

THE DEVELOPING JURISPRUDENCE OF THE RIGHTS OF THE CHILD — CONTRIBUTIONS OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

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I. INTRODUCTION

I would like this morning to discuss with you three multilateral treaties produced since 1980 by the international organization known as the Hague Conference on Private International Law. All of them seek to serve the best interests of children on the move with protections to which the United Nations Convention on the Rights of the Child declares that they are entitled. It looks as if the United States will sooner or later be a party to all of these conventions. I also want to mention one other encouraging development in the United States in the area of international child support enforcement.

The Hague Conference was established in 1893. The United States joined the organization in 1964 after its re-constitution with a Permanent Bureau in the 1950s. The organization celebrated its 100th anniversary during its diplomatic session in May 1993 at the conclusion of which it adopted the final text of the Hague Convention on intercountry adoption.

Before the 1960s the Hague Conference's work was primarily aimed at preparing conventions setting out rules for determining which country's law would apply to various types of legal transactions and

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relationships and which country's authorities would have jurisdiction. However, the Conference also prepared conventions dealing with civil procedure and providing for international judicial assistance and cooperation, such as the conventions on service of process abroad and the taking of evidence abroad, always only in civil and commercial matters. The conventions on international judicial assistance called on party States to establish Central Authorities with the responsibility to cooperate with each other and to make these conventions work. The Hague Conference has also convened very useful sessions permitting Central Authority officials to discuss the implementation of these Conventions with their counterparts from other countries.

This other type of convention generally attracted more party States than most of the Hague conflicts conventions, suggesting that there was a niche for the Hague Conference to prepare conventions in various legal areas providing for cooperation among national authorities.

Starting with the 1980 Convention on the International Child Abduction, the Hague Conference and its member states focused much of their attention on conventions providing for cooperation among party states for the purpose of protecting children, and children on the move from one country to another. Children are particularly vulnerable and in need of protection when they have been parentally abducted or when they are being adopted by persons residing in another country than their country of origin. The same is true when their divorcing or separating parents living or planning to live in different countries are dealing with the question of which parent will have primary responsibility for protection of the person and property of the child and which parent may be given only visitation rights.

II. INTERNATIONAL CHILD ABDUCTION

Work on the first such convention in 1976-1980 predated the United Nations Convention on the Rights of the Child by about a decade. I am told that some of the provisions of this Hague Convention formed the basis for ideas that are reflected in similar language and concepts in the United Nations Convention.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction¹ was intended to deter parental abductions and to remedy as much as possible their very bad effects on children. It was also designed to help governments and the left-behind parents involved better

1. Hague Conference on Private International Law, *Actes et documents de la quatorzième session*, 1982, Tome III, Child Abduction, at 413-22; T.I.A.S. No. 11,670; 51 Fed. Reg. 10498-502 (1986); 19 I.L.M. 1501-05 (1980).

to cope with the previously intractable problem of international parental child abductions. The Convention requires the prompt return of children removed or retained outside the country of the child's habitual residence, when the removal or retention is in breach of the rights of custody of a parent, whether those rights exist by operation of law or are based on a custody decree. Negotiators were aware that many such abductions take place before any court proceedings for divorce have been initiated. In those days, one still spoke more of custody rights, meaning the rights of the parents to have custody of the *object* of custody, the child, than of the rights of the child to be the *subject* of protective measures.

The child abduction convention already speaks in its preamble of the conviction of the signatory States "that the interests of children are of paramount importance in matters relating to their custody" and refers to the desire "to protect children internationally from the harmful effects of their wrongful removal or retention," language very similar to that found in the later United Nations Convention on the Rights of the Child.

The wrongfully removed or retained child is promptly to be ordered returned, unless one of the narrow exceptions to the return obligation has been established by the parent resisting the return request. The return obligation anticipates article 11 of the United Nations Convention which provides that party states are to take measures to combat illicit transfer and non return of children abroad. Looking at article 12 of the United Nations Convention, one notices its underlying concerns for the child's opinion to be taken into account as the basis of the earlier provision in article 13, paragraph 2, of the 1980 Hague Convention stating that the requested judicial or other 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."

Anticipating also the provisions of article 9(3) of the United Nations Convention on the rights of the child who is separated from one or *both* parents "to maintain personal relations and direct contact with both parents on a regular basis," article 21 of the 1980 Convention, while somewhat sketchily, provides for the possibility of an application "to make arrangements for organizing or securing the effective exercise of rights of access" by non-custodial parents, for the exercise of which governmental Central Authorities are to take steps to remove obstacles.

The United States became a party to this Convention in mid-1988 and the Convention now has forty-five party states. The Department has no way of knowing how many cases of wrongful removals to or retentions of children in the United States occur annually. However, there are about 300 such cases annually covered by the Hague Convention and coming to

the attention of the State Department. Similarly, there are about 700 children from the United States wrongfully removed or retained abroad annually, about 500 covered by the 1980 Convention. Helping with Hague and non-Hague cases is an office in the Consular Affairs bureau of the State Department, the Children's Issues Office, which serves as the United States Central Authority, that also deals with intercountry adoptions to the United States. This office has a staff of eight officers.

On the whole, the Convention has worked quite well, and the cooperation between Central Authorities in party states is helpful. Unique to the Hague Conference as an organization unifying private law, there have been two one-week sessions of a special commission that has brought together Central Authority officials from party states. These officials assemble to discuss systemic and other problems encountered in the implementation of the Convention and to develop solutions for them, to meet each other face-to-face, and to develop a level of confidence in each others' motivations to make the Convention work as well as possible in their respective countries. The next such meeting is scheduled for mid-March 1997, and the State Department is already examining in what respects United States implementation of the Convention is short of what it should be and how we can improve on it. We are, of course, also examining in what respects implementation of the Convention by other countries seems unsatisfactory and should be improved.

III. INTERCOUNTRY ADOPTION

In 1988 the member states of the Hague Conference decided that the organization should seek to prepare a convention to set internationally agreed norms and procedures to safeguard children involved in intercountry adoptions. Up to that time there were no internationally agreed standards for such adoptions. However, between 15,000 and 20,000 children were thought to be moving annually from one country to another in connection with their adoption by persons resident in a country other than their country of birth or origin.

The member states were clear that the primary objective of work on a convention would be to regulate and improve intercountry adoptions. The legal institution was seen as the vehicle for providing children in need of families permanent families of their own, after consideration of the possibility of their adoption by a suitable family in their country of origin. Intercountry adoption was not seen as a process designed primarily to make children without families available for persons wishing to adopt a child.

If there was any doubt that there were abuses in the intercountry adoption process, such as the marketing of children for adoption, excessive payments to facilitators, or the inadequate protection of birth parents, this was borne out after work on this Convention had already begun by the situation in Romania shortly after the overthrow of Ceaucescu. Hundreds, even thousands, of children were snapped up by persons wishing to adopt them during a period of almost no laws, regulations or procedures in Romania to protect the children and their birth parents and to ensure that the children were really available for intercountry adoption, involving as it does in most cases the severance of the previous legal parent-child relationship.

The United Nations Convention on the Rights of the Child, in article 21(b) as interpreted by many, placed intercountry adoption, internationally unregulated as it then was, at the end of the list of alternative methods of care for children without families. This is thought to follow from the recognition in that sub-section that intercountry adoption may be considered an alternative means of child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. The order of preferences envisaged in the United Nations Convention places return of the child to its family of origin first, followed by placement of the child by adoption with a family in its country of origin, and then other forms of care in the country of origin not involving a permanent family for the child, foster and institutional care, all before intercountry adoption, which was seen by many to be only an alternative of last resort.

Now let's look at the preamble of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,² the final text of which was adopted in May 1993, about five years after the United Nations Convention.

The preamble begins: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a *family* environment, in an atmosphere of happiness, love and understanding" and continues "[r]ecalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin." It then states "[r]ecognizing that intercountry adoption *may* offer the advantage of a permanent family to a

2. Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, 1994, Tome II, Adoption-Co-operation, Final Act, Part A, at 523-35; 40 NETH. INT'L L. REV. 292 (1993); I/II UNIFORM L. REV. 237-67 (1993); 32 I.L.M. 1134 (1993); see Appendix of P.H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q., 76 (1994).

child for whom a suitable *family*, [as opposed to suitable *care*,] cannot be found in his or her State of origin." You can see that the stress on the need for a child to have a permanent family of its own because of the importance of such a family for the full and harmonious development of the child's personality leads to the new conclusion that intercountry adoption *may* offer the advantage of a family that foster and institutional care can not. This realization that intercountry *may* offer the advantage can be understood as "*does* offer the advantage" when intercountry adoptions result from sound and ethical adoption practices or when they are internationally regulated under the 1993 Hague Convention. In these circumstances, the Hague Convention suggests that intercountry adoption should be preferred over forms of care in the child's country of origin that do not offer the advantage of a permanent family.

The preamble, then, while not a legally binding part of the 1993 Hague Convention but rather its mis-en-scene, the face with which it presents itself, and the entire Convention of which the preamble is a part, represent for the first time a real, rather than a grudging, international endorsement of intercountry adoption.

The preamble continues, noting the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child, with respect for the child's fundamental rights, and to prevent the abduction, the sale of, or the traffic in children. For corresponding language in the United Nations Convention, see its articles 11, 34, and 35. The preamble closes, noting that the signatory states desire to establish common provisions taking into account the principles set forth in international instruments, among them, in particular, the United Nations Convention on the Rights of the Child of November 1989.

Having presented itself in this way, the Convention sets out a framework of minimum norms and procedures, with certain determinations to be made in the country of origin of the child, and certain others in the receiving country, before the adoption may proceed. Among the determinations to be made by competent authorities in the country of origin are that they have ensured, having regard to the age and degree of maturity of the child, that "the child's consent to the adoption, where such consent is required, has been given freely. . . ." This is a direct follow-up to the mandate in article 12 of the United Nations Convention to which reference was made earlier.

The Hague Convention requires the establishment of Central Authorities in every party state with certain mandatory, largely programmatic oversight and cooperation functions and responsibilities, although in some countries they may also have case specific functions. Those Central Authority functions that are specific to individual adoptions

may largely be performed by Convention-accredited agencies, and approved other providers of adoption services. However, it is left up to each country to determine with which agencies accredited, or providers approved, by another state it may choose to work. It is also up to each party state to determine what additional requirements and conditions to those established in the Hague Convention it may set with regard to the intercountry adoptions of children from that country or coming to that country. The Convention also requires that all Convention adoptions be recognized in all party States.

The United Nations Convention, in particular article 7, is behind at least one other provision of the Hague Convention, article 30, which requires the competent authorities of a Contracting State to ensure that information held by them concerning the child's origin, "in particular information concerning the identity of his or her parents, as well as the medical history, is preserved." Those competent authorities are to ensure that the child or the child's representative has access to such information, under appropriate guidance, in so far as is permitted by the law of the State where the information is held. In transmitting information on the child to the receiving state, the state of origin is reminded in article 16(2) to take care not to reveal the identity of the mother and the father if, in the state of origin, these identities may not be disclosed. Thus, the requirement to preserve information concerning the identity of the parents is directed primarily at countries from which the children come. However, the Hague Convention leaves it to the law of the country or countries where such information has been preserved to determine whether the child's access to that information will be permitted. If access is permitted, currently or at some future time, the information will have been preserved and will be available.

As I hope will be evident from this very sketchy and incomplete summary of the provisions of this Convention, the Hague Conference member states had the United Nations Convention in mind in setting out rather detailed norms and procedures.

The Hague Convention has already broken a number of records, more countries involved in its negotiation than for any other Hague Convention (66), including thirty countries of origin that were not member states of the Hague Conference, but whose involvement in the preparation of the Convention as the voting equals of member states was deemed crucial for the Convention's relevance, effectiveness, and broad acceptance. More countries, including the United States, signed the Convention in the first year after it was finalized than any previous Hague Convention, and signing States now number twenty-seven. The Convention entered into force in just under two years with three ratifying

States, another first. In the meantime, eight other States have become parties. Many other countries of origin and receiving countries, including the United States, are working towards becoming parties to this Convention, which promises to become one of the Hague Conference's greatest success stories.

The Convention will require federal legislation to ensure its full and uniform implementation in the United States. Such legislation is also necessary, among other things, to establish and provide for the establishment and funding of the required United States Central Authority, to set up the system for Convention-accreditation of United States adoption agencies, to ensure recognition of Convention adoptions throughout the United States, and to amend the Immigration and Nationality Act to make special allowance for entry for permanent residence of children from abroad under the Convention. In order for the United States to be able to comply with the requirements of the Convention imposed on countries of origin, there will need to be a new form of state court determinations for those few children from the United States that are to be the subject of adoptions, whether in the United States or abroad, that will be covered by the Hague Convention.

On the whole, we expect that if our primary focus is on meeting our obligations under the Hague Convention, current practices in the United States can be modified in relatively minor ways to fit into the framework of requirements set by the Hague Convention. Thus, once the President sends the Convention forward for Senate advice and consent to United States ratification, probably next year (1997), and the State Department achieves the introduction in Congress of legislation that is currently in preparation for clearance by the Administration, and provided there is adequate support for United States ratification from the United States private sector including the adoption and child welfare community, the United States should be able to ratify the Convention by the year before the end of the millennium.

IV. PROTECTION OF CHILDREN (CUSTODY)

At the seventeenth session of the Hague Conference, the suggestion was accepted that the organization seek by its eighteenth session in 1996 to prepare a convention on the protection of the person and property of minors that would revise an earlier 1961 Hague Convention on this topic. The 1961 Convention had placed jurisdiction for the purpose of custody primarily with the authorities of the country of the child's nationality, as well as in other states in certain circumstances and for certain purposes. These competing bases of jurisdiction, the poor

functioning of cooperation between authorities of the countries involved, and absence of a provision on enforcement in one party state of measures of protection taken in another, plus only modest acceptance of the 1961 Convention, led to the belief that a new Convention was needed.

The Hague Conference member states on October 18, 1996 adopted a new Convention,³ after three two-week preparatory sessions and a three-week diplomatic session of the organization at all of which the United States delegation played a very active role. The Convention provides that the judicial or administrative authorities of the contracting state of the child's habitual residence have clear, primary jurisdiction to take measures directed to the protection of the child's person or property.

The Convention's preamble, after noting conflicts between legal systems, the importance of international cooperation for the protection of children, confirming that the best interests of the child are to be a primary consideration, and noting that the 1961 Convention needs revision, notes that the states signatory desire to establish common provisions taking into account the United Nations Convention on the Rights of the Child.

The Convention provides, by way of exception, for transfer of jurisdiction to the authorities of certain other states to be offered, sought, and effected if they are deemed better placed than the country of the child's habitual residence to assess the best interests of the child.

The Convention sets out rules for determining the applicable law, requires the recognition in all other contracting states by operation of law of measures taken by authorities of contracting states, and has rather detailed provisions for mandatory and possible cooperation between Central Authorities and competent authorities in contracting states.

The 1996 Convention seeks to bolster the provisions of the 1980 Child Abduction Convention concerning the prompt return of parentally abducted children and the exercise of rights of access.

There was considerable concern, particularly among United States experts, that the jurisdiction provisions of the new Convention could undermine the return requirements of the 1980 Hague Child Abduction Convention. Fortunately, article 7 explicitly now provides that the authorities of the state of the child's habitual residence *before* the wrongful removal or retention keep their jurisdiction until the child has acquired habitual residence in another state *and* either each person or body having rights of custody has acquiesced in the removal or retention, *or* there was a

3. 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 18, 1996, Hague Conference on Private International Law, Final Act of the Eighteenth Session, Part A, at 3-22 (English and French on alternating pages); 35 I.L.M. 1391-405 (1996).

long delay amounting, in effect, to laches, *i.e.*, acquiescence, on the part of the person or body with the breached custody rights in bringing the return request *and* no return request is still pending *and* the child is settled into its new environment. Thus, if the return request under the 1980 Hague Convention should be refused and so long as jurisdiction with regard to measures of protection has not shifted because the requirements of article 7 have not been met, jurisdiction can only be shifted to the state where the child is located pursuant to the transfer arrangements set out in articles 8 and 9 that require the consent of authorities in the state from which the child was abducted.

V. INTERNATIONAL CHILD SUPPORT ENFORCEMENT

These three most recent Hague Conventions concerned with child protection and, in effect, also children's rights to such protection, have firmly established the Hague Conference as an important international forum for filling in the framework of laudable general aims and goals set out in the United Nations Convention on the Rights of the Child. It does so with conventions focused on substantive obligations and detailed norms, as well as procedures for intergovernmental cooperation among governmental authorities, including periodic intergovernmental consultations.

Looking at the United States we see that it is already a party to the Hague Convention on International Child Abduction. Inter-agency consultations are under way in the United States government aimed at preparing federal implementing legislation for the Hague Intercountry Adoption Convention, the United States being the country that is adopting more children from abroad annually than all other countries put together (11,340 in the year ending September 30, 1996). A United States delegation recently returned from the final negotiations on the Hague Convention on Protection of Children with the belief that in due course the United States should be able to become a party to that Convention as well.

I would like to mention work done since 1980 on her own time and expense by Gloria DeHart, a Deputy California Attorney General, until her retirement a few years ago. Her efforts resulted in agreement on arrangements with twenty foreign countries on behalf of the individual States of the United States that effectively provide for the reciprocal enforcement by each of support obligations, including child support, emanating from the other.

Since Ms. DeHart's shift to part-time work in California, she has also been working part-time in my part of the Office of the Legal Adviser in the State Department. In consultation with the National Child Support

Enforcement Association and with the help of the State Department and the Office of Child Support Enforcement in the Department of Health and Human Services, Gloria DeHart prepared provisions that became part of the just-enacted Welfare Reform Legislation.⁴ These provisions for the first time formally give the federal government a role in international support enforcement. Under Title 42, United States Code, new section 659A, the Secretary of State, with the concurrence of the Secretary of Health and Human Services (HHS), is authorized to declare, by international agreement or unilateral declaration or both, that a foreign country is a reciprocating country if it has the means to enforce support owed to obligees resident in the United States and those means substantially conform with the enforcement standards set out in that section. Such a declaration entitles the child and spousal support obligations emanating from such a reciprocating country to enforcement throughout the United States. HHS, in a function likely to be delegated to its Office of Child Support Enforcement, is made responsible to facilitate support enforcement in cases involving United States residents and residents of foreign countries that have been declared to be reciprocating countries.

Once, as the result of this new authority, new arrangements have been made at the federal government level with most of the twenty countries mentioned earlier, we shall seek to make such arrangements also with the dozen or so additional countries with which Ms. DeHart was earlier seeking to conclude arrangements at the state level in the United States, as well as further countries that indicate their interest.

VI. CONCLUSION

I believe that it is possible to conclude from the above that there is very considerable motion within the United States towards improving, through United States implementation of certain conventions and reciprocal arrangements, the protection and welfare of children on the move to or from the United States in various circumstances in which they are particularly vulnerable. Those efforts extend also to children dependent on support which a person located in another country should be paying.

4. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 371; 110 Stat. 2253, 42 U.S.C. § § 659a, 654.