

TESTIMONY

of

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for the

UNITED STATES SENATE

COMMITTEE ON FOREIGN RELATIONS

“International Parental Child Abduction”

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Mr. Chairman and distinguished members of the Committee, I welcome the opportunity to appear before you today to discuss the challenges of international parental child abduction. We are deeply grateful for the Committee's concern and leadership on these issues and its long-standing commitment to children. I also want to express my thanks to Ambassador Susan Jacobs for her leadership and for the State Department's expansion of its Office of Children's Issues and its commitment to become more engaged in these cases than ever before.

The International Centre for Missing & Exploited Children ("ICMEC") is a not-for-profit corporation, supported entirely by private funds and resources. ICMEC leads a global movement to protect children from exploitation and abduction. We have

- Trained law enforcement in 121 countries;
- Reviewed laws in 200 countries and worked with parliaments in 100 countries to enact new law on child pornography.
- Reviewed laws in 200 countries, developed model law on child sexual exploitation, and worked with parliaments and international bodies to change national legislation and international conventions.
- Created a research institute, the Koons Family Institute on International Law & Policy, to examine child abduction and sexual exploitation and launch policy initiatives with world leaders.
- Built a Global Missing Children's Network, now including 22 countries.
- Worked with Belgium, Romania, South Africa, Russia, Belarus and others to establish national centers on missing & exploited children.
- Created a regional center, the Southeastern European Center on Missing and Exploited Children, serving thirteen countries in the Balkan region.
- Entered into formal partnerships with Interpol, the Organization of American States, the Hague Conference on Private International Law, and others.
- Hosted international conferences, including a 2009 meeting of 400 Arab leaders in Cairo which produced "The Cairo Declaration," an agreement on child protection; a 2010 conference of judges from 15 countries at the US State Department to examine cross-border transportation of children, resulting in the "The Washington Declaration," now cited in case law worldwide; and a 2011 forum in Rome in partnership with the Vatican, the Mayo Clinic and Il Telefono Azzurro, which produced "The Declaration of Rome" on children's rights.
- Managed private sector financial industry and technology industry coalitions to address child sexual exploitation.
- Launched a Global Health Coalition of pharmaceutical companies and health care institutions to attack the problem of child sexual abuse and exploitation not just from a legal and law enforcement perspective but as a public health crisis.
- And there is much more.

We created ICMEC in 1998 in large measure because of growing concerns about international parental child abduction and the operation of the Hague Convention on the Civil Aspects of International Child Abduction. In 1998 I joined with Lady Catherine Meyer, the wife of the then-British Ambassador to the United States, Sir Christopher Meyer, to co-chair the International Forum on Parental Child Abduction, which brought together a global working group of experts in Hague Convention practice.

The attendees of that forum identified a series of problems including the lack of systematic data on the operation of the Hague Convention; wide variations in outcomes among the various Hague Convention countries; undue delay in reaching resolutions in cases; difficulty in locating children who are the subject of a Hague Application; lack of adequate support for victim families; varying competence and experience of attorneys and judges handling abduction cases within individual States; lack of uniformity in the interpretation of the Hague Convention particularly with the “exceptions” under Article 13; improper use of narrowly-defined exceptions to return; lack of enforceability of some return and access orders; and much more. Even with all of the progress that we have made, it is striking how the challenges we face today are much the same.

In 2000 we held the Second International Forum on Parental Child Abduction. We concluded that the treaty itself should not be modified, and that its original intent was more important than ever before, but that we must do far more to support and assist signatories, helping to ensure that the true intent of the Convention is realized. The attendees adopted a resolution urging the Hague Permanent Bureau to produce and promote Practice Guides to assist in the implementation and operation of the Convention.

ICMEC proposed that the practice guides address the operation of Central Authorities, enforcement of orders, access and prevention. The production of these guides would build upon recognized best practices under the Convention, and provide a framework for applying the Convention. The good practices identified in the guides would not be legally binding upon signatory countries, but would serve as guidance to countries based upon the research and advice of experts in order to help ensure the most effective process possible.

To illustrate the kind of process we were recommending, in partnership with world-renowned expert, Professor Nigel Lowe of the Cardiff University School of Law in the United Kingdom, a member of the ICMEC board, ICMEC itself produced customized practice guides for thirteen nations.

ICMEC formally proposed that this process be adopted at the Fourth Special Commission meeting at The Hague in March 2001 and implemented for all signatory countries. At that Special Commission meeting ICMEC successfully advocated for member states to support its proposal to create Guides to Good Practice to help implement the Convention. The proposal was adopted and ICMEC committed to assist in this effort.

In April 2003 at the Peace Palace at The Hague, ICMEC and the Hague Permanent Bureau entered into a formal Memorandum of Understanding to work together on these issues. Since then ICMEC and the Hague Permanent Bureau have collaborated on the creation of Guides to Good Practice to help existing and new Contracting States organize their judicial and administrative systems to effectively implement the Convention. And ICMEC has assisted the Hague Permanent Bureau in many other ways, including funding research on outcomes among member countries.

In October 2004 at The Hague ICMEC hosted a forum on International Child Abduction and the 1980 Hague Convention. We convened experts from across Europe and the United States. Out of this meeting came a number of questions and recommendations for ICMEC to explore in preparation for the 5th Special Commission meeting.

Among those questions was: “Are Good Practice Guides alone enough to guarantee change?” We concluded they were not and agreed to explore methods for monitoring the implementation of Good Practice in all Contracting States.

We discussed the need to improve trans-frontier access/contact between parents and children, and identified a series of challenges including the operation in some states of procedures which are both insensitive to the special features and needs of international cases and are the cause of unnecessary delays and expense; an inadequate level of international co-operation at both administrative and judicial levels; and the absence of firm legal provisions to enforce access.

We discussed the importance of providing support and assistance to newly contracting states. There was caution among existing member states about accepting treaty relationships with newly acceding states they believed ill prepared to fulfill their obligations. This trend gave rise to the question—“Are we doing enough to ensure the acceptance of newly acceding states?”

To help advance this engagement with non-Hague states, in 2006 I participated in the Hague Conference’s Malta process, in which judges from Islamic countries and other non-Hague states came together in Malta to meet with judges and experts from other parts of the world to explore the challenges associated with international child abduction and seek solutions.

Our most recent joint conference with the Hague Permanent Bureau was the International Judicial Conference on Cross-Border Family Relocation, held at the US State Department in March 2010. More than fifty judges and experts from fourteen countries gathered to develop a framework for handling these cases.

At the conclusion of the three-day meeting, the judges and other attendees adopted and issued the “Washington Declaration on International Family Relocation” which is a framework outlining the issues that should be considered by all judges to standardize how these types of cases are handled. The Declaration is already being used and cited in case law worldwide.

ICMEC is also active in promoting the ratification of the Hague Convention in non-signatory states. We are pleased that the total number of Hague signatories has climbed to 91 with its adoption by South Korea and Kazakhstan in 2013 and by Japan in 2014.

We are particularly hopeful about its adoption by Japan. To the best of our knowledge no US child has ever been returned from Japan as a result of the actions of a Japanese court or the Japanese government. I have met with, talked to and tried to help many left-behind U.S. parents whose children were abducted to Japan. However, absent some ability to mediate or reach an agreed-upon settlement, the left-behind US parent simply does not get their child back. Cases go unresolved for years.

For the United States, Japan has the largest number of parental abduction cases of any non-Hague country, and is third in new cases following only Mexico and Canada among all Hague and non-Hague countries.

In 2009 ICMEC sent its Senior Policy Director to Japan to advocate for change. She addressed audiences of elected officials, Diet members, journalists, religious organizations, attorneys, NGOs and community activists. She participated in a press conference with diplomats from the United States, Canada, the United Kingdom and France, all of whom shared our concerns. In 2010 the Ambassadors of 12 countries, including the US, UK, Australia and Germany, signed a joint statement urging Japan to adopt the Hague Convention.

The then-Japanese Prime Minister Yukio Hatoyama said, “We have been condemned by the USA, Canada, the UK, and France over this and I firmly believe we need to change things. The effect will be Japan coming into this century. We need to be clear though, these changes will take time. A very strong cultural change shifting from maternal primacy over the children is needed as well. I think we have already seen the beginning of this, but a change in laws is not the sole solution.”

Secretary of State Hillary Clinton discussed this issue with Japanese leaders, and President Obama raised it to the new Prime Minister Shinzo Abe. We are delighted that Japan has now ratified the Hague Convention and put implementing legislation in place. We are hopeful that Japan’s action signals a new day of cooperation on these issues. However, Japanese leaders have told us that full implementation of the Hague Convention will take time and that fundamental legal and cultural challenges must be addressed.

In my quarter century of work with leaders of the Hague Conference, I have learned over and over again that a country’s ratification of the Convention does not guarantee implementation. Our efforts to produce good practice guides and undertake research to monitor the extent of compliance demonstrate that there are Hague signatories which still do not meet the letter and spirit of the Convention.

So, what are the challenges for the future? The Committee asked that I address several questions:

1 – The scope of international parental child abduction, challenges to seeking the return of abducted children in countries which participate in the Hague Abduction Convention and countries which do not, and issues of US reciprocity.

The State Department estimates more than 1,000 outgoing international child abductions reported to the Office of Children's Issues each year. About half of the children abducted to Hague Convention countries are returned. About 40% of the abduction cases involve children taken to countries which are not signatories to the Hague Convention.

Challenges/Disturbing Trends – ICMEC funded statistical research on the operation of the Hague Convention. This research was performed by Professor Nigel Lowe of Cardiff Law School in the UK, a member of the ICMEC board. The research utilized 2008 data from member countries, and was presented to the 2011 Hague Special Commission. The conclusions were troubling:

There was a significant increase in the number of applications: There was a 44% increase in the total number of applications made under the Hague Convention in 2008 as compared to 2003, with a 45% increase in return applications and a 40% increase in access applications. A British study found that cases in the UK have risen 88% in the past decade.

There were fewer returns of children: The overall return rate was 46%, down from 51% in 2003 and 50% in 1999. Further, just 27% of the returns were judicially ordered, while 19% of the returns were voluntary. The data also showed that judicial refusals climbed to 15%, up from 13% in 2003 and 11% in 1999. In 2008 44% of the applications were decided in court, with 61% of court decisions resulting in a judicial return compared with 66% in 2003 and 74% in 1999.

The Hague process is taking longer: The key element in ensuring success in the Hague process is speed. The longer it takes, the lower the likelihood of successful resolution. In fact there is an incentive to create delays, making it more likely that a court will find that the child is now settled and that it is not in his or her best interests to be returned to their country of habitual residence.

Yet, the average time taken to reach a decision of judicial return was 166 days in 2008, compared to 125 days in 2003 and 107 days in 1999. A judicial refusal took an average of 286 days, compared to 233 in 2003 and 147 in 1999. Even for applications resulting in a voluntary return the average time was 121 days, compared to 98 days in 2003 and 84 days in 1999. The standard we seek in these cases is 42 days or six weeks.

The Hague Convention is not about child custody, it is about conflicts of law. Its stated goal is the prompt return of the child to his or her country of habitual residence. The longer the process takes, the less likely we are to achieve the kind of uniformity and consistency that we need across 91 countries.

The focus of the Hague Convention is on ensuring that the right jurisdiction makes the determination regarding the custody of the child by rigorously applying the principles of return to habitual residence, unless there are valid Article 13b defenses or some other impeding circumstances for non-return.

Based on the results of the survey, the 2011 Hague Special Commission emphasized the need for close cooperation between Central Authorities in the processing of applications and the exchange of information noting the principles of “prompt responses” and “rapid communication” as set out in the *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*.

An encouraging development is the emergence of liaison judges and the increased cooperation between the members of the International Hague Network of Judges and the relevant Central Authority resulting in the enhanced operation of the Convention. In some countries, including the United States, judges may receive a Hague case who have never handled such a case before and are unfamiliar with the Hague Convention. The ability to confer with an expert judge who is experienced in Hague cases is important and increases the likelihood that a case will be handled properly.

Periodically, the US itself has been accused by other countries of not observing reciprocity under the Hague Convention. There are nearly 10,000 state judges in the US who could conceivably receive and handle a Hague case. In the United Kingdom just 17 judges handle Hague cases. Thus, judicial training and the judicial liaison function are of paramount importance in the US. The US has made enormous progress in this regard.

The Process in Non-Hague Countries: Many non-Hague countries have deeply held and long maintained traditions that have developed over centuries in such a way that they hold a more rigid concept of best interests of the child. It is often difficult to resolve differences over the issue of child custody between a parent from a religious legal system and a parent from a secular legal system. The challenges can be enormous.

That is why we are encouraged by the movement to create bi-lateral agreements between Hague and non-Hague states. Such agreements provide a basis for resolution of these conflicts under the general principle of the Hague Convention—that is, by rigorously applying the principles of return to habitual residence, unless there are valid Article 13b defenses or some other impeding circumstances for non-return. Mediation between countries, particularly on access issues, has also met with some success.

Some of the better known examples of bilateral agreements are US/Egypt, UK/Pakistan, France/Algeria, Belgium/Morocco, Canada/Lebanon, etc.

There is a Growing Tendency of Courts in Return Cases to Undertake In-Depth Welfare Inquiries Before a Return is Contemplated: The purpose of the Hague Convention is to achieve the speedy, summary return of abducted children to their countries of habitual residence where the courts in those countries make the determination as to proper custody.

Yet, there are a growing number of courts that are undertaking in-depth examinations of the entire family situation surrounding the child and considering a wide range of factors before ordering the child's return. Their rationale is that they have an obligation to consider seriously allegations regarding "grave risks to the child" and make rulings regarding the full circumstances of the case. Thus, in some instances courts in countries to which the abducted child has been taken are effectively retrying the issue of custody in direct contravention of the underlying purpose of the Hague Convention.

This was an issue in recent cases before the European Court of Human Rights. For example, in the 2010 ECHR decision in *Neulinger & Shuruk v. Switzerland*, the court held that "basic norms of human rights require (a) that courts in every case under the Hague Convention...must consider the best interests of both the child and the child's family and (b) that a child should not be returned to its habitual residence, even if that is required by the Hague Convention, if it is not in its best interests to do so."

A second case considered by the ECHR was *X v. Latvia* in which the court initially held that "the Latvian courts' approach in granting the return order lacked in-depth examination of the entire family situation and of a whole series of factors..." However, ultimately the ECHR permitted the return of the child to Australia per the provisions of the Hague Convention.

Obviously, a trend in which courts readjudicate what is in the best interests of the child potentially strikes at the heart of the Hague Convention. It is a concern of which policy makers in the US and globally should be aware. ICMEC is consulting with policy makers in many countries, including European countries. It is our view that the Hague Child Abduction Convention, now 34 years old, represents far and away the best framework for resolving these complex, difficult cases, and that we need to preserve it as the primary instrument for handling these cases.

A third case of significant interest is *Lozano v. Alvarez*, heard by the US Supreme Court on December 11, 2013. The *Lozano* case examines one of the exceptions to the return of the child under the Hague Convention. Article 12 of the Convention provides an exception to the obligation to return a child if the petition for return is filed more than one year after the child's removal and a preponderance of the evidence shows that the child is now settled in his or her new environment such that the return would not be in the child's best interests. The question is whether a court may equitably suspend this one-year filing period provision when the abducting parent has concealed the whereabouts of the child.

The Use of Exceptions: The use of the exceptions allowed under the Hague Convention appears to be increasing, as judges find new reasons not to return children to their countries of origin. Of particular interest is the domestic violence exception. There are indications that more and more abducting parents are alleging domestic violence by the custodial parent. While this is an important factor and requires thorough investigation and consideration, it is clear that for some abducting parents, this appears to have become a strategy, whether there is a factual basis or not.

Access for Left-Behind Parents: Perhaps there is no challenge under the Hague Convention that is greater than that of simply providing access to the other parent. In the Conclusions and Recommendations of the June 2011 meeting, the Special Commission noted that access applications were markedly slower to reach a conclusion than return applications, taking an average of 338 days as compared to 188 days for return.

2 – What More Can Be Done to Achieve the Return of Abducted Children and Assist Their Left-Behind Parents?

- We need to reaffirm the importance of the Hague Convention and work toward uniform, consistent global application and reciprocity, including pressing for more countries to become signatories.
- We need US officials to become stronger advocates on behalf of left-behind parents and utilize the influence of the US government to bring about resolutions.
- We need to launch a global effort to increase the speed with which Hague Convention cases are addressed and resolved, reducing undue delays.
- We need to address the lack of enforceability of some return and access orders;
- We need to create more and better systematic data to measure the operation of the Hague Convention and evaluate the performance of individual countries.
- We need to investigate the impact of key decisions of the European Court of Human Rights and other courts which seem to potentially risk undermining the core premise of the Hague Convention.
- We need to address the lack of uniformity in the interpretation of the Hague Convention particularly with the “exceptions” under Article 13.
- We need to conduct more in-depth investigation into the impact of domestic violence on international parental child abduction.
- We need to build on the Malta process by evaluating how the Hague Convention is working in Morocco and Turkey, and seeking to replicate the positives associated with those experiences in other Islamic countries.
- We need to improve judicial training and address variations in caseload and experience of Central Authorities and judges in many countries.
- We need to provide greater support for victim families.