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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(xxii) and (xxiii) 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

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

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

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

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

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

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

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.

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

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/>.