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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 (HCPIIL). 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

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

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 HCPIIL 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

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 HCPIIL], a paper presented at the 25th Anniversary Conference, Justice, Courts & Community, July 26-29, 2001, Sydney, Australia, available at <http://www.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

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 HCPIIL 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

¹⁸ Germany is a case in point. See Mathias Rohe, *Islamic Law in German Courts*, available at <http://www.comune.pisa.it/casadonna/hm/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

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>.