Articles

INTERNATIONAL EXTRADITION AND PARENTAL CHILD ABDUCTION

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Child snatching by parents or parental child abduction is a frequent occurrence in today's world. The high rate of divorce, coupled with the conflict in social values as to custody and access rights of parents, has fuelled an increase in child kidnapping. More and more persons from different nationalities and different countries are marrying. When these marriages break down and custody rights are given to one parent, the 'losing parent' may be tempted to abduct the children and flee the jurisdiction. Such cases are now notorious. In Australia the alleged abduction by a Malaysian prince of his Australian children has caused national consternation and a call for increased government intervention. One solution to this problem is to use the *Hague Convention on Civil Aspects of Child Abduction*[1] to recover and return the child to his/her custodial parent. But what happens if a country is not a party to the Convention?[2] To what extent is it possible to prosecute and extradite a 'defaulting' parent for child abduction and to use this as a tool to recover the child?

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1 See also the *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children.*

2 It may also be possible to enforce a foreign custody order at common law or to take court action in the jurisdiction where the abducted child is located and obtain a custody order there: See Martin, 'Abduction of Children - Some National and International Aspects' (1986) 1 Australian Journal of Family Law 125.

The criminal liability of parents for child abduction

Common law offence of kidnapping

The origin of the word 'kidnapping' shows that it has always had a strong connection with the abuse of children' s rights; for 'kidnapping' is a 'composite word made up of two colloquial expressions (kid/ napping) which together denote child snatching.'[3] The hideous practice of seizing and stealing children in order to provide servants or labourers for the American colonies was a manifestation of the wider disease of slavery. The misery and suffering inflicted on children by the traders in human flesh was widely condemned. The English judges responded by creating the common law criminal offence of kidnapping. The offence consisted of 'the stealing and carrying away, or secreting of any person against that person's will'.[4] It is a crime involving force or fraud against the victim's will. As such it is an aggravated species of false imprisonment.

Parental child-snatching or kidnapping of children by parents is nothing new. It was not until 1984 that the House of Lords in the case of *Regina v D*[5] held that the offence of kidnapping may be committed by the parent of the child. In that case D, a father, enlisted the assistance of two armed men to take his two year old daughter, who was a ward of the state and in the care and custody of the mother, from England to New Zealand. The court held that the offence of kidnapping may be committed by the parent of the child who takes that child without its consent or without lawful excuse.[6] The court acknowledged that in the nineteenth century the father's paramount authority in the family would have provided a lawful excuse in respect of kidnapping of an unmarried child under the age of majority, but that defence was no longer available in the changed social and legal conditions in the present since the paramountcy of the father's position in the family had disappeared.

To constitute kidnapping, the 'stealing or taking away' must be without the victim's consent. In *Regina v D*[7] it was held that a young child of two years could not have given consent because he would not have the understanding or intelligence to give consent. Where a child is older, it is a

3 *People v Edge* [1943] I R 115 at 146 per Black J.

4 *Easts' Pleas of the Crown* (1803) vol 1 at 429.

5 [1984] 1 AC 778 ; (1984) 2 All ER 249.

6 The ingredients of the offence of kidnapping are: (a) the taking or carrying away of one person by another; (b) by force or fraud; (c) without the consent of the person so taken or carried away; and (d) without lawful excuse. See *Regina v D* [1984] 1 AC 778 at 800. The offence is completed when the victim is seized and carried away against his will, and there is no reason why kidnapping should be regarded as a continuing offence involving concealment of the person seized: See *R v Reid* [1973] QB 299, [1872] 2 All ER 1350(CA).

7 [1984] 1 AC 778 at 806 where Lord Brandon expressed the view that he would 'not expect a jury to find at all frequently that a child under 14 had sufficient understanding or intelligence to give its consent'. Cf *R v C (Kidnapping: Abduction)* [1991] 2 FLR 252 at 258 Watkins LJ. See also *Gillick v West Norfolk and Wiesbech Area Health Authority* [1986] 1 AC 112, [1985] 3 All ER 402.

question of fact for the jury whether a child has the understanding or intelligence to give his/her consent. For example, in *People v Edge*[8] the Irish Supreme Court held that the taking away of a fourteen year old boy against the will of his lawful guardian did not amount to kidnapping since the boy had reached an age where he could, and did, give consent.

The offence of kidnapping is an attack on, and infringement of, the personal liberty of the individual, whereas contempt of a court order in relation to custody is an attack on the authority of the court. It is not clear how the nature of the interest protected by the law affects the question of prosecution. In *Regina v D* Lord Brandon of Oakbrook considered that the conduct of parents who abducted their children in defiance of court orders can and generally should, be dealt with as a contempt of court. He went on to say that:

> in exceptional cases, where the conduct of the parent concerned is so bad that an ordinary right-thinking person would immediately and without hesitation regard it as criminal in nature,[9]

that conduct should be dealt with by way of criminal prosecution.[10]

Australia

In Australia both federal law and state law is potentially relevant to a criminal prosecution in a parental child kidnapping case. Relevant offences under state law include the offences of 'child stealing'[11] and 'abducting a child under the age of sixteen.'[12] In New South Wales there is an offence of 'abducting a child under the age of fourteen by force or fraud with intent to deprive possession', which attracts a potential prison sentence of ten years.[13] None of these state offences were specifically designed to deal with parental child abduction. None have been comprehensively tested in a court of law to see whether and in what circumstances they may apply to the abduction of children by one of their parents. Indeed, some offences would seem to apply to a parent only in rare circumstances.[14] This explains in part why in practice

8 [1943] IR 115.

9 [1984] 1 AC 778 at 806.

10 In *R v C (Kidnapping: Abduction)*[1991] 2 the English Court of Appeal advised that prosecutors should avoid altogether charging anyone with child kidnapping at common law, in view of the comprehensive scope of the offences in the *Child Abduction Act* 1984.

11 See for example, *Criminal Code* (Queensland) s 363, *Criminal Code* (Western Australia) s 343, *Crimes Act* 1958 (Victoria) s 63.

12 See, for example, *Criminal Code* (Queensland) FLR 2S2 s 363 A, *Criminal Code Consolidation Act 1935* (South Australia) s 80. See also *Crimes Act* 1900 (NSW) s 90 (Abduction of girl under 16).

13 *Crimes Act* 1900 (NSW) s 91.

14 For example, it is a defence to a charge of 'child stealing' (ie the taking away of a child from any parent, guardian or any other person having the lawful care or charge of such a child) to show that the accused has claimed in good faith the right of possession of the child, or is the child's mother or has claimed to be the father of an illegitimate child. See *Crimes Act* 1958 (Victoria) s 63. The provision does not explicitly refer to the father of a legitimate child. In England it has been held that the father who claims a right to possession of his legitimate child is also exempted from the offence of 'child stealing.' See *R v Austin* [1981] 1 All ER 374 (CA).

the states of Australia have been reluctant to use their own criminal provisions against parents, preferring that where a child is taken by the unsuccessful party in a child custody case, the matter be left to be dealt with under the federal *Family Law Act* 1975.

The *Family Law Act* 1975 creates a number of offences which are relevant to child abduction, including the offence of interfering with a person's right to custody,[15] and the offence of illegally removing a child from a person who is entitled to custody or access.[16] These offences apply to parental child abduction in purely domestic and also in international cases. There is also the power of the Family Court to punish persons for contempt of that court, for example, in relation to breaches of custody or access orders.[17]

Australian law has gone further by creating specific offences of international parental child abduction. In 1983 two offences were added to the *Family Law Act* 1975 so as to deal with an aggravated form of contempt, namely the removal of a child (ie a person under 18 years) from Australia to an overseas country in contravention of a court order or while custody/guardianship/access proceedings were pending.[18]

Section 70 A of the *Family Law Act* 1975 provides inter alia :

(1) Where there is in force an order (including an interim order) made by a court in Australia with respect to the custody or guardianship of, or access to, a child (including an ex-nuptial child), a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, such a person, shall not take or send, or attempt to take or send, the child from Australia to a place outside Australia except-

(a) with the consent in writing (authenticated as prescribed) of each person who, under the order is entitled (whether alone or together with another person or other persons) to the custody or guardianship of, or access to, the child; or

(b) in accordance with an order of a court made under this Act or under a law of a State or Territory at the time or, or after, the making of the firstmentioned order.

Penalty: $10,000 or imprisonment for 3 years, or both.

(2) Where proceedings have been instituted in a court in Australia for an

15 *Family Law Act* 1975 s 70(6).
16 Ibid s 63.
17 Ibid s 108(1) and s 70(6).
18 Prior to November 1983, the removal of a child out of Australia contrary to a court order was covered by s 62 of the *Migration Act* 1958 which provided a maximum penalty of $2,000 or 12 month's imprisonment.

> order with respect to the custody or guardianship of, or access to, a child (including an ex-nuptial child), and those proceedings are pending, a person who is a party to the proceedings, or a person who is acting on behalf of, or at the request of, such a person shall not take or send, or attempt to take or send, the child from Australia to a place outside Australia except:
>
> (a) with the consent in writing (authenticated as prescribed) of each party to the proceedings; or
>
> (b) in accordance with an order of a court made under this Act or under a law of a State or Territory after the institution of the proceedings.
>
> Penalty: $10,000 or imprisonment for 3 years, or both.

Sub-sections (1) and (2) make it an offence to remove children from jurisdiction and an offence to attempt to achieve that. The burden of establishing the elements of the offences in sub-sections (1) and (2) is on the prosecution, but the defence bears the burden of proof of the alternative exceptions in paragraphs (a) of each sub-section. In most cases the prosecution should be a relatively straightforward task. Evidence that there were proceedings of a specified kind in a court in Australia or specified orders in force in Australia and of the parties thereto may be available from the fugitive's spouse or former spouse and from the Registrar of the Family Court of Australia. Evidence that the fugitive took the child from Australia may be available from a travel agent or employee of an airline or shipping company. There may also be corroborating documentary evidence of the departure of the fugitive and the child from Australia.

The Australian courts have treated offences under section 70 A as very serious. In *R v Constantine*[19] Lee A-J of the NSW Court of Criminal Appeal observed that:

> Removal of a child from the jurisdiction by a party who does not have custody resulting in an offence under s 70A(1) will almost invariably place the child in a situation where its total well-being and care are taken out of the hands of the party entitled to custody, who may well be helpless to take measures to recover the child. Not only is the party deprived of the enjoyment of the custody, but, more important, the child's welfare can be seriously jeopardised because of the loss of care and guidance of the person chosen by the law to attend its welfare.
>
> The court in proceedings under s 70A(1) is in a real sense protecting the rights of the child to remain in Australia in the custody of the party to whom

19 (1991) 25 NSWLR 431 at 438-9. The Court of Criminal Appeal held that a custodial sentence of 9 months with release on recognisance after 4 months was not too severe.

> the court has granted custody until that person decides, or the court decides, that it shall be otherwise. That state of affairs is not one to be viewed as open to variation at the whim or the pleasure of the other party. It is quite wrong to view an offence under s 70A(1) or s 70A(2) as merely the result of a disagreement between husband and wife and to deal with the matter by reference to considerations referably to the reasonableness or otherwise of the conduct of the parties in regard to the removal of the child, although such matters may well necessarily, to a degree, come under consideration in regard to offences under s 70(A). The wrongful disturbance of the rights of the child and of the custodian are fundamental considerations and the question of penalty should be approached in every case under s 70A(1) with them prominently in mind. Where the evidence leaves no doubt, as here, that the husband has deliberately flouted the custody orders obtained by his wife and actually removed the children out of jurisdiction, not merely without her consent but in defiance of her wishes, an offence of the nature that may require a gaol sentence has been shown by those facts alone for objectively those facts demonstrate unlawfulness of a very high order.

United Kingdom

Under section 1 of the *Child Abduction Act* 1984[20] it is an offence for a person who is 'connected with a child (eg parent including a putative father) to take or send a child under the age of sixteen out of the United Kingdom without the 'appropriate consent', for example, without the consent of the other parent or a guardian or without the leave of the court. It is a defence if the removal is done in the belief that the other person consented or would have done had he/she been aware of all the circumstances, or that having taken all reasonable steps to communicate, he/she had failed to communicate with the other person or (providing there is no court order) the other person has unreasonably refused to consent. Where there is sufficient evidence to raise such a defence, it is for the prosecution to rebut it.

Prosecution under section 1 of the *Child Abduction Act* requires the consent of the Director of Public Prosecutions. The maximum penalty for a conviction on indictment are:

> 7 year's imprisonment and on summary conviction 6 month's imprisonment or a sum not exceeding the statutory maximum of 2,000 pounds or both.

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20 See also s 2 of the *Child Abduction Act* 1984 which creates an offence for a person 'unconnected with the child' to abduct a child under 16 and s 3 of the Act which makes it an offence to abduct a girl under 16. See also s 49(1) of the *Children's Act* 1989 which creates an offence of abducting a child from a 'responsible person.' There is no specific offence of child abduction where a parent removes the child within the country, for such a case would be best dealt with be a court with family jurisdiction who may more easily make and enforce a custody order. See generally, Bevans HK, *Child Law* Butterworths, (1989) at 153-9 ; Lowe and White, *Wards of the Court* Barry Rose, (1986) par 17-1 ff; Bromley and Lowe, *Bromley's Family Law* Butterworths, (1987) at 285-8.

United States

In the United States there is no distinct offence of international child abduction. This does not mean that parents who run away with their children thereby depriving another parent of custodial or guardianship privileges can not be prosecuted. Various offences relating to child abduction are found in statutory provisions enacted under state law. For instance, chapter 4 of the *Penal Code* of California is headed 'Child Abduction' and contains a number of offences.

Section 277 of the Californian *Penal Code* provides:

> In the absence of a court order determining rights of custody or visitation to a minor child, every person having a right of custody of the child who maliciously takes, detains, conceals or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child, shall be punished by imprisonment in the county gaol for a period no more than one year, a fine of one thousand dollars ($1,000), or both, or by imprisonment in the state prison for a period of one year and one day, a fine of five thousand dollars($5,000), or both.

Section 278 of the *Penal Code* provides:

> Every person not having a right of custody, who maliciously takes, detains, conceals, or entices away any minor child with intent to detains or conceal that child from a person, guardian, or public agency having lawful charge of the child shall be punished by imprisonment in the state prison for two, three or four years, a fine of not more than ten thousand dollars ($10,00,) or both, or imprisonment in a county gaol for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

Section 278.5 of the *Penal Code* provides:

> (a) Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county gaol for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.
>
> (b) Every person who has a right to physical custody of or visitation with a child pursuant to an order, judgement, or decree of any court which grants another person, guardian, or public agency right to physical custody of or visitation with the child, and who within or without the

> state detains, conceals, takes, or entices away that child with the intent of depriving the other person of that right to custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county gaol for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

These offences variously require the taker of the child to have or not to have a 'right of custody'. For example, section 277 and section 278.5(a) and (b) of the *Penal Code* apply only in respect of persons who have a right of custody of the child, while the offence in section 278 is only available in respect of a person who has no right of custody of the child. Section 277 creates an offence akin to 'child abduction' in circumstances where there is no court order determining the rights of custody or visitation. The essence of section 277 is that it is a wrong committed by a person who has a right of custody against the lawful joint custody rights of another person etc. Section 278.5(a) and (b) are also versions of a 'child abduction' offence in that they are offences committed with the intent of depriving another person of the right to physical custody or visitation. On the other hand, section 278 is similar to the offence of 'child stealing' in that the essence of the charge is that it is a wrong committed against the right of possession, which the person etc. having lawful charge had of the child. An offence under s 278 can not be committed by a parent who has a right of custody of the child.

Canada

The *Criminal Code* of Canada[21] creates two distinct offences of child abduction, namely abduction in contravention of a custody order and abduction where there is no custody order. It is an offence under section 250.1 of the Code for a parent, guardian or person having the lawful charge of a person under the age of fourteen to take, entice away, conceal, detain, receive or harbour that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada with intent to deprive a parent etc of the possession of that person. Under section 250.2(1) of the Code it is an offence for a parent, guardian or person having the lawful charge of a person under the age of fourteen to take, entice away, conceal, detain, receive or harbour that person, in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent etc of the possession of that person. It is a defence if an abducting parent can establish that the taking of the child was done with the consent of the other parent having lawful possession, care or charge of the child (s 250.3), or that it 'was necessary to protect the young person from danger or imminent harm': section 250.4. It is expressly stated that it is no defence to show that the young person 'consented to or

21 See generally Wilson and Tomlinson, *Wilson: Children and the Law* Butterworths, (1986) at 45-6.

suggested any conduct of the accused' (s 250.5). No proceedings under section 250.2(1) may be commenced without the consent of the Attorney-General or counsel instructed by him/her for that purpose. Penalties for contravening sections 250.1 or 250.2(1) are in either case a maximum imprisonment of ten years on conviction on indictment.

Malaysia

In the case of countries which apply Islamic or Shari'ah law to family law,[22] it is difficult to determine with any degree of precision the scope of criminal offences in cases of parental child abduction. Although criminal law and procedure in many Middle Eastern countries, northern African states, as well as the south east Asian states of Indonesia, Brunei and Malaysia, is almost completely westernised, family law as applied to Muslims is determined by the Shari'ah. The relationship between constitutional, private and public laws is complex. For example, in the case of Malaysia there are eleven States with Syariah courts directly answerable to the ruler of the state. There are various criminal offences under Islamic law (eg gambling) which can only be committed by Muslims and are prosecuted by the Religious Affairs Department. There are also general criminal offences under the national *Penal Code* of Malaysia such as kidnapping offences which appear to be similar to offences found in western states. It is, for example, an offence under section 360 of the *Penal Code* of Malaysia to 'convey any person beyond the limits of Malaysia without the consent of that person, or of some person legally authorised to consent on behalf of that person'. It is an offence under section 361 of the *Penal Code* to take or entice any minor (ie a male under fourteen or a female under sixteen out of the keeping of the lawful guardian of such minor, without the consent of such guardian.[23] An offence under sections 360 or 361 is punishable by seven years imprisonment and a fine.

Miscellaneous Offences

It is not unusual that where a parent abducts his/her child, the parent commits other criminal offences, including assault and false imprisonment,[24] as well as offences relating to passport and immigration laws. For example, sections 9A, 9B and 9C of the Australian *Passports Act* 1938 create a series of offences relating to the improper use or possession of passports, offences relating to the forgery etc of passports, and offences relating to the issue of

22 See Nasir J, *The Status of Woman under Islamic Law* Graham Trotman, (1991); Coulson N, *Islamic Surveys: A History of Islamic Law* Edinburgh Press, (1964) chs 10 and 11; Bozeman, *The Future of Law in a Multicultural World* Princeton, (1971) ch 2.

23 The words 'lawful guardian' include any person lawfully entrusted with the care or custody of such minor or other person. Section 321 does not extend to the acts of any person who in good faith believes himself to be the father of an illegitimate child or who in good faith believes himself entitled to the lawful custody of such child, unless such act is committed for an unlawful purpose.

24 A parent may be guilty of the offence of unlawfully imprisoning his/her child: *R v Rahman* [1985] Crim L R596; (1985) 81 Crim App R 349.

passports. It is also an offence under section 10 of the *Passports Act* 1938 to knowingly make any false or misleading statement in support of an application by another person for an Australian passport.

Prosecution policy considerations

Unlike many civil law jurisdictions, it is not the law in most common law jurisdictions, including Australia, that all suspected criminal offences must automatically be the subject of prosecution. The decision whether or not to prosecute federal offences in Australia is subject to policy guide-lines set out in a statement issued by the Director of Public Prosecutions in 1986.[25] The Guide-lines state that it is necessary to consider whether, in the light of the available evidence and the circumstances of the case, the public interest requires prosecution of the alleged offender. In the case of the prosecution of a parent for an offence under section 70 A of the *Family Law Act* 1975 there are a number of factors that may be taken into consideration, including the seriousness of the offence, any mitigating or aggravating circumstances, the alleged offender's antecedents, and the need for deterrence, both personal and general.[26] In an objective sense an offence under this provision is serious because of the penalty which may be imposed ($10,000 or 3 years imprisonment). An offence may be considered serious in a subjective sense where, for instance, a young child is taken out of Australia in a covert way, and the parent does not inform his/her spouse that he/she has taken the child with him/her. Another aggravating circumstance exists where the fugitive refuses to return the child to Australia thereby continuing his/her contemptuous conduct. On the other hand a mitigating circumstance would exist if the parent accompanied by the abducted child voluntarily returned to Australia and surrendered himself/herself to the authorities. The need for general deterrence is also an important factor militating in favour of a prosecution. It is notorious that orders made by the Family Court are frequently flouted and that the Family Court does not enjoy a high degree of public confidence particularly among disappointed litigants. The willingness of the 'victim' to give evidence in the matter is also a critical factor in deciding whether or not there is a prima facie case against the parent and in assessing the public interest in favour of prosecution. Finally, the availability and efficacy of any alternatives to prosecution may be taken into account.

Extradition Law and Practice

Extradition is the process whereby one state surrenders to another state a person who is accused or convicted of a crime committed within the jurisdiction of the requesting state. It is an act of sovereignty for a state to surrender a person within its borders to a foreign state. In the absence of a

25 *Prosecution Policy of the Commonwealth: Guide-lines for the making of decision in the Prosecution Process*, Office of the Director of Public Prosecutions, January 1986.

26 See *R v Constantine* (1991) 25 NSWLR 431 at 438-9 for a discussion of these factors in sentencing.

treaty obligation, there is no international legal obligation imposed on states to extradite any person. States frequently use their immigration laws to deport or expel a non-national wanted by another state where there is no extradition arrangement and/or as an alternative to formal extradition.

Location of the Fugitive and Child

The location of a fugitive and the snatched child raises many practical problems. In many respects it may be just like looking for a needle in a haystack. Unless the parent is charged with a criminal offence, the police are unlikely to take any interest in searching for a snatched child. Contrary to popular belief, the international police organisation, ICPO-Interpol, does not have a team of worldwide investigators searching for fugitives. In effect, Interpol provides a valuable communications system between police forces. Intelligence gathering by Australian law enforcement agencies and the Australian Federal Police Liaison officers located in foreign countries may play an important role in locating fugitives. Luck, determination, an understanding of the likely movements of the fugitive, and the use of private detectives are equally important.

Is there an applicable extradition treaty or arrangement?

The first consideration is whether there is an extradition treaty or arrangement between the requesting state and the requested state. Suffice to say that there is a wide range of arrangements between countries facilitating extradition. There are also significant gaps in the coverage of extradition arrangements, resulting in the creation of havens for fugitives.

A person may only be extradited from Australia to a foreign country if that country is an 'extradition country' to which the *Extradition Act* 1988 has been applied.[27] Extradition from Australia may be effected when the other country concerned:

(i) is a member of the Commonwealth of Nations so that the *Extradition (Commonwealth) Regulations* 1988 has listed that country;

(ii) is a party to a bilateral extradition treaty with Australia, either 'inherited' or 'truly bilateral';

(iii) is one to which Australia has applied the *Extradition Act* 1988 on the basis of a guarantee of reciprocity; or

(iv) is a party to a multilateral convention to which Australia is a party which contains an obligation to try or extradite for offences specified

27 There is no prerogative power to grant extradition from Australia, but there is such a power to request extradition from another country to Australia: *Barton v Commonwealth* (1974) 131 CLR 477; *Riley v Commonwealth* (1985) 159 CLR 1.

in the convention.

These various sources of Australia's extradition obligations are not expressly spelt out in the *Extradition Act* 1988, but they represent the principal ways in which Australia has applied its extradition law to foreign countries.

Unlike the laws applicable in many states, the existence of a binding international treaty is not a prerequisite to extradition from Australia. Australian law is very flexible since it allows the *Extradition Act* 1988 to be applied to another state on the basis of reciprocity.[28] The *Extradition Act* 1988 may be modified in its application to a particular country by regulations giving effect to a bilateral extradition treaty or by regulations which specify limitations, conditions, exceptions and qualifications not arising out of a bilateral extradition treaty.[29]

Since the establishment of a Task Force[30] in 1985, Australia has taken a leading role in modernising and expanding its extradition arrangements. The strategy has been to conclude modern extradition treaties or arrangements with as many appropriate countries as possible. Indeed, between 1985 and 1993 Australia negotiated more new extradition treaties and arrangements than any other country in the world. Today, Australia has bilateral extradition treaties and arrangements with 29 countries,[31] inherited treaties with 22 countries,[32] and extradition arrangement with 65 jurisdictions of the Commonwealth of Nations.[33] Given that there are approximately 170

28 Other examples of flexibility are s 15 of the *Extradition Act* 1989 (UK) which permits the making of 'special extradition arrangements' so that the Act may be applied *ad hoc* and *ad hominem* in a particular case by certificate of the Secretary of State, and s 3 of the *Extradition Act* 1992(Malaysia) where the Minister of Home Affairs may by special direction apply the Act to a country which has requested extradition in relation to the extradition of a particular fugitive criminal.

29 *Extradition Act* 1988 s11(1).

30 The Task Force, consisting of representatives from the Federal Attorney-General's Department, Department of Foreign Affairs and Trade and the Office of the Attorney-General, has developed a model Extradition Treaty which played a critical role in the negotiations.

31 Argentina, Austria, Belgium, Brazil, Denmark, Ecuador, Finland, France, Federal Republic of Germany, Fiji, France, Greece, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Marshall Islands, Mexico, Monaco, Netherlands,. Norway, Philippines, Portugal, South Africa, Spain, Sweden, Switzerland, United States of America.

32 Albania, Bolivia, Chile, Colombia, Cuba, Czechoslovakia, El Salvador, Guatemala, Haiti, Hungary, Iraq, Liberia, Nicaragua, Panama, Paraguay, Peru, Poland, Rumania, San Marino, Thailand, Uruguay, Yugoslavia.

33 Anguilla, Antigua & Barbuda, Bahamas, Bangladesh, Barbados, Belize, Bermuda, Botswana, British Antarctic Territory, British Indian Ocean Territory, British Virgin Islands, Brunei, Canada, Cayman Islands, Cook Islands, Cyprus, Dominica, Falkland Islands, Gambia, Ghana, Gibraltar, Grenada, Guyana, Hong Kong, India, Jamaica, Kenya, Kiribati, Lesoto, Malawi, Malaysia, Maldives, Malta, Mauritius, Montserrat, Namibia, Nauru, Nigeria, Pakistan, Papua New Guinea, Pitcairn, Henderson, Ducie and Oeno Islands, St Christopher and Nevis, St Helena, St Helena Dependencies, St Lucia, St Vincent and Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Georgia and South Sandwich Islands, Sri Lanka, Swaziland, Tanzania, Sovereign Base areas of Akrotiri and Dhekelia in Cyprus, Tonga, Trinidad and Tobago, Turks & Caicos, Tuvalu, Uganda, United Kingdom, Vanuatu, Western Samoa, Zambia, Zimbabwe.

countries in the world, there are significant gaps in the extradition coverage. For example, in the Asia-Pacific rim, Australia has extradition arrangements with Singapore, Brunei, Malaysia and many Pacific countries based on the London Scheme for Extradition[34] and treaties with Philippines and South Korea. There is also an arrangement with Japan and a treaty with Indonesia which is signed but not yet in force. The countries of Indo-China, Taiwan and the Peoples Republic of China are the notable omissions.

Is there an extradition offence?

The next question is whether the crime of parental child abduction is an extradition offence within the scope of the relevant extradition treaty and/or the national extradition law. In the case of Australia an extradition offence is defined in section 5 of the *Extradition Act* 1988 as an offence against the law of Australia and of the requesting country punishable by death or imprisonment or other deprivation of liberty for a period of not less than twelve months. This definition may be modified by a regulation applying the *Extradition Act* 1988 to a particular country. For example, in the case of extradition to countries of the Commonwealth of Nations, an extradition offence is defined by reference to a period of not less than two years.

Where under a bilateral treaty an extradition offence is determined by reference to a list of offences, eg 'kidnapping', 'abduction' or 'child stealing', there is a question as to whether parental child abduction is covered by the treaty. This is because parental child abduction is a special kind of offence that the contracting states, depending on their respective laws at the time, did not necessarily have in contemplation.

As late as 1983 the firm policy of the United States Government was to reject automatically any international request for extradition for an alleged child custody offence.[35] The legal justification for the international policy was that none of the United States treaties contemplated extradition for any criminal offence of a child custodial nature. However, by 1987 (following pressure by Congress and an internal review by the State Department and the Department of Justice) the United States took a different view as to the scope of its treaties. It began accepting extradition requests in child custodial cases and making extradition requests of countries such as the United Kingdom and Australia especially where custodial offences related to the children of United States citizens.

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34 The London Scheme on Extradition is a set of guidelines which form the basis of domestic legislation in Commonwealth countries to regulate extradition to Commonwealth countries. The London Scheme is not binding but relies on mutual trust and goodwill between Commonwealth countries for implementation. The major drawback to the Scheme is that some countries have not applied their extradition laws to Australia thereby creating a potential haven. Australia has unilaterally applied the *Extradition Act* 1988 to all Commonwealth countries without requiring any reciprocity.

35 This was consistent with the domestic policy at that time that the United States law enforcement agencies should not become involved in any child custodial case.

There is nevertheless still room for argument as to the scope of treaties which rely on the list approach to defining extraditable offences. But in cases where the bilateral treaty contains an open-ended clause,[36] parental child-abduction can frequently be regarded as extraditable on that basis. Moreover, in the more modern bilateral extradition treaties to which Australia is a party, an extradition offence is defined not by reference to a list of offences but to include any offence which is punishable for a minimum period of time, usually one year.

Is the double criminality principle satisfied?

A formidable obstacle to extradition is the double criminality principle which provides that an act is not extraditable unless it constitutes a crime under the laws of both the state requesting extradition and the state from which extradition is sought. The principle ensures that a person's liberty is not restricted where his/her conduct is not recognised as criminal in the state receiving an extradition request. That is, it would seem contrary to fairness and justice, for instance, to detain a person in Australia for conduct that would be legal if it had occurred in Australia.[37]

In most states, unless the double criminality principle is satisfied, extradition is not permitted. Both national laws and treaties must be carefully scrutinised. Under section 19(2)(c) of the *Extradition Act* 1988 the magistrate is required to be satisfied that the conduct constituting the offence in relation to the extradition country or 'equivalent conduct' would have constituted an extradition offence in relation to the relevant part of Australia.

The first task is to determine what local or corresponding offence in the requested country the fugitive would have committed if he/she had committed the crime there. It is not necessary, under the law of Australia,[38] that the corresponding offence be described by the same name as the alleged offence. For example, a parent may be charged with child abduction in California, but the corresponding offence in Australia might be custodial interference. The selection of the local offence(s) will depend on the facts of the case and what exactly is alleged. The prosecution in Australia may select any number of corresponding federal offence(s) or any state offence(s) where the extradition proceedings are conducted.

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36 For example, article III.2 of the *Treaty between Australia and the State of Israel Concerning Extradition* 1975 provides that 'Extradition shall also be granted for any other act or omission constituting an offence if the offence is, according to the laws of both Contracting Parties, one for which extradition can be granted'.

37 Shearer I, *Extradition in International Law* Manchester University Press, (1971) at 137-8.

38 Section 10(3) (b) of the *Extradition Act* 1988; *Riley v Commonwealth* (1985) 62 ALR 497; 159 CLR 1 at 17-18, per Deane J. The law is similar in Canada (See La Forest, *Forest's Extradition to and From Canada* Canada Law Book, (1991) and the authorities cited at 70-1) and in England (see *Re Bellencontre* [1891] 2 QB 122; *Re Nielsen* [1984] AC 606).

It is also not necessary that the crime concerned be conceptually similar in both countries. Under Australian extradition law[39] the legal ingredients of the alleged offence in the requesting country and the corresponding offence in the requested country need not be identical. However, while not all the ingredients of the offence charged in the requesting State need exist before there is a local offence, if the local offence requires more ingredients that those alleged, there is no extradition offence.

The application of the double criminality principle may require a translation or substitution of certain factors, such as locality, institutions, officials and procedures. This entails complex legal questions particularly where the alleged criminal conduct is committed in relation to an institution, such as a Family Court, which is established under a law having a purely parochial character.[40] For example, if Australia sought the extradition of a parent for an offence under section 70A(1) of the *Family Law Act* 1988 should, and to what extent should, the court of the requested country in applying the double criminality principle transplant the local institution of the requesting country (ie the Family Court) and the law affecting custody, guardianship or access? Does it make any difference that there is no specialist court devoted to family law in the requested country? If religious courts have exclusive jurisdiction in family law matters in a state, are such courts 'equivalent institutions' for the purpose of applying the double criminality principle? Is it relevant that a court of the requested country would never have reached the same decision on custody as the court of the requesting country? What is the position if the courts of both the requested and requesting countries have given contradictory custody orders? If a Malaysian Islamic court has given custody to the father and subsequently the Australian Family Court gives custody to the mother, will a Malaysian court consider the double criminality principle satisfied where the offence is based on abducting a child contrary to the Australian custody order? The answers to these questions are by no means straightforward either under Australian law or foreign law.

That double criminality has been an obstacle is illustrated by an Australian decision. In 1984 a request by the United States for the extradition of a parent from Australia in a child custodial matter was rejected by a magistrate[41] in Brisbane on the ground that the offence for which the fugitive was charged was not an extradition crime within the meaning of section 4(1A) of the now repealed *Extradition (Foreign States)Act* 1966.[42]

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39 *Linhart v Elms* (1988) 81 ALR 557 at 573. The position is similar in Canada and England, see above n 38.

40 See ibid at 571; *Zoeller v Federal Republic of Germany* (1990) 91 ALR 341; *Re Anderson* (1861) 11 UCCCP 9; *Re Collins (No 3)* (1905) 10 CCC 80(BCSC).

41 See *R A Hicks v David Edward Kateuse*, Unreported, B J Connors (Magistrate's Court , Brisbane) 4 September 1986.

42 Section 4(IA) of the *Extradition (Foreign States) Act* 1966 provides that an offence against the law of a foreign state is an extradition crime if and only if the act or omission constituting the offence or the equivalent act or omission would, if it took place in or within the jurisdiction of the part of Australia where the person accused of the offence is found, constitute an offence against the law in force in that part of Australia.

In this case the father had been charged with custodial interference in the first degree in violation of section 11.41.320 of the Alaskan statute. The Alaskan offence required that the offender be a relative of the child, who with knowledge that he had no legal right to do so, took, enticed, or kept the child from his/her legal custodian. The magistrate said that it was his duty to determine whether the Alaskan offence of custodial interference would be 'substantially similar' to the Queensland offence of child stealing. Section 363 of the Queensland *Criminal Code* provides as follows:

> Child Stealing: Any person who with intent to deprive any parent, guardian or other person who has lawfully care or charge of a child under the age of fourteen years or the possession of such child ... (1) forcibly or fraudulently takes or entices away or detains the child or (2) receives or harbours the child knowing it to have been taken or enticed away or detained is guilty of a crime and is liable for imprisonment with hard labour for seven years.
>
> It is a defence to a charge of child stealing that the accused person claimed in good faith a right to the possession of the child.

The magistrate held that both offences can not be regarded as 'substantially similar'[43] in that an essential element of the Alaskan offence was that the victim be removed from the state and that this was not an element of the Queensland offence. He also said that a further difference was that the Queensland law required the use of force or fraud and that this formed no part of the Alaskan charge. The ratio of the decision appears to be that the Queensland offence can not be committed by a parent. The relevant Queensland offence speaks of removing a child from the lawful care and custody of a parent and the magistrate concluded that such an offence could not be committed by a parent. Although this view may now be open to question, at the time it was expressed, there was no direct authority to the contrary. Moreover, the test in determining dual criminality is not the same today[44] and the equivalent Alaskan offence is now section 70 A of the *Family Law Act* 1975.

What documents are required in extradition cases?

In an extradition proceeding there is generally no requirement that a requesting country sends its witnesses to the foreign country. Indeed, it is virtually unknown for witnesses to participate in extradition cases, except for very limited purposes, such as the giving of expert evidence. That is, extradition cases are largely based on the production of authenticated

43 The 'substantially similar' test was derived from the decision in *R v Governor of Pentonville Prisone, ex parte Budlong* (1980) 1 All ER 701 which was applied in *Puharka v Webb* (1983) 48 ALR 485 at 495.

44 That is the test is now based on a 'conduct-based approach' to double criminality, rather than a comparison of the similarity or differences between the foreign offence and the local offence: See *Linhart v Elms* (1988) 81 ALR 557 at 571, 571; *Zoeller v Federal Republic of Germany* (1990) 91 ALR 341.

documents supplied by the requesting country.

Under the *Extradition Act* 1988 there is no requirement that foreign countries produce prima facie evidence in an extradition hearing.[45] However, in a case to which the provisions of section 11 of the *Extradition Act* apply, a regulation which implements an extradition treaty or arrangement may modify the Act by requiring the production of evidence.

A request for extradition by Australia is accompanied by such documents as are necessary to support the case for surrender. The requirements are those laid down in the treaties relating to that country or the extradition legislation of the foreign country. In the case of extradition to Australia from Commonwealth countries such as Canada or the United Kingdom, it is necessary to produce prima facie evidence of the crime. For this purpose, the Attorney-General will authorise a magistrate to take evidence in Australia for the use in the foreign extradition proceeding.[46] In contrast, Australia's modern extradition treaties with most European countries, such as Germany and Italy, do not generally require prima facie evidence. The removal of the prima facie case requirement in respect of particular countries has reduced the cost and eased the burden for prosecutorial authorities in extradition cases

Limits on extradition

Political offences exception

By far the most important exception in extradition law is the 'political offences exception'. It is a general rule in all states that extradition of a person is barred if the request for extradition is for an offence is of a political character.[47] Political offences include not only crimes such as treason and sedition but also crimes committed in a political context or for a political purpose. Although the precise meaning of political offences is not clear, there is one highly persuasive authority which would suggest that parental child abduction can not amount to a political offence. Over 30 years ago in the celebrated *Schtraks*[48] extradition case the British House of Lords held that the abduction by an uncle of his nephew for the purpose of bringing him up in the Orthodox Jewish faith was not a political offence. In that case Israel had sought the extradition of Schtraks who had refused to comply with a court decision ordering the return of the child to its parents. Schtraks refused to return the child because he felt that the parents would not bring up the child in a strict Orthodox education. The case provoked a heated and

45 *Extradition Act* 1988 s 19.
46 Ibid s 45.
47 See Wijngaert, *The Political Offence Exception to Extradition Kluwer (1980)*. See also *Extradition Act* 1988 s 5, s 7(a) and (b).
48 *Schtraks v Government of Israel* [1964] AC 556. This case has been followed in Australia: See *Re Wilson, ex parte Witness T* (1976) 135 CLR 179 and *Prevato v Governor Metropolitan Remand Centre* (1986) 8 FCR 357; 64 ALR 37.

public controversy between liberal and orthodox Jews in Israel and was even the subject of a debate in the Israeli Knesset (Parliament). The House of Lords took the view that the fugitive was involved in a family quarrel and that he had simply acted out of personal conviction and not as a member of a political party. The fact that the fugitive's conduct had become a matter of political controversy in Israel did not render the conduct an offence of a political character.

Nationality Principle

Under the constitution and the laws of many states with civil law systems there are mandatory or discretionary grounds for refusing extradition on the basis of the nationality of the fugitive. Indeed, most civil law countries refuse to extradite their nationals, although usually they are prepared to prosecute the fugitive instead. Prosecution is only possible if adequate evidence is provided by the requesting country. In contrast, common law countries do not generally[49] refuse extradition on the basis of nationality of the fugitive. Australia's extradition treaties reflect the varying practices. For example, the treaty with Monaco absolutely excludes the surrender by Monaco of its nationals, while Australia merely has a discretion to decline to surrender Australian nationals.

Humanitarian Principle

One of the most enduring and important safeguards in extradition law among countries of the Commonwealth of Nations is the humanitarian principle. The London Scheme for extradition provides that the executive authorities have a discretion to refuse extradition in any case where it would be unjust, oppressive or too severe a punishment.[50] In the case of some of Australia's treaties with non-Commonwealth countries there is a discretionary bar to extradition where the requested state considers that it would be unjust, oppressive or incompatible with humanitarian considerations to grant extradition. In exercising this discretion the Attorney-General is generally required to consider the nature of the offence, the interests of the requesting state and the personal circumstances of the fugitive, particularly his age and health. Other treaties, such as those with Italy, Portugal and Switzerland, provide that a requested state may recommend to the requesting state that a request for extradition be withdrawn where it considers, taking into account the age, health or other personal circumstances of the person sought, that extradition should not be requested.

There is much jurisprudence on the meaning of this provision. Although

49 Cf s45 of the *Extradition Act* 1988 which provides a mechanism for Australia to prosecute nationals for extraterritorial crimes in circumstances where Australia decides to refuse to extradite her nationals to countries which can not or will not extradite their nationals to Australia.

50 The Scheme was amended in 1983 to remove the need for there to be in addition to circumstances of unjustness or oppression, a trivial offence, male fides or lapse of time.

in the case of extradition from Australia to foreign countries (except New Zealand),[51] the courts now have no function in considering this safeguard - that is it is a matter solely for the Attorney-General - nevertheless, previous court decisions provide some guidance on the possible application of this safeguard. The circumstances which may be considered to justify a finding that it would be unjust or oppressive to surrender an accused include:

(a) the deterioration of the person's health;

(b) the advanced age of a person;

(c) the disruption of business and family life, especially in so far as disruption affects the possibility of rehabilitation;

(d) the degree of rehabilitation of the person since the alleged offence by the establishment of social, business and familial ties;

(e) the nature and circumstances of the offence;

(f) any inexplicable delay in the commencement or conduct of the extradition proceedings, which is not attributable to the accused;

(g) evidence of any illness or absence of a witness material to the defence which unfairly imperils the fugitive's ability to conduct a defence;

(h) where evidence has been destroyed or is otherwise unavailable to the accused because of the passage of time;

(i) where a charge is misconceived or lacking in foundation, or could not possibly be right as a matter of fact; and

(j) the nature and incidents of the justice system to which the fugitive is to be returned and to the circumstances or mode of treatment pending trial.[52]

The humanitarian safeguard was relied on by the then Australian Attorney-General, Senator Gareth Evans, in 1984 as a basis for decided against extraditing a parent to Canada to face a criminal charge of child abduction.[53] At the time of the alleged offence, the fugitive had separated from his wife in Canada who had been granted interim custody of their only child. The fugitive, who was an Australian citizen, allegedly abducted his two year old child during an access visit and returned to Australia on a forged passport. The case became a 'cause celebre' with intense political

51 See *Extradition Act* 1988 s 34(2).

52 See the Law Reform Commission, *Service and Execution of Process*, (1987) Report No 40, AGPS at 170.

53 Press Release by the Attorney-General, *Garry Maxwell Cant - Decision Not to Extradite to Canada*, (17 September, 1984).

pressure emanating from the political authorities in Ontario and a newspaper campaign in both Canada and Australia for and against extradition. The fugitive was provisionally arrested in Australia for the purpose of extradition, nine months after the alleged abduction. The magistrate held that the fugitive was liable to surrender, but the Attorney-General refused to surrender him to Canada. The Attorney-General considered that despite the seriousness of the offence there were exceptional circumstances in the instant case, in particular there was a possibility that the fugitive might face a substantial sentence in Canada, which was greater than the sentence he might face if he had committed the offence in Australia.[54] The Attorney-General also said that the fugitive had already been substantially penalised in that - he had lost his child (who had been recovered by the mother in proceedings in the Australian Family Court), incurred substantial legal costs of over $50,000 in the Australian custody proceedings, and had spent two weeks in prison in the course of the extradition matter. In reaching his decision the Attorney-General said that he had not taken into account any compassionate arguments since these were no more relevant to an extradition request than any criminal matter where a custodial sentence is a possibility.

Collateral Purpose

The requested state may deny extradition if the request of a fugitive is sought not for the trial or execution of a conviction but for a collateral purpose. The purpose of an extradition request should not be to achieve the return of a child, although that might be the incidental practical consequence of the arrest of the abducting parent. It is the executive authorities,[55] rather than the courts, that may deny extradition on this ground; for courts do not generally question the bona fides of an extradition request.[56]

In some of the early extradition requests involving custodial matters, the United States Government sought assurances from the requesting country that extradition of the parent was being sought exclusively for the purpose of prosecution. The United States Government was concerned that extradition proceedings should not be used as a lever to achieve custody of the child itself. This was in accordance with the traditional view that custody is essentially a matter of private law.

The author understands that no country was prepared to accede to the United States Government's request. Indeed, it is interesting to observe that many extradition cases for parental child abduction are initiated but not pursued, once the 'defaulting' parent has given up or been forced to return

54 Whereas the equivalent Australian offence provides for 3 years imprisonment or a $10,000 fine, the Canadian offence provides for up to 10 years in gaol.

55 See *Extradition Act* 1988 s 22 (3)(f) which gives the Attorney-General an over-riding discretion to refuses to surrender a fugitive in relation to an extradition offence.

56 See Forest above n 35, and the authorities cited at 22-3, especially *Re Arton (No 2)* [1896] 1 QB 509; *Royal Government of Greece v Brixton Prison Governor* [1969] 3 All ER 1337 (HL); *Schmidt v The Queen* (1987) 33 CCC (3d) 193 (SCC).

the child to the custodial parent. This indicates that extradition may very well be a lever to obtain the return of the child.

The Hague Convention and extradition

The *Hague Convention on Civil Aspects of International Child Abduction*, which came into force in Australia on 1 January 1987[57] has been ratified[58] by and acceded[59] to by less that twenty per cent of the countries of the world. The Convention, despite its international character, has not been ratified by significant groups of countries, including any Islamic state[60] and any Asian country.

Under the *Hague Convention* courts of contracting states are required to return a child to its place of habitual residence if it was removed or retained in breach of the rights of custody of a party requesting the child's return. There are limited defences under the Convention, such as the return may cause serious harm to the child, that a mature child objects to the return or that the child has become settled in its new environment.

The Convention is silent on the question of extradition. However, the policy underlying the Convention may be considered. The 'family' policy approach of the Convention is that there should be a conciliatory approach to custody matters ('to secure the voluntary return of the child or to bring about an amicable resolution of the issues') and that the interests of the child should be paramount. Implicit in this policy is the notion that custody should be safeguarded without resort to the criminal process. That policy may be given some weight in the context of the Convention but not such weight as to preclude extraditing a person for child abduction.

The policy arguments run both ways. Where the proper custody of the child has been secured in circumstances where great distress has been caused to the child and both parties to the marriage, it is arguable that it is undesirable to prolong the matter through the criminal process. On the other hand, it has been argued that the criminal law provides the most rational and sensible response to the sudden upheaval of one person from the life he/she has been living by another person.[61]

57 See s 111B of the *Family Law Act* 1975 and the *Family Law (Child Abduction Convention) Regulations* 1986.

58 The following 20 countries have ratified the Convention: Argentina; Australia; Austria; Canada; Denmark; France; Germany; Greece, Ireland; Israel; Luxembourg; Netherlands; Norway; Portugal; Spain; Sweden; Switzerland; United Kingdom; United States of America; and Yugoslavia.

59 The following 10 countries have acceded to the Convention: Belize; Burkina Faso; Ecuador; Hungary; Mexico; Mauritius; Monaco; New Zealand; Poland; and Rumania. Accession instead of ratification is made by countries that are not members of the Hague Conference on Private International Law.

60 This statement must be qualified in the case of Israel where Islamic courts have jurisdiction over Muslims in family law matters.

61 Wilson and Tomlinson, *Wilson: Children and the Law*, above n 21 at 46.

The existence of criminal punishments together with civil remedies complicate the enforcement process and custody and access rights of the 'absconding parent.' If the child is returned to his/her place of habitual residence pursuant to the *Hague Convention*, the abductor who wishes to return to that place to visit the child may face serious criminal penalties. That is even if no attempt is made to extradite the abductor, the criminal consequences of his/her wrongful conduct remain.

Safeguarding the Rights of Children

If a parent who is for all practical purposes in charge of the welfare of a child is arrested on an extradition warrant for child abduction and remanded in custody, the question arises as to how can the rights of a child be protected. The child's immigration status and living arrangements must be dealt with. It is not desirable that a young child be detained in custody or at a detention centre where he/she is an illegal immigrant. It is also not desirable to leave a child with the spouse/de facto of the fugitive, on the basis that he/she may attempt to remove the child from jurisdiction. In these circumstances, the practice[62] in countries such as Australia and the United States is for the federal authorities (who are responsible for international extradition) to co-ordinate with state or local child welfare agencies who will assume temporary custody of an unprotected child where no other appropriate family member was able to do so. In some cases the extradition warrant is issued but not executed until the arrival of the legal custodian in the requested state.

Conclusions

(i) There is no doubt that the most effective method of securing the return of an abducted child is to use the machinery of international co-operation, such as the *Hague Convention on Civil Aspects of Child Abduction*. It is important that as many countries as possible sign and implement that Convention.

(ii) Extradition for parental child abduction can raise difficult and sensitive matters of policy and international relations. What is required is a measured political response and due attention to the public interest in the enforcement of criminal law. The problem is especially acute where the requested state has very different social, cultural and religious views on children's custody to the requesting state. It must be realised that prosecution and extradition of a parent for the abduction of his/her child is a blunt instrument to compel the return of the child. However, in cases where the fugitive is located in a state which is not a party to the *Hague Convention*, extradition

62 Cf Under the Australian State-Commonwealth arrangements made pursuant to the *Hague Convention of the Civil Aspects of International Child, Abduction* the Commonwealth provides a co-ordinating role and the State/Territorial authorities are responsible for the recovery and care of the children).

provides a possible, albeit indirect, tool in assisting in the return of the abducted child.

(iii) The coverage of extradition treaties and arrangements should be broadened. There are many countries, including Australia, which have inadequate or non-existent treaty relationships with countries or satellites of the former Soviet Union and key Asian countries. Unless there is a concerted effort to reduce the number of extradition havens, international law will be undermined.

(iv) Extradition is slow, cumbersome and often handicapped by bureaucratic and over legalistic hurdles. It can take many months if not years to mount an extradition case. It can take even longer to successfully extradite a fugitive from a foreign country. States should update and simplify their extradition laws and be more vigorous and imaginative in utilising the extradition process.

(v) Certain obstacles to extradition may be countered by strengthening national criminal laws. For example, if more states created specific offences of international child abduction akin to those under the law of Australia or the United Kingdom, the obstacle of double criminality might be reduced.

(vi) National governments should give a higher priority to combating international parental child abduction. There is a strong tendency for both police agencies and prosecutors to treat parental child abduction as a purely private matter. Despite changes in laws, there is still a residual reluctance of prosecutors to charge parents with child abduction and an even greater disinterest in pursuing extradition requests for international child abduction. International child abduction is, however, now a matter of international concern which can no longer be ignored.