*. ch. 7:10, 439-455 (rev. 1996).

[16] *Id*. ch. 7:05, 411-416 (rev. 1996).

[17] *Supra* note 13.

[18] 2 Stat. L. of Zimbabwe, Ch. 11:10, 161-174 (rev. 1996).

[19] *Id*. Ch. 11:11, 175 (rev. 1996).

To this end, such a provision would not apply to any person resident in Zimbabwe, but abroad at the time of declaration. If such person acts or speaks in a manner which would be considered a violation of the laws of Zimbabwe, law enforcement assets have the power to pursue through appropriate channels the apprehension of such an individual and bring him to justice in Zimbabwe.

In addition, legislation, such as the Civil Matters (Mutual Assistance) Act, 1996 as amended,[20] assures the reciprocal enforcement in Zimbabwe of civil judgments issued in foreign countries and territories and those of Zimbabwe in the foreign countries and territories. Similarly, the Criminal Matters (Mutual Assistance) Act, 1991 as amended,[21] also provides reciprocal arrangements in criminal matters between Zimbabwe and foreign countries. The Extradition Act, 1990 as amended,[22] further affords an opportunity to any foreign country and Zimbabwe itself to extradite any person to and from the country to Zimbabwe for appropriate matters as regulated by this Law. Finally, the general Criminal Law of Zimbabwe is available to parties to the Convention, as recognized by Zimbabwe, to ensure that all provisions of the Convention are complied with. Thus an ample regime of law enforcement mechanisms is at the disposal of the government of Zimbabwe to ensure the enforcement of orders issued by the nation's courts, in particular the High Court with respect to matters of the Convention.

V. Legal Assistance Programs

Article 26 of the Convention regulates liability for administrative and other costs, expenses, and charges. The premise of this article is that the Central Authorities and other public services connected with the contracting states do not impose any charges with respect to applications filed under the Convention.

In particular, they may not require any payment from the applicant towards the costs and expenses of the proceeding or, those arising from the participation of legal counsel or advisers. However, they may require the payment of expenses incurred or to be incurred in implementing the return of the child. However, a contracting state may, by making a reservation in accordance with article 42 declare that it will 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 these costs may be covered by its legal system of legal aid and advice. Upon the return of a child or issuing of an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay the necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Section 13 of the Child Abduction Act stipulates, having made a reservation as required by the third paragraph of article 26 of the Convention, the costs referred to in paragraph three will not be the responsibility of the state or any government official of Zimbabwe, except in so far as they are so born, consistent with the grant of legal aid under any legislation.

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[20] 1 Stat. L. of Zimbabwe, ch. 8:02, 511-516 (rev. 1996).

[21] *Id*. ch. 9:06, 563-573 (rev. 1996).

[22] *Id*. ch. 9:08, 657-664 (rev. 1996).

Furthermore, the Legal Assistance and Representation Act, 1969 as amended,[23] ensures the granting of legal assistance to indigent persons appearing in the courts of Zimbabwe with respect to criminal proceedings only. There are no identical provisions to cover civil cases. The law of 1969 also provides terms to compensate attorneys who appear for such persons in the High Court and Supreme Court. One should also be mindful of section 13 of the Child Abduction Act, noted above, which prohibits the state bearing costs as a reservation to article 26 of the Convention.

VI. Conclusion

It is hard to gauge the effectiveness of the Convention in Zimbabwe in the absence of any case law to this effect. However, the fact that Zimbabwe, though not an original participant in the Hague Conference of 1980, has deemed it fit to integrate the Convention as part of its national law is indicative of the importance the government of Zimbabwe attaches to the subject of child abduction, domestically and internationally.

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April 1999
Updated November 2003

[23] *Id.* Ch. 9:13, 673 (rev. 1996).

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APPENDIX A

SUMMARY OF PARTIES AND DATES OF ENTRY INTO FORCE AS OF MAY 4, 2004[1]

	Jurisdiction[2]	Entry into Force	Entry into Force with the U.S.[3]
1	ARGENTINA	1 Jun 1991	1 Jun 1991
2	AUSTRALIA (only for the Australian States and mainland Territories)	1 Jan 1987	1 Jul 1988
3	AUSTRIA	1 Oct 1988	1 Oct 1988
4	BAHAMAS	1 Jan 1994	1 Jan 1994
5	BELARUS (Byelorussia)	1 Apr 1998	X
6	BELGIUM	1 May 1999	1 May 1999
7	BELIZE	1 Sep 1989	1 Nov 1989
8	BERMUDA (overseas territory of the UK)	1 Mar 1999	1 Mar 1999
9	BOSNIA AND HERZEGOVINA	1 Dec 1991	1 Dec 1991
10	BRAZIL	1 Jan 2000	1 Dec 2003
11	Bulgaria	1 Aug 2003	X
12	Burkina Faso	1 Aug 1992	1 Nov 1992
13	CANADA	1 Dec 1983	1 Jul 1988
14	CAYMAN ISLANDS (overseas territory of the UK)	1 Aug 1998	1 Aug 1998
15	CHILE	1 May 1994	1 Jul 1994
16	COLOMBIA	1 Mar 1996	1 Jun 1996
17	Costa Rica	1 Feb 1999	X
18	CROATIA	1 Dec 1991	1 Dec 1991
19	CYPRUS	1 Feb 1995	1 Mar 1995
20	CZECH REPUBLIC	1 Mar 1998	1 Mar 1998
21	DENMARK (except for the Faroe Islands and Greenland)	1 Jul 1991	1 Jul 1991
22	ECUADOR	1 Apr 1992	1 Apr 1992
23	El Salvador	1 May 2001	X
24	Estonia	1 July 2001	X
25	FALKLAND ISLANDS (overseas territory of the UK)	1 June 1998	1 Jun 1998
26	Fiji	1 Jun 1999	X
27	Finland	1 Aug 1994	1 Aug 1994
28	FRANCE (for the whole territory of the French Republic)	1 Dec 1983	1 Jul 1988
29	GEORGIA	1 Oct 1997	X
30	GERMANY	1 Dec 1990	1 Dec 1990
31	GREECE	1 Jun 1993	1 Jun 1993
32	Guatemala	1 May 2002	X
33	HONDURAS	1 Mar 1994	1 Jun 1994
34	HONG KONG (Special Administrative Region of China)	1 Sep 1997	1 Sep 1997
35	HUNGARY	1 July 1986	1 Jul 1988
36	Iceland	1 Nov 1996	1 Dec 1996

[1] Compiled from the Hague Conference on Private International Law (HCPIL) *Child Abduction Homepage*, *at* http://www.hcch.net/e/status/stat28e.html (last visited May 14, 2004) and the U.S. Department of State status page for *Participating Countries*, at http://travel.state.gov/hague_list.html (last visited May 14, 2004). The HCPIL homepage can be found at http://www.hcch.net/e/ and the U.S. Department of State homepage for *International Parental Child Abduction* can be found at http://travel.state.gov/abduct.html.

[2] Capitalized jurisdictions identify those included in this report.

[3] The letter "X" indicates that the United States has not accepted the accession of this jurisdiction as of May 4, 2004.

37	IRELAND	1 Oct 1991	1 Oct 1991
38	ISLE OF MAN (British Crown dependency)	1 Sep 1991	1 Sep 1991
39	ISRAEL	1 Dec 1991	1 Dec 1991
40	ITALY	1 May 1995	1 May 1995
41	Latvia	1 Feb 2002	X
42	Lithuania	1 Sep 2002	X
43	LUXEMBOURG	1 Jan 1987	1 Jul 1988
44	Macau (Special Administrative Region of China)	1 Mar 1999	1 Mar 1999
45	MACEDONIA, THE FORMER YUGOSLAV REPUBLIC OF	1 Dec 1991	1 Dec 1991
46	MALTA	1 Jan 2000	1 Feb 2003
47	Mauritius	1 Jun 1993	1 Oct 1993
48	MEXICO	1 Sep 1991	1 Oct 1991
49	Moldova, Republic of	1 Jul 1998	X
50	MONACO	1 Feb 1993	1 Jun 1993
51	MONTSERRAT (overseas territory of the UK)	1 Mar 1999	1 Mar 1999
52	NETHERLANDS, THE (for the Kingdom in Europe)	1 Sep 1990	1 Sep 1990
53	NEW ZEALAND	1 Aug 1991	1 Oct 1991
54	Nicaragua	1 Mar 2001	X
55	Norway	1 Apr 1989	1 Apr 1989
56	PANAMA	1 May 1994	1 Jun 1994
57	Paraguay	1 Aug 1998	X
58	Peru	1 Aug 2001	X
59	POLAND	1 Nov 1992	1 Nov 1992
60	PORTUGAL	1 Dec 1983	1 Jul 1988
61	Romania	1 Feb 1993	1 Jun 1993
62	SAINT KITTS AND NEVIS	1 Aug 1994	1 Jun 1995
63	Serbia and Montenegro	1 Dec 1991	1 Dec 1991
64	SLOVAKIA	1 Feb 2001	1 Feb 2001
65	Slovenia	1 Jun 1994	1 Apr 1995
66	SOUTH AFRICA	1 Oct 1997	1 Nov 1997
67	SPAIN	1 Sep 1987	1 Jul 1988
68	Sri Lanka	1 Dec 2001	X
69	SWEDEN	1 Jun 1989	1 Jun 1989
70	SWITZERLAND	1 Jan 1984	1 Jul 1988
71	Thailand	1 Nov 2002	X
72	Trinidad and Tobago	1 Sep 2000	X
73	Turkey	1 Aug 2000	1 Aug 2000
74	Turkmenistan	1 Mar 1998	X
75	UNITED KINGDOM of Great Britain and Northern Ireland	1 Aug 1986	1 Jul 1988
76	United States of America	1 Jul 1988	- N/A -
77	Uruguay	1 Feb 2000	X
78	Uzbekistan	1 Aug 1999	X
79	VENEZUELA	1 Jan 1997	1 Jan 1997
80	ZIMBABWE	1 Jul 1995	1 Aug 1995

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APPENDIX B

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As point 1, the General Assembly resolves "to urge member states to consider signing and ratifying, ratifying, or acceding to, as soon as possible as the case may be, "The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,""The Inter-American Convention on the International Return of Children, of July 15, 1989," and "The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption" and to call on States parties to comply with their obligations under this Convention in order to prevent and remedy cases of international parental child abduction."

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Article 34 states: "Among the Member States of the Organization of American States that are parties to this Convention and to the Hague Convention of October 25, 1980 on the civil aspects of international child abduction, this Convention shall prevail" (para. 1). "However, States Parties may enter into bilateral agreements to give priority to the application of the Hague Convention" (para. 2).

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Section 2.8 refers to the Australian Government's efforts to encourage regional countries and major migrant source countries to accede to the Convention. Although somewhat outdated, since some of the other countries mentioned in it have since joined the Convention, the report briefly discusses others that have not yet joined.

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Footnote 476 (p. 92) discusses the effect of Egypt's failure to accede to the Hague Child Abduction Convention on a Louisiana court child custody ruling and also refers to 2001 U.S. court cases dealing with the Convention. The portion of the text of the article to which the footnote refers is a discussion of the *Amin v. Bakhaty* child custody dispute involving an Egyptian mother and an Egyptian/New Jersey father and the applicability/ non-applicability of the Uniform Child Custody Jurisdiction Act in the international arena (pp. 91-93).

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See also individual listings in this bibliography for some of the articles included.

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The Convention was adopted by the General Assembly on November 20, 1989 and entered into force on September 2, 1990. The status of ratifications of the CRC and the declarations and reservations are also available via the website, as are two Protocols to it. As of November 2003 there were 192 States parties to the CRC; only the United States and Somalia have not yet ratified the agreement.

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BY PARENTS. By Janet Chiancone, Linda K. Girdner, *and* Patricial M. Hoff. Washington, D.C.: December 2001. 19 pp. HV6598.C45 2001

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March 2004

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APPENDIX C

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION[1]

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

[1] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, *available at* the website of the Hague Conference on Private International Law www.hcch.net/e/conventions/text28e.html.

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either 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 the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) 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.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

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.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.