

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue cap at the top. The globe in the top bulb is dark blue, while the globe in the bottom bulb is light blue. The text is centered within the hourglass.

WikiLeaks Document Release

<http://wikileaks.org/wiki/CRS-RS21261>

February 2, 2009

Congressional Research Service

Report RS21261

International Parental Child Abductions

Alison M. Smith, American Law Division

June 30, 2004

Abstract. This report discusses the applicability of the Hague Convention and current U.S. laws, both civil and criminal, which seek to address the quandary of children abducted by a parent to foreign nations.

WikiLeaks

CRS Report for Congress

Received through the CRS Web

International Parental Child Abductions

Alison M. Smith
Legislative Attorney
American Law Division

Summary

Since 1988, the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”) has been the principal mechanism for enforcing the return of abducted children to the United States.¹ While the treaty authorizes the prompt return of the abducted child,² it does not impose criminal sanctions on the abducting parent.³ Congress, to reinforce the Hague Convention, adopted the International Parental Kidnapping Crime Act of 1993 (the “Act”) to impose criminal punishment on parents who wrongfully remove or retain a child outside U.S. borders.⁴ However, the Hague Convention is not always applicable in such cases. This report will discuss the applicability of the Hague Convention and current U.S. laws, both civil and criminal, which seek to address the quandary of children abducted by a parent to foreign nations. This report will be updated as events warrant.

Parental child abductions across international boundaries often garner global attention and demand international solutions. Several international conventions have attempted to resolve, or at least facilitate efforts to negotiate, international child custody disputes. These conventions have generally been thought to have achieved adequate success in resolving disputes, but the conventions’ available remedies do not apply to nations who fail to participate. The conventions’ procedures are inapplicable and unenforceable in non-signatory nations, and as a result, parents and governments must

¹ Throughout this report, “abduction” and “kidnapping” refer to the unlawful removal or retention of a child by one parent to deprive the other parent of the rights of custody and access to that child. See International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204.

² See Hague Conference on Private International Law: Final Act, Draft Conventions on Civil Aspects of International Child Abduction and on International Access to Justice, Articles on the Law Applicable to Certain Consumer Sales, and Recommendations and Decisions of the Conference, Oct. 25, 1980, 19 I.L.M. 1501 (1980) (hereinafter ‘Hague Convention’).

³ See id. art. 7(f), 19 I.L.M. at 1503.

⁴ See 18 U.S.C. § 1204, 1204(a).

often embark on the difficult and sometimes impossible task of looking elsewhere in attempting to resolve international child custody disputes with such nations.⁵

The Hague Convention protects children from their wrongful removal across international borders and provides procedures to aid in their safe return.⁶ The Hague Convention's platform guarantees that one signatory nation will respect and follow the custody rights and laws of all other signatory nations.⁷ The signatory nations are: Argentina, Australia, Austria, the Bahamas, Belgium, Belize, Bermuda, Bosnia-Herzegovina, Brazil, Burkina Faso, Canada, the Cayman Islands, Chile, Colombia, Croatia, Czech Republic, Cyprus, Denmark, Ecuador, the Falkland Islands, Finland, France, Germany, Greece, Honduras, Hong Kong Special Admin. Region, Hungary, Iceland, Ireland, Isle of Man, Israel, Italy, Luxembourg, Macau, Former Yugoslav Republic of Macedonia, Malta, Mauritius, Mexico, Monaco, Montserrat, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Serbia and Montenegro, Slovak Republic, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, and Zimbabwe.⁸

However, the Hague Convention does not act as an extradition treaty nor does it purport to adjudicate the merits of a custody dispute.⁹ It is merely a civil remedy¹⁰ designed to preserve the status quo by returning the child to the country of his or her "habitual residence" and allowing the judicial authorities in that country to adjudicate the merits of a custody dispute. The Hague Convention deems the removal of a child wrongful when one parent breaches custody rights attained by the other parent in the

⁵ See Cara L. Finan, Comment, Conventions on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction, 34 Santa Clara L. Rev. 1007, 1008 (1994) (noting U.S. State Department cannot help parents when dealing with Non-Hague nations); see also Lara Cardin, Comment, The Hague Convention on the Civil Aspects of International Child Abduction As Applied to Non-Signatory Nations: Getting to Square One, 20 Hous. J. Int'l L. 141, 157-58 (1997) (noting problems parents may face when dealing with country not part of Hague Convention).

⁶ See Hague Convention art. 1 (outlining purpose of Hague Convention).

⁷ See *id.* at art. 1 (noting objective of Hague Convention); but see Cardin, *supra* note 5, at 145 (warning Hague Convention only empowers court to decide merits of abduction). The courts where the child habitually resides determine custody issues. See *id.* The location where the child resided at the time of the abduction or unlawful retention determines habitual residence. See Joel R. Brandes & Carol L. Weidman, "Habitual Residence" Under the Hague Convention, N.Y.L.J., Sept. 23, 1997, at col. 1 (defining habitual residence).

⁸ Information obtained from United States Central Authority, Office of Citizens Consular Services, Child Custody Division at [http://www.travel.state.gov/hague_list.html]

⁹ Article 19 of the Hague Convention states, "A decision under this Convention concerning the return of the child shall not be taken as a determination on the merits of any custody issue." *Id.*, art. 19, at 1503.

¹⁰ The Hague Convention is a "private civil legal mechanism," and as such, "the parents, not the governments are parties to the legal action." Bureau of Consular Affairs, U.S. Dep't of State, Pub. No. 10489, International Parental Child Abduction 9 (1997).

jurisdiction of the child's habitual residence.¹¹ The Central Authorities, appointed by each respective signatory nation, cooperate with one another to discover the location of the wrongfully retained child, to prevent further harm to the child, and to ensure the prompt return of the child. Signatory nations do not have to automatically return the child to his or her place of habitual residence; discretionary exceptions exist that enable the child to remain with the removing parent. For example, Article 4 of the Convention establishes that if the child is over sixteen at the time of the original taking or retention, or becomes sixteen at any time after the taking, the convention does not apply. Also, if the custody rights involved are those of visitation ("access" as they are termed in the convention), the Central Authority may facilitate and secure those rights, but under Article 21, a violation of visitation rights does not trigger procedures for the child's return.

Other requests for returns may be affected by discretionary factors. It is within the judge's discretionary power under Article 12 to refuse return of the child if the child has become settled in the new environment and more than one year has passed from the date of the taking or detention. If more than one year has passed and the reason for the delay was concealment of the child's location, the petition may still be considered under the argument that the one-year limit should be tolled due to the abducting parent's conduct, as equity demands no one profit from their own wrongdoing.

Discretion is also afforded under Article 13 if the child is deemed mature enough to voice a preference for staying, or if there is a grave risk of harm to the child if returned. Children as young as nine have been found mature enough to have their wishes considered.¹² Finally, return may also be refused if it would be against the fundamental principles of human rights and freedoms in the requested state to return the child. Signatory countries have rendered a wide variation of decisions interpreting these discretionary criteria.¹³ There is also a marked variance in the rate of return among the different signatory countries.¹⁴

The Hague Convention attempts to prevent Central Authorities in the requested states from making judgments based upon cultural principles of the child's origin country by abandoning the method of using the child's "best interests" to justify keeping the

¹¹ See Hague Convention, art. 3 (outlining when removal of child considered wrongful); see also *id.* at art. 5 (defining what custody rights include). Parents' attained custody rights to a child include rights associated with the care of the child and the right to determine the child's place of residence. See *id.* But see Brandes & Weidman, (stating parent does not need actual custody to implore convention). A lawful custodian's denial of association with a child or a breach of a custody agreement may occur, giving rise to the application of the Hague Convention. The violation of a court decree does not have to exist for the Hague Convention to consider the removal or retention of a child wrongful.

¹² See *S v. S.* [1993] 2 F.L.R. 492 (C.A.) (English decision refusing to return child to France).

¹³ See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 *Fam. L.Q.* 9,24 (1994).

¹⁴ See Linda Girdner & Janet Chiancone, *A.B.A. Ctr. on Children and the Law, Survey of Central Authorities of the Hague Convention on the Civil Aspects of International Child Abduction* (1997) (showing successful return rate varying from 5% (Finland) to 95% (Luxembourg)).

wrongfully retained child in that respective state.¹⁵ The Hague Convention bases its terms on civil, not criminal, international law, and therefore criminal liability and extradition provisions do not fall within its scope.¹⁶

Although the Hague Convention contains certain limitations, it apparently offers the greatest chance of a prompt return of the wrongfully removed child. The difficulty with parental international child abductions lies in the fact that many countries have not participated in the Hague Convention, and when a parent takes a child to a Non-Hague contracting state, governments of the nations involved are not obligated to assist in that child's return. Some countries refuse to participate in the Hague Convention because they do not believe in the automatic return of the child, rather they presume that the determination of the child's best interests should occur within their own jurisdiction under their own laws.¹⁷ An analysis of the child's best interest considers the religious and social values of the respective countries involved, but religious and cultural tensions between these countries and Western culture family law often render negotiations nearly impossible.¹⁸

U.S. Laws.

Law enforcement in the United States often viewed parental kidnapping as a private family matter that did not require outside involvement. This belief has changed with the enactment of several laws that recognize the seriousness and criminality of parental kidnappings.¹⁹ Presently, law enforcement agents with arrest warrants seek out parents who violate a custody decree by taking a child out of the state or country. Unfortunately difficulties arise when parents take children out of the country because foreign courts have no obligation to enforce American custody decrees or to abide by American laws. Even though the United States has difficulty enforcing parental kidnapping laws abroad, these laws can act as useful mechanisms to facilitate solutions to international child abductions.

¹⁵ See Dorothy Carol Daigle, Note, Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and Its Exception, 26 V and J. Transnat'l L. 865, 869 (1993) (noting how automatic return of child tries to prevent value judgments about state).

¹⁶ See Finan, *supra* note 5, at 1013 (clarifying Hague Convention not grounded in criminal law). Punishment of the abductor is not the Hague Convention's purpose; its main concern focuses on having the wrongfully removed child placed back in his or her original situation before the removal by denying the abductor any legal advantage from the retention of the child in another signatory state.

¹⁷ Carol S. Bruch, Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention, 33 N.Y.U.J. Int'l. & Pol. 49, 51-53 (discussing the difficulties between Western countries and Islamic nations when negotiating child custody disputes because of the sensitivity surrounding the differing religious and social aspects of the cultures involved).

¹⁸ *Id.*

¹⁹ As of July 2001, as provided by Public Law 106-113, Section 236, both parents or legal guardians are required to execute a passport application for a minor child under age 14. In addition, the person executing the application must provide documentary evidence demonstrating that the individual has either: (1) sole custody of the child; (2) consent of the other parent to the passport's issuance. 22 U.S.C.A. § 213.

On April 29, 1988, the same day the United States became a signatory to the Hague Convention, Congress enacted the International Child Abduction Remedies Act (ICARA).²⁰ ICARA explains how the Hague Convention functions within U.S. courts, calling for an immediate return of children wrongfully removed under the terms of the Hague Convention unless one of the exceptions apply. ICARA broadens the jurisdiction in which a person seeking the return of an abducted child may present the abduction claim. The Hague Convention provides for the designation of a “Central Authority” by each signatory nation.²¹ A parent seeking the return of a child who the parent claims has been wrongly abducted may apply to the “Central Authority” of the child’s habitual residence or of any other signatory nation to the Hague Convention.²² ICARA additionally provides that a parent may commence a civil action for the return of a child by filing a petition in the proper jurisdictional court for relief sought, and the court will decide the case in a manner consistent with the terms of the Hague Convention. The President of the United States shall appoint a Federal Agency to serve as a Central Authority in accordance with the guidelines of Central Authorities under the Hague Convention, and ICARA authorizes this Central Authority to issue any regulations necessary to perform its duties under the Hague Convention and ICARA. In the United States, the Office of Children’s Issues (OCI) in the Department of State serves as the Central Authority in instances where children are wrongly removed from the U.S. Unfortunately, the Hague Convention and ICARA cannot function as remedies in a situation that involves a non-signatory nation of the Hague Convention and U.S. courts have dismissed complaints made under ICARA for failure to state a claim because of the involvement of a non-signatory nation.²³

The International Parental Kidnapping Act (IPKA)²⁴ criminalizes removing a child from the United States with “the intent to obstruct the lawful exercise of parental rights.” The term “parental rights” refers to the right to joint or sole physical custody of a child obtained through a court order, a legally binding agreement between the involved parties, or by operation of law.²⁵ A parent can use the IPKA as an affirmative defense and it will not detract from the provisions of the Hague Convention.²⁶ Defendants have challenged

²⁰ 42 U.S.C. § 11601(a).

²¹ Hague Convention, art. 8, at 1502.

²² Hague Convention, art. 6, at 1501.

²³ See *Mezo v. Elmergawi*, 855 F. Supp. 59 (E.D.N.Y. 1994) (discussing how ICARA and Hague remedies do not apply to non-signatories).

²⁴ 18 U.S.C. § 1204 (explaining what constitutes criminal act under IPKA). Violating the statute subjects the perpetrator to a fine, imprisonment of not more than three years, or both. *Id.*

²⁵ See *id.* (defining term “parental rights”).

²⁶ See *id.* (outlining affirmative defense and boundaries of IPKA). Affirmative defenses under IPKA are: 1) the defendant acted pursuant to a valid court decree under UCCJA; 2) the defendant was escaping domestic violence; 3) the defendant had lawful physical custody of the child and failed to return the child because of circumstances beyond his or her control, and the parent made an attempt at reasonable notice to the other parent within twenty-four hours. See *id.*

the constitutionality of IPKA, questioning the vagueness of the Act and claiming that the Act violates the free exercise of religion, but U.S. courts have upheld it.²⁷

IPKA may provide the potential to prosecute the wrongful acts of the parent, but it cannot guarantee the return of children from the foreign country where their parents wrongfully removed them. For example, in *United States v. Amer*,²⁸ Ahmed Amer abducted his two children to Egypt and was given custody in an Egyptian court. His wife was previously given custody in a U.S. court,²⁹ and also filed a complaint with the Federal Bureau of Investigation.³⁰ Upon Ahmed's return to the United States, he was arrested on charges of international parental kidnapping in violation of IPKCA.³¹ Ahmed was sentenced to twenty-four months imprisonment and a one-year term of supervised release with the special condition that he effect the return of the abducted children to the United States.³² When Ahmed began his supervised release term, he was unwilling to return his children to the United States.³³

²⁷ See *United States v. Fazal-Ur-Raheman Fazal*, 2002 U.S. Dist. LEXIS 5756 (Feb. 13, 2002) (finding that IPKCA was constitutionally valid under a rational basis analysis); see also, *United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (rejecting the challenge that IPKCA violates the free exercise clause because it is a neutral law of general application that “punishes parental kidnappings solely for the harm they cause.”).

²⁸ 110 F.3d 873, 873 (2d Cir. 1997).

²⁹ See *id.*

³⁰ See Brief for the United States at 4-5, *United States v. Amer*, 110 F.3d 873 (2d Cir. 1996) (No. 96-1181).

³¹ See *id.* at 7.

³² See *id.* at 14.

³³ See Transcript of the Hearing at 9, 23, *United States v. Amer*, 110 F.3d 873 (2d Cir. 1996) (CR-95-693 (CBA)).