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The Hague Convention of the Civil Aspects of International Child Abduction: The Need for Ratification

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International abduction of children by noncustodial parents increasingly has become a serious problem due to escalating incidents of divorce and the accessibility of travel between countries. The rising number of "child snatchings" has caused great concern in the diplomatic and international business communities. The custodial parent endures emotional and financial hardship during the search for the stolen child. The real victim of childnapping, however, is the child, who suffers lingering trauma for years after the abduction.

There were 257 cases of parental child abductions from the United States in 1984. The Office of Consular Services, U.S. Department of State, breaks down the kidnapping figures by geographic regions: East Asia - 18; Near East - 58; Central and South America and the Caribbean - 75; Africa - 3; Europe and Canada - 103. In 1984 there were 1,563 active, unsolved cases at the State Department. Telephone interview with Monica A. Gaw, Consular Affairs Office, Office of the City Consular Service, State Department (Feb. 4, 1985). The total number of U.S. citizens seeking return of abducted children from abroad has doubled between 1982 and 1984. Telephone interview with Peter H. Pfund, Esq., Assistant Legal Advisor for Private International Law, State Department (Feb. 1, 1985) [hereinafter Pfund Interview].


Crouch, Effective Measures Against International Child Snatching, 131 New L.J. 592, 592 (1981); Comment, American Responses, supra note 2, at 417.

The House noted in its hearings on parental kidnappings:

For the children victimized by snatchings, the resulting psychological (and sometimes physical) harm cannot be overestimated. Child psychologists report that child-snatching induces fear, guilt, and anger in children, and causes severe, irreversible, and irreparable psychological harm in many
This comment discusses United States and international civil and criminal legislation enacted to deter and punish international parental child stealing. It also demonstrates the dire need for the United States to ratify the Hague Convention on the Civil Aspects of International Child Abduction, providing for the immediate return of an abducted child to the custodial parent or institution by the authorities in the abducting country.

I. United States Responses

The National Conference of Commissioners on Uniform Laws drafted the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968 in response to the "intolerable state of affairs where self-help and the rule of 'seize-and-run' prevail." All fifty states, the District of Columbia, and the Virgin Islands have enacted legislation identical or substantially similar to the UCCJA.

Prior to adoption of the UCCJA, United States courts generally refused to recognize and enforce custody decrees of foreign nations and sister states. Because courts did not give full faith and credit to foreign custody orders, noncustodial parents effectively were given an incentive to steal their children and move to another jurisdiction. Moreover, when making an initial award of custody or modifying a prior order, courts would give great weight to the fact that the children were present in the forum.

This refusal to award comity to foreign custody decrees stems from a 1953 Supreme Court decision, May v. Anderson. The May Court held that custody decrees are not entitled to full faith and

8 See infra notes 11-12, 71 and accompanying text.
9 See infra notes 115-47 and accompanying text.
10 See infra notes 186-92 and accompanying text.
12 UCCJA, Prefatory Note (1968). The UCCJA is reprinted in 9 U.L.A. 111 (1979), and in R. Crouch, supra note 11, at 49.
13 Comment, American Responses, supra note 2, at 429.
14 Id. at 419-20; Agopian & Anderson, supra note 6, at 5.
15 See P. Hoff, Interstate and International Child Custody Disputes 10 (ABA Monograph, Mar. 1982) [hereinafter ABA Monograph].
16 345 U.S. 528 (1953).
credit under the Constitution where the custody determination is *ex parte*. The most frequent explanation for not enforcing custody awards, however, is that such awards are not final, but remain modifiable based on the current best interests of the child. In *Ford v. Ford*, the most recent Supreme Court decision involving child custody, the Court held that South Carolina was not precluded from determining the best interests of the child even though Virginia already had made a custody determination on the same grounds.

Foreign national custody decrees apparently were entitled to even less judicial recognition. In *Hilton v. Guyot* the Supreme Court established the requisites for recognition and enforcement of foreign judgments. It stated that to be entitled to enforcement, a foreign judgment must have been rendered by a court having subject matter and personal jurisdiction, and the defendant must have had proper notice and the opportunity for a full and fair trial. The Restatement of Conflict of Laws provides that a valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized.

Courts have been reluctant to enforce other courts' custody decrees for three reasons. First, the judge in the later action may disagree with or mistrust the prior award. Judges in the United States have been particularly unwilling to enforce foreign custody awards when they suspect the awards are not based on the United States standard—the best interests of the child. Second, there is nationalistic competition between courts, stemming from the belief that a judge will look more favorably on someone present within the jurisdiction. Third, judges and attorneys often become involved emotionally in custody disputes, and therefore, awards may not have a rational basis.

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17 U.S. CONST. art IV, § 1.
18 May, 345 U.S. at 533.
21 Id. at 194. See also Kovacs v. Brewer, 356 U.S. 604, 616 (1958) (forum state has at least as much right to disregard, qualify, or depart from custody judgment as does state where originally rendered).
22 "Judgments rendered in a foreign nation are not entitled to the protection of full faith and credit. In most respects, however, such judgments . . . will be accorded the same degree of recognition to which sister State judgments are entitled." Restatement (Second) Conflict of Laws § 98 comment b (1971).
23 159 U.S. 113 (1895).
24 Id. at 166-67.
27 Bodenheimer, supra note 26, at 83.
28 Id. at 84.
29 Id.
Thus, most United States courts in early cases made de novo custody determinations when suit was brought in the United States and the child was present, even where a foreign court already had made such a determination. For example, in *Rzeszotarski v. Rzeszotarski*, the father came to the United States on a scientific-cultural exchange program from Poland. More than a year later, the father invited his five-year old son to live with him and learn English. Two months after the boy arrived, the father notified his wife that he was going to obtain a divorce, and that he wanted custody of his son. The mother, however, was awarded custody of the boy under a Polish judgment. The United States court held that the Polish court did not have jurisdiction for custody purposes, because the child was not domiciled in Poland during the proceeding, which was *ex parte*. The dissent stated that the majority was rewarding the abducting parent for his wrongdoing, and that had the mother been a citizen of the United States, she undoubtedly would have been awarded custody.

Similarly, in *Anderson v. Anderson*, the father had been awarded temporary custody by a West German court. The *Anderson* court held that it was not required to honor a foreign custody order, but was “under [an] obligation to decide the question of custody on the merits . . . leaving or placing the custody where the best interests of the child or children require.”

Courts in states that recently have enacted the UCCJA have applied full faith and credit and *Hilton* principles to uphold child custody orders entered by courts of foreign nations. These courts have established a tripartite test to determine whether comity should be granted: (1) whether the foreign court had jurisdiction over the parties and the subject matter; (2) whether the procedural and substantive law was reasonably comparable to the law of the forum; and (3) whether the foreign order was based on the best interests of the child.

*In re Lang* represents the minority view of United States courts.  

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31 Id. at 433.
32 Id. at 434.
33 Id. at 438.
34 Id. at 442-43 (Fickling, J., dissenting).
prior to the drafting of the UCCJA. Lang held that New York courts should recognize and enforce foreign custody awards absent a showing of extraordinary circumstances demonstrating that otherwise the child will suffer. The parents were divorced in Switzerland, and custody of the two children had been awarded to the father. The mother snatched the children and brought them to the United States. The court stated:

Adherence to the principle of comity provides the key to rational disposition for the welfare of the children, . . . in many, if not most, custody cases involving self-help, . . . Not only does self-help make the eventual placement of the children an arbitrary consequence but it breeds reprisal in kind.

The UCCJA was drafted to counteract the “self-help” wave of interstate and international parental child snatchings, by preventing the abducting parent from legitimizing the wrongdoing by petitioning an out-of-state court for a new award of custody.

The UCCJA aims to deter parental child abduction by limiting jurisdiction of custody matters to courts of one state. Section 3 of the UCCJA permits a court to assert jurisdiction over a custody matter only if: (1) the state is the “home state” of the child at the commencement of the proceeding; (2) there is a significant connection between the child and at least one custodian and the state; (3) the child is physically present in the state and has been abandoned, or is in immediate need of protection from abuse or neglect; or (4) no other state would be able to assume jurisdiction under (1), (2), or (3).

An underlying purpose of the UCCJA is to give integrity to custody awards by preventing multiple custody litigation. The UCCJA attempts to accomplish this goal by encouraging selection of the most appropriate forum and providing for recognition and enforcement of out-of-state custody decrees where the foreign court assumed jurisdiction under section 3 or a similar statute.

Other sections of the UCCJA reflect the additional policy of pro-

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40 9 A.D.2d at 406, 193 N.Y.S.2d at 768.
41 Id. at 408, 193 N.Y.S.2d at 770.
42 S. Katz, supra note 4, at 14.
43 Id. at 4; Agopian & Anderson, supra note 6, at 8.
44 “Home state” is defined as the state in which the child lived with one or both parents at least six consecutive months immediately preceding the commencement of the custody proceeding. UCCJA § 2(5).
45 Id. § 3(a).
46 Id. § 1(a)(6). Section 1 provides that the general purposes of the Act are to: (1) avoid jurisdictional competition between state courts; (2) promote cooperation between courts so that the state that can best decide the case in the interests of the child has jurisdiction; (3) deter abductions undertaken to obtain custody awards; and (4) facilitate enforcement of out-of-state custody decrees. Id.
47 Id. §§ 13, 15. Section 15(b) provides an added disincentive to a potential child abductor—the court may require the wrongdoer to pay all necessary expenses of the custodial parent, including attorneys’ fees. Id. § 15(b).
moting stability in the lives of children from broken homes. These sections prohibit a second court from assuming jurisdiction once litigation has commenced in another state and require the state to which the abducting parent flees to decline jurisdiction, based on the "clean hands" principle. The UCCJA also establishes procedures to facilitate cooperation and communication between courts to avoid multiple custody awards and provide the proper forum with all available information about the child.

The general tenets of the UCCJA apply with equal force to international custody disputes. The drafters believed that the objectives of avoiding jurisdictional conflicts and multiple litigation are "as strong if not stronger when children are moved back and forth from one country to another by feuding relatives." Consequently, the only prerequisite to enforcement of a foreign custody order by a United States court is that the foreign proceeding must have provided all affected parties with reasonable notice and an opportunity to be heard. This is a lesser standard on which to grant comity than the Hilton standard, which required that the substantive and procedural laws be reasonably similar to the law of the forum. One commentator has opined that United States courts will be compelled to enforce decrees of foreign states that have radically different custody laws and prerequisites to assume jurisdiction in a custody case.

Some courts have had difficulty determining whether the United

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48 Id. § 6. Section 6(c) provides that if a court is notified that a custody proceeding was pending in another court before the institution of the proceeding in that court, it shall stay its proceeding and notify the other court of the pendency of its action, so the appropriate forum may be determined in the best interests of the child. Id. § 6(c).
49 Id. § 8. Section 8 has a provision similar to that of § 15, providing that a court that declines jurisdiction on the basis of the complainant's wrongdoing may order the complainant to pay the expenses incurred by other parties in defending the suit. Id. § 8(c). See supra note 16 and accompanying text.
50 See R. Crouch, supra note 11, at xii.
51 UCCJA §§ 16-22.
52 Id. § 23. Section 23 states:
The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.
Id.
54 UCCJA § 23 comment, 9 U.L.A. at 168. But see Al-Fassi v. Al-Fassi, 433 So.2d 664, 668 (Fla. Dist. Ct. App. 1983), cert. denied, 446 So.2d 99 (Fla. 1984) (court refused to decide whether Bahamian custody award merited comity, but held it had jurisdiction to modify the award). "Comity must give way to the interests of the state in exercising parens patriae jurisdiction over the child with the objective of protecting the recognized best interests of the child." Id.
55 See supra text accompanying note 38; see also Comment, Treaty Responses, supra note 19, at 678.
56 R. Crouch, supra note 11, at 40.
States should exercise jurisdiction over a custody dispute under section 3 of the UCCJA. For example, in *Brauch v. Shaw* the court decided it had jurisdiction where the father had snatched the child from the mother in England while a custody proceeding was pending and had taken the child to Rio de Janeiro and finally to New Hampshire. The court assumed jurisdiction because the child had resided in New Hampshire for nine consecutive months before the father instituted the proceeding and because returning the child to England would cause further disruption in the child's home environment.

The court concluded that jurisdiction was not mandated, however, and that on remand the lower court could find that there is more information concerning the child's needs and welfare in England.

Conversely, several United States courts have held that they did not have jurisdiction under the UCCJA. A Pennsylvania court held that it would not modify a Danish custody award to the mother even though there was evidence that the mother's father might sexually abuse the children in Denmark. The court reasoned that there was no evidence of physical or emotional harm to the children in the custodial household, and the parental misconduct of child abduction outweighed the possibility of future sexual misconduct by the grandfather.

Other courts have had difficulty determining whether the parties had adequate notice and opportunity to be heard under the provisions of section 23. In *Miller v. Superior Court* the California Supreme Court upheld an Australian temporary custody order to the father because the mother's attorney had been served with notice of the hearing, the mother could not be located, and the award was only temporary and subject to modification in Australia.

Although the UCCJA has been effective in deterring parental child abduction for the parent who steals a child with the hope of

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58 Id. at 574, 432 A.2d at 7.
59 Id. at 574-75, 432 A.2d at 8.
62 492 Pa. at 206-08, 423 A.2d at 345-46 (Nix, J., dissenting).
63 275 Pa. Super. at 302, 418 A.2d at 733.
65 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978).
66 Id. at 930, 587 P.2d at 727, 151 Cal. Rptr. at 9.
being awarded custody in another jurisdiction, it has failed to deter those who snatch the children with no intention of "legitimizing" the act.\(^{68}\)

The indefinite scope of the UCCJA's jurisdictional provisions places discretion in the trial judge and creates the risk that jurisdiction will be assumed inappropriately.\(^{69}\) Sections 12 and 13 are also subject to discretionary abuse. The UCCJA does not require states to give full faith and credit to all foreign decrees; it requires only recognition and enforcement of awards be given in conformance with its jurisdictional provisions.\(^{70}\) Thus, a court cannot do anything if a sister court refuses to recognize its order.

Finally, the UCCJA does not punish the abducting parent. A court may order the wrongdoer to pay the custodial parent's costs, but such order is not mandatory. Additionally, the parent who abducts but does not seek court-ordered custody escapes unscathed under the UCCJA.

In response to the weaknesses in the UCCJA, Congress enacted the Parental Kidnapping Prevention Act of 1980 (PKPA)\(^{71}\) on December 28, 1980.\(^{72}\) The PKPA was enacted after Congress found that: (1) custody decisions among the different jurisdictions were conflicting and inconsistent; (2) an increasing number of cases were being brought each year; (3) the limited authority of state officials outside their jurisdictions contributed to the frequency of child kidnappings and restraint; and (4) children and their parents were being harmed by the growing numbers of child abductions.\(^{73}\)

The purposes of the PKPA\(^{74}\) are strikingly similar to those established by the drafters of the UCCJA.\(^{75}\) They include promoting cooperation among states in recognition and enforcement of custody and visitation orders, deterring interstate and international child abductions, and avoiding jurisdictional disputes between state courts.\(^{76}\)

The PKPA has three main effects on the law surrounding parental child abduction.\(^{77}\) First, the Act requires all state courts to accord full faith and credit to prior custody decrees.\(^{78}\) Second, it provides

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\(^{68}\) R. Crouch, supra note 11, at xiii-xiv; S. Katz, supra note 4, at 31.

\(^{69}\) See S. Katz, supra note 4, at 32.

\(^{70}\) Id.


\(^{72}\) The PKPA was passed as a rider to the Pneumococcal Vaccine Medicare Coverage Act, H.R. 8406, 96th Cong., 2d Sess. (1980). The PKPA is found at §§ 6-10 of that Act. See ABA Monograph, supra note 15, at 2.


\(^{74}\) Id.

\(^{75}\) ABA Monograph, supra note 15, at 3.

\(^{76}\) S. Katz, supra note 4, at 121-22.

\(^{77}\) See Agopian & Anderson, supra note 6, at 17; Foster & Freed, A Legislative Beginning to Child Snatching Prevention, 17 Trial, Apr. 1981, at 36, 37.

for the use of federal and state parent locator services currently used to find delinquent supporting spouses.\textsuperscript{79} Third, the Act expands the Fugitive Felon Act to include child snatching as a felony when interstate or international flight is involved.\textsuperscript{80}

At the time the PKPA was enacted, only forty-three states had enacted the UCCJA.\textsuperscript{81} Section 8, however, was designed to require all states—UCCJA and non-UCCJA—to recognize and enforce child custody orders from sister states that were made in conformity with the jurisdictional provisions of section 8(c).\textsuperscript{82} The jurisdictional provisions of the PKPA are similar to those of the UCCJA.\textsuperscript{83} The PKPA provides that jurisdiction to determine custody rests in either: (1) the "home state;"\textsuperscript{84} (2) a state with which the child has significant connections, if there is no home state; (3) a state in which the child is physically present if an emergency situation exists; or (4) if no other state appears to have jurisdiction, the state where the action was commenced.\textsuperscript{85}

The primary difference between the jurisdictional provisions of the UCCJA and the PKPA is that the PKPA requires the home state to assume jurisdiction. Only when there is no state that meets the definition of home state may a state with a significant connection with the child assume jurisdiction.\textsuperscript{86} Under the PKPA, to have jurisdiction to modify an existing decree, a court must be in the state that issued the decree initially, or if that state declines jurisdiction, it must be a state that meets the jurisdictional requirements of section 8(c).\textsuperscript{87}

Section 9 of the PKPA expands the use of the federal parent locator service (the FPLS), within the Department of Health and Human Services, to aid in locating the abducting parent and missing children.\textsuperscript{88} The FPLS is a computerized information system that

\begin{itemize}
\item \textsuperscript{79} 42 U.S.C. § 663(17) (1982).
\item \textsuperscript{80} 18 U.S.C. § 1073 (1982).
\item \textsuperscript{81} ABA Monograph, supra note 15, at 3.
\item \textsuperscript{82} See S. Katz, supra note 4, at 122; ABA Monograph, supra note 15, at 3.
\item \textsuperscript{83} See Agopian & Anderson, supra note 6, at 18; Comment, American Responses, supra note 2, at 433.
\item \textsuperscript{84} 28 U.S.C. § 1738A (b)(4) (1982) defines "home state" in language identical to that of the UCCJA. \textit{Compare with} definition of "home state" in § 2(5) of the UCCJA, supra note 44.
\item \textsuperscript{85} 28 U.S.C. § 1738A(c) (1982).
\item \textsuperscript{86} Agopian & Anderson, supra note 6, at 18; Comment, American Responses, supra note 2, at 433.
\item \textsuperscript{87} 28 U.S.C. § 1738A(f) (1982). Section 1738A(e) also provides that before a custody determination can be made, all interested parties must have been afforded reasonable notice and an opportunity to be heard. \textit{Id.} Section 1738A(g) further provides that state courts are encouraged to award attorneys' fees and expenses in the case of abduction or when the court deems proper. \textit{Id.}
\item \textsuperscript{88} 42 U.S.C. § 663 (1982). Section 663 applies to proceedings to determine custody and visitation rights, as well as to proceedings to enforce or modify those rights, and to criminal law proceedings for kidnapping or custodial interference. ABA Monograph, supra note 15, at 5.
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amasses data from various federal agencies, including the Social Security Administration. Parents cannot apply directly to the FPLS, but must petition the court for a request to use the service. The FPLS is not a comprehensive system because it is based on social security numbers. If the abducting parent changes his identity and social security number, a search on the FPLS computer is futile.

The third major provision of the PKPA authorizes the federal government to assist in the location and apprehension of fugitives from state kidnapping charges. The Justice Department and the FBI will become involved, however, only when the state has felony parental child abduction laws and has issued a warrant for the abducting parent's arrest.

The Justice Department and the FBI have been reluctant to become involved in custody disputes. Concerned by the hands-off approach of federal officials, the House Judiciary Committee in September, 1981 instructed the Justice Department to implement the PKPA fully. Once the Justice Department becomes totally involved in assisting in locating and extraditing parental child snatchers, the UCCJA and PKPA should complement each other effectively to deter parental child abductions and promote stability in the resolution of custody disputes.

Thus, when children are brought into the United States by an abducting parent, the UCCJA should provide the basis for enforcing a foreign court order absent extraordinary circumstances. When children are taken from the United States, however, it is less likely that a United States custody order will be enforced abroad. Ultimately, the parent must convince a foreign court to order the return of the child because the foreign court is likely to apply its own law in determining custody.

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89 ABA Monograph, supra note 15, at 5; Agopian & Anderson, supra note 6, at 19.
90 ABA Monograph, supra note 15, at 5-6. The information on the FPLS computer is updated annually, so the address obtained may not be the current address of the abducting parent. Id.
91 18 U.S.C. § 1073 note (1982). This provision was necessary because the Justice Department has refused to apply the Fugitive Felon Act, 18 U.S.C. § 1073 (1982), to parental child abduction cases. Agopian & Anderson, supra note 6, at 20.
92 As of 1982, 40 states had made parental child abduction a state felony. Section 10 of the PKPA will not apply to the remaining 10 states unless the abducting parent can be charged with a felony. Agopian & Anderson, supra note 6, at 20.
93 Foster & Freed, supra note 77, at 37; ABA Monograph, supra note 15, at 8.
95 The PKPA, however, works only to locate and apprehend the absconding parent. When the parent is located and extradited, the child will not be returned automatically. The custodial parent must seek the return of the child under the UCCJA or the PKPA, according to applicable state procedures. ABA Monograph, supra note 15, at 7.
96 Comment, Treaty Responses, supra note 19, at 671 & n.7.
97 S. ABRAHMS, supra note 7, at 108-09.
Most countries adhere to the principle that their courts have jurisdiction to render custody decisions despite a foreign judgment, if the child is present in that country. Although the "best interests of the child" standard is applied in most countries, the United States cannot compel a foreign country to honor a United States award based on the same standard.

For example, in In re E. (D) (An Infant), on the basis of the best interests of the child, the British court awarded custody to the child's aunt and uncle even though a New Mexico court had awarded temporary custody to the child's natural mother. Similarly, in In re C (minors) the English court awarded custody to the natural father, an English citizen, while a custody suit brought by the stepfather was pending in California. While acknowledging that California properly had assumed jurisdiction, the court made the award on the ground that the California court would have awarded custody to the natural father, based on a California social worker's report pointing to the father as the preferred parent.

The problem has become so exacerbated that a Minnesota court refused to grant an abducting parent visitation rights until the parent obtained a German declaratory judgment acknowledging that American courts had exclusive jurisdiction to determine custody matters in the case, and that German courts had a duty to enforce the Minnesota court's award of permanent custody to the mother.

There is little the United States Government can do in these situations. In a letter to all consular posts, the State Department stated that consuls must attempt to locate the missing child and ascertain the child's health and circumstances. Once the child is located, the post's duty is to interview the child or have a local official pay a

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98 Dep't of State, Assistance in Child Custody Disputes, reprinted in 61 MICH. B.J. 158 (1982) [hereinafter Dep't of State Notice].

99 Zukerman, Support and Custody of Children—International and Comparative Aspects, INT'L BAR ASS'N TWELFTH CONFERENCE REPORT 162, 169 (1968). Most jurisdictions state that parents have equal rights to custody; nevertheless, the tender years doctrine seems to prevail, unless the mother is very unfit. Id. In several countries, the father has the paramount right to custody (e.g., France, Northern Ireland, Scotland, and Portugal). Id. Other factors include parental preference of older children, fitness of the parents, and whether an order has been issued elsewhere. Id. at 170-71. Although this report is somewhat dated, recent case law demonstrates its continued validity. See infra notes 101-05 and accompanying text.

100 Dep't of State Notice, supra note 98, at 158.

101 [1967] 1 Ch. 287.

102 Id. at 301 (special circumstances outweigh comity considerations).


104 Id. at 238.

105 Tischendorf v. Tischendorf, 321 N.W.2d 405, 412 (Minn. 1982), cert. denied, 460 S. Ct. 1037 (1983). See also McKee v. McKee, [1951] 2 D.L.R. 657, 666 (best interests of child require that custody be awarded to abducting parent). But see In re H (infants), [1966] 1 W.L.R. 381, 389 (duty of courts in all countries to do all they can to ensure that wrongdoer does not gain advantage by his wrongdoing—American court proper to decide case).

106 Transmittal Letter OCS-1, Sept. 4, 1979, reprinted in Nash, Contemporary Practice of
call to the child's residence. The post should inform local authorities that the United States interest "is not necessarily in the return of the child but in the health and welfare of a minor United States citizen. . . ."107 In addition to locating the child, the consular officer should provide the custodial parent with a list of attorneys, outline custody procedures, and "be as helpful as possible without acting as legal advisor. . . ."108

Thus, the custodial parent must resort to the complicated and costly process of obtaining return of the child via the laws of a foreign country.109 Similarly, the United States Government will not assist foreign governments by extraditing child abductors found in the United States or give assistance to United States citizens who seek to have a child snatcher extradited to the United States.110

A custodial parent may be able to avoid an international child snatching by preventing the other spouse from obtaining a passport in the child's name. This prophylactic measure is accomplished by filing with Passport Services a copy of a custody order with provisions prohibiting removal of the child from a particular jurisdiction without court approval.111 If, however, a parent absconds with the child to a jurisdiction with an open-door policy to United States citizens, such as Mexico or Canada, and the abducting parent applies for a passport there, there is nothing the custodial parent can do except obtain a court order in that country enforcing the United States judgment.112

Thus, American solutions to international child snatching are not completely satisfactory. In increasing numbers, noncustodial parents successfully kidnap their children and move overseas without sanction. The United States Government is powerless to help the custodial parent in these situations, and thus, the suffering that surrounds parental child kidnapping continues. There have been sev-
eral attempts to resolve this problem by international agreement. The next section of the comment discusses two recent international treaties that offer alternative solutions to the problem.

II. International Responses

On May 20, 1980, the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (the Strasbourg Convention) was opened for signature. The Strasbourg Convention establishes standards for recognition and enforcement of child custody decrees made by the member nations of the Council of Europe. The Council recognizes that international child stealing is a serious problem and seeks to establish procedures for the return of snatched children "to provide greater protection of the welfare of the children."

The Convention provides for the creation of Central Authorities that cooperate to execute the purposes of the treaty. Article 5 sets out the duties of the Central Authorities, which include locating the child, enforcing a member state's custody award, and returning the child to the custodial parent through whatever means are necessary including court proceedings. The Central Authority must bear the burden of all costs incurred on an applicant's behalf except the cost of the child's repatriation.

Article 7 provides that "[a] decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting

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113 See Comment, Treaty Responses, supra note 19, at 688.
116 See Comment, American Responses, supra note 2, at 436-37. The Strasbourg Convention was signed by 15 nations but, as of 1982, had been ratified only by France. Id. at 437. The Convention becomes effective three months after three countries ratify it. Strasbourg Convention, art. 22(1).
117 Strasbourg Convention, preamble.
118 Id. arts. 2(1), (3).
119 Id. art. 5.
120 Id. art. 5(1).
121 Id. art. 5(3).
Thus, the general premise of the Strasbourg Convention is that member nations must recognize and enforce their respective custody decrees unless one of the specified grounds for refusal to recognize and enforce is applicable.\footnote{123}

Article 8, for example, requires that at the time of the "improper removal,"\footnote{124} a country's Central Authority must return the child if: (1) the sole nationality of the child and his parents is of that nation; (2) the child's habitual residence\footnote{125} is in that State; and (3) application was made to the Central Authority within six months of the wrongful removal.\footnote{126}

If the criteria of article 8 are not met,\footnote{127} article 9 will apply if application to the Central Authority is made within six months of the abduction. Article 9 lists several grounds under which a contracting state may refuse to recognize and enforce a foreign custody decree.\footnote{128} Such refusal is justified if the defendant was not given adequate notice to enable the preparation of a defense, unless service was not effected because defendant concealed his or her whereabouts.\footnote{129} It is also permissible to refuse to recognize a foreign custody decree where there is insufficient connection between the child, the parents, and the court of origin,\footnote{130} or if the original custody decree is incompatible with the decision of the requested state.\footnote{131} Review of the merits of the requesting court's decision, however, is proscribed by the Convention.\footnote{132}

Finally, if neither article 8 or 9 applies, the requested court may
refuse to recognize and enforce a foreign custody decree for the reasons set out in article 10.\textsuperscript{133} The requested state may refuse to return the child if the effects of the requested state's decision "are manifestly incompatible with the fundamental principles of the law" of the requested state,\textsuperscript{134} or if changed circumstances, including passage of time, have caused the requesting state's decision to be no longer in the best interests of the child.\textsuperscript{135}

A state also may refuse to repatriate a child if the child has greater connections with the requested state than with the requesting state,\textsuperscript{136} or if a decision by the requested state would be incompatible with a decision made in the requested state or in a third state that is enforceable in the requested state.\textsuperscript{137} These grounds for refusal are important because a contracting state may make a reservation under article 17, so that the article 10 grounds for refusal will be applied to article 8 and 9 situations.\textsuperscript{138}

The Strasbourg Convention mandates the return of a child abducted prior to the entry of a custody decree if the custodial parent obtains a decree in the preremoval forum.\textsuperscript{139} Article 18, however, allows contracting states to make reservations so as not to be bound by article 12.\textsuperscript{140}

The Strasbourg Convention is a complex document with many exceptions and limitations. Commentators have criticized the Strasbourg Convention because its complicated procedures make uniform interpretation and enforcement difficult, if not impossible.\textsuperscript{141} Others have expressed concern that the broad exceptions to the Strasbourg Convention undermine its effectiveness by giving the courts too much discretion.\textsuperscript{142}

The Council of Europe believed that courts in any jurisdiction would award custody to the same parent once all the facts were presented. The Council found that the most significant problems faced by applicants were tracing children in the abducting states and bringing actions for return of the children before the proper authori-

\textsuperscript{133} Id. art. 10(1). This article applies when there has not been an improper removal, or if the application for enforcement was made more than six months after an improper removal. Explanatory Report, supra note 115, at 13 ¶ 46.

\textsuperscript{134} Strasbourg Convention, art. 10(1)(a).

\textsuperscript{135} Id. art. 10(1)(b).

\textsuperscript{136} Id. art. 10(1)(c).

\textsuperscript{137} Id. art. 10(1)(d). See Explanatory Report, supra note 115, at 14-15 ¶¶ 51.

\textsuperscript{138} Strasbourg Convention, art. 17(1). Article 17(2) subjects a state that invokes the article 17(1) reservation to reciprocal treatment when it is the requesting state. Id. art. 17(2).

\textsuperscript{139} Id. art 12.

\textsuperscript{140} Id. art. 18.

\textsuperscript{141} See, e.g., Comment, American Responses, supra note 2, at 445-46; Eekelaar, supra note 114, at 305.

\textsuperscript{142} Comment, Treaty Responses, supra note 19, at 691.
ties.\textsuperscript{143} Therefore, the Council emphasized the role of the Central Authorities, and opted to exclude provisions making return of the wrongfully removed child mandatory.\textsuperscript{144} By giving the judge discretion to order the child to remain in the abducting state, the problem of having to return the child to a situation that would endanger the child’s health and well-being was avoided.\textsuperscript{145} Furthermore, the Council believed that discretion would not be abused, because the requesting state’s courts could retaliate by keeping a child in its jurisdiction contrary to the abusing court’s custody order.\textsuperscript{146}

The same year the Strasbourg Convention was presented for signature, another Convention was discussed. In October 1980 at the Fourteenth Session of the Hague Conference on Private International Law, the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) unanimously was approved.\textsuperscript{147} The Hague Convention is designed primarily to facilitate the prompt return of a child under age sixteen\textsuperscript{148} who is wrongfully removed or retained,\textsuperscript{149} and to ensure that the rights of custody and access in one member state are respected in all other contracting states.\textsuperscript{150}

The Hague Convention further states that the rights of custody that the abductor has breached may arise by judicial decision or by reason of an agreement having legal effect under the laws of the requesting state.\textsuperscript{151} Thus, unlike the Strasbourg Convention, the Hague Convention applies to international abductions that occur before or after a judicial award of custody has been made.\textsuperscript{152} The wrongfulness of the conduct is determined by the laws of the country in which the child habitually resides.\textsuperscript{153} The child abductor may be a

\textsuperscript{143} Jones, \textit{supra} note 3, at 470.
\textsuperscript{144} \textit{Id.} at 472-73.
\textsuperscript{145} \textit{Id.} at 474.
\textsuperscript{146} \textit{Id.} at 474-75.
\textsuperscript{147} The Hague Conference consisted of 23 nations, including the United States, plus representatives of 6 nations, attending as nonvoting delegates. \textit{See} Agopian & Anderson, \textit{supra} note 6, at 22. The Hague Convention is reprinted in \textit{R. CROUCH, supra} note 11, at 93.
\textsuperscript{148} Hague Convention, art. 4. It was thought that a child of 16 could object to his being kidnapped. \textit{See} Eekelaar, \textit{supra} note 114, at 316.
\textsuperscript{149} Article 3 defines wrongful removal or retention as a breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and . . . at the time of removal or retention those rights were actually exercised . . . or would have been so exercised but for the removal or retention.
\textsuperscript{150} Hague Convention, art. 3.
\textsuperscript{151} \textit{Id.} art. 1. \textit{See also} Agopian & Anderson, \textit{supra} note 6, at 23; Bodenheimer, \textit{The Hague Draft Convention on International Child Abduction}, 14 \textit{FAM. L.Q.} 99, 102-03 (1980); S. ABRAHMS, \textit{supra} note 7, at 118.
\textsuperscript{152} \textit{Id.} art. 3(b).
\textsuperscript{153} \textit{See} Bodenheimer, \textit{supra} note 150, at 104; Comment, \textit{Treaty Responses, supra} note 19, at 693; Eekelaar, \textit{supra} note 114, at 310.
\textsuperscript{153} Hague Convention, art. 3(a). It has been suggested that “habitual residence,” as used in the Hague Convention, approximates “domicile.” \textit{See} Bodenheimer, \textit{supra} note 150, at 104 n.25.
INTERNATIONAL CHILD ABDUCTION

parent, an agent of the parent, or any other person who wrongfully assumes custody of a child. Applicants for relief under the Convention can be the natural or adoptive parents, guardians, or any person who has obtained custody by court order.

The Hague Convention provides for cooperation among governmental authorities through the use of Central Authorities. Like the Strasbourg Convention, the Hague Convention states that Central Authorities shall take "all appropriate measures" to locate an abducted child, provide information regarding the social background of the child and the laws of the requesting state, attempt to secure voluntary return of the child, and if no amicable resolution is possible, to initiate legal proceedings and provide legal aid and advice to the applicant. Article 26 provides that the Central Authorities must bear their own administrative costs and the costs of all legal proceedings, but may request reimbursement for the expenses incurred in repatriating the child.

Custodial parents may apply for assistance to the Central Authority of the country of habitual residence or to the Central Authority of the abducting nation. Victimized parents, however, may bypass the Central Authority and institute their own legal proceedings directly.

Once a Central Authority receives an application, its responsibility is to transmit the application to the Central Authority of the abducting state as soon as the child's location is ascertained. The Central Authority of the State where the child is located is obligated to attempt to negotiate the voluntary return of the child. If it is unsuccessful, it must expeditiously initiate legal proceedings for the return of the child, and the judicial authority must reach a decision within six weeks from the date of commencement of the proceeding.

The six-week limit on legal proceedings should be easy to com-

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154 See Bodenheimer, supra note 150, at 104; Comment, Treaty Responses, supra note 19, at 693-94.
155 An institution, such as a child care center, also qualifies as an applicant under the Convention. See Comment, American Responses, supra note 2, at 441-42 n.181; Bodenheimer, supra note 150, at 104-05.
156 Hague Convention, arts. 6, 7.
157 Id. art. 7. But see id. art. 27 (Central Authority not bound to accept an application if the requirements of the Convention not met).
158 Id. art. 26. Article 26 also provides that a contracting state may make a reservation under article 42 and thereby refuse to assume the expenses of any legal proceedings. Id.
159 Id. art. 8. Article 8 requires the submission of certain information about the missing children from the applicants. Id. Attached as an appendix to the Convention is a model form for optional use by the Central Authorities.
160 Id. art. 25.
161 Id. art. 9.
162 Id. art. 10.
163 Id. art. 11.
ply with because the Hague Convention does not permit a decision on the merits of the custody dispute. The purpose of the Convention is to restore the child to the status quo before the abduction, and therefore, the court has a limited function. To order the immediate return of the child, the court need only find that the child was removed wrongfully, and that the proceedings were instituted within the Convention's one-year statute of limitations. If a year or more has passed, the court may in its discretion order the immediate return of the child unless it finds that the child has become acclimated to the new environment.

Although harsh, the one-year statute of limitations was implemented for two reasons. First, an aggrieved parent usually acts immediately to gain the return of the child. "Failure to act quickly would indicate that the parent was ambivalent about or acquiesced in the assumption of custody by the abductor." Second, children assimilate quickly into a new culture, and therefore, removal of a child from an abducting parent after a year would cause a serious disruption in the life and stability of the child. This assumption, however, overlooks the destabilizing effects of a nomadic abducting parent who does not remain in any one place long enough for a child to become acclimated.

Articles 13 and 20 of the Convention provide the limited exceptions to the duty of the judicial authority to order the immediate return of a child. Article 13 provides that a judicial authority is not bound to order the return of a child if the person opposing the child's return establishes that: (1) the person or institution having custody of the child was not exercising it at the time of the abduction or subsequently had consented to the abduction; or (2) there is a grave risk that the child would be exposed to physical or psychological harm if returned. If the court finds that the child objects to

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164 Id. art. 16.
165 See House Hearings, supra note 2, at 366 (report of Prof. Bodenheimer to the Secretary of State, Jan. 1980).
166 Hague Convention, art. 12.
167 Id.
168 See House Hearings, supra note 2, at 368; Comment, Treaty Responses, supra note 19, at 694.
169 Comment, Treaty Responses, supra note 19, at 694.
170 See House Hearings, supra note 2, at 368; Comment, Treaty Responses, supra note 19, at 694.
171 See House Hearings, supra note 2, at 369. The U.S. delegation objected to the one-year statute of limitations, noting that it may take up to two years to locate a child in this country because there are no registration procedures like those in most European countries. Comment, Treaty Responses, supra note 19, at 694; Westgate, Kidsnatch Treaty Being Studied, SINGLE PARENT, Mar. 1980, at 20, 21, reprinted in House Hearings, supra note 2, at 126, 127.
172 Hague Convention, art. 13(a).
173 Id. art. 13(b). Note the similarity between this provision and the emergency jurisdiction provision of the UCC/j. See supra note 45 and accompanying text. This is in-
being returned and is of sufficient age and maturity for the court to give weight to the child's opinion, it is not obligated to order the child's return.\textsuperscript{174}

Article 20 provides that the child should not be returned "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."\textsuperscript{175} While article 13 specifies that the burden of proof is on the abductor to prove the first two exceptions,\textsuperscript{176} it is not clear who has the burden of proof under article 20.\textsuperscript{177}

Under article 3 the applicant has the burden of proving he or she has lawful custody of the child, and that the removal by the defendant was wrongful.\textsuperscript{178} The applicant is aided, however, by numerous provisions of the Convention. The court must consider the social background of the child\textsuperscript{179} and the laws of the requesting state regarding child abduction.\textsuperscript{180} The applicant is not required to file any bond or other security\textsuperscript{181} and is entitled to the same legal aid and advice as a national in the abducting State.\textsuperscript{182}

Article 21 provides that a person seeking to secure effective visitation rights may apply to the Central Authorities in the same manner as an applicant for the return of a wrongfully removed child.\textsuperscript{183} The Central Authorities are obligated to "promote the peaceful enjoyment of access rights . . . [and] shall take steps to remove . . . all obstacles to the exercise of such rights."\textsuperscript{184} Access rights are not defined in the Convention, but article 5(b) provides that they include "the right to take a child for a limited period of time to a place other
than the child's habitual residence."  

Both the Strasbourg Convention and the Hague Convention offer solutions to the tragedy of international child abduction. The language of the Hague Convention is straightforward. It is more simplistic than the Strasbourg Convention and provides for fewer reservations and exceptions. Furthermore, the Strasbourg Convention may be signed and ratified only by the twenty-one member nations of the Council of Europe. The Hague Convention, on the other hand, is open to other nations, including the United States, Japan, and the Commonwealth nations. Only four nations have ratified the Hague Convention: France, Switzerland, Portugal, and all but two provinces of Canada.

The most prominent drawbacks of the Hague Convention are the one-year statute of limitations and the limited number of states that have expressed an interest in the problem of international child snatching by attending the Hague Conference. The nonparticipating nations provide numerous havens for potential child abductors.

As discussed above, United States legislation has attempted to curb the increasing frequency of interstate and international child abductions. There remains an overwhelming need, however, for further solutions to the problem of parental child snatching overseas, especially because the United States Government is practically powerless to secure the return of abducted children once they are located abroad. Ratification of the Hague Convention by a sufficiently large number of countries should provide a solution.

The United States signed the Hague Convention on December 23, 1981. During the first week of March 1985 family law professors and practitioners (the Study Group) will meet in California to discuss and draft implementing legislation to submit to the congress.

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185 Id. art. 5(b). See also Anton, supra note 173, at 554-55; Farquhar, supra note 177, at 27-28. The delegates felt that strict rules and procedures for visitation would be difficult to devise and would provide for ill feeling between the parents rather than the requisite goodwill for the proper exercise of visitation rights. See Anton, supra note 173, at 555.

186 See Anton, supra note 173, at 556; Comment, American Responses, supra note 2, at 447.

187 Hague Convention, art. 38.

188 See Comment, American Responses, supra note 2, at 448. Article 43 provides that the Convention will become effective three months after three nations ratify it. Id.

189 Pfund Interview, supra note 1. Several other nations have expressed an interest in ratifying it, e.g., United States, Greece, and Belgium. P. Hoff, supra note 11, at 10-11.

190 This should be a problem only in the United States. It takes an average of three months to locate a missing person in Europe. Westgate, supra note 171, at 21. It is speculated it could take up to two years in the United States. See supra note 171 and accompanying text.


192 Pfund Interview, supra note 1.

193 Id.
sional judicial committees contemporaneously with the Hague Convention.\textsuperscript{194}

Originally, it was thought that the Hague Convention would be self-executing. It has been determined by family law experts and the State Department, however, that certain questions raised by the Hague Convention are not reconcilable with United States law without some guidelines.\textsuperscript{195} A major question is whether federal or state courts will have jurisdiction over cases arising under the Hague Convention. Traditionally, federal courts have exercised jurisdiction over cases involving treaty interpretation.\textsuperscript{196} State courts, however, have had virtually exclusive jurisdiction over domestic disputes because of the federal courts' refusal to hear such matters.\textsuperscript{197} The Study Group intends to discuss this question and in all likelihood will suggest that initial jurisdiction be designated in state courts to hear cases arising under the Convention.\textsuperscript{198}

Another problem of implementation of the Hague Convention in the United States is the establishment of a Central Authority. Commentators have suggested the Justice Department or the Department of Health and Human Resources as possibilities.\textsuperscript{199} The latter is the better choice because that agency manages the FPLS, now used in connection with the PKPA.\textsuperscript{200}

Implementing legislation also should provide the proposed Central Authority with funding to cover its administrative costs as well as the cost of using the FPLS to assist in locating abducted children.\textsuperscript{201}

\textsuperscript{194} Id.
\textsuperscript{195} See S. ABRAHMS, supra note 7, at 119-20.
\textsuperscript{196} See, e.g., Crouch, supra note 5, at 593; Foster & Freed, supra note 77, at 38.
\textsuperscript{197} See 28 U.S.C. § 1531(a) (1982). This statute, however, gives federal courts not exclusive jurisdiction, but concurrent jurisdiction. See Comment, American Responses, supra note 2, at 471-72. See also Barber v. Barber, 62 U.S. (21 How.) 582, 592 (1858).
\textsuperscript{198} Recently, federal courts have been willing to hear tort cases arising from child snatchings that involve allegations of false imprisonment or intentional infliction of emotional distress, which arguably arise out of domestic disputes. See, e.g., Wasserman v. Wasserman, 671 F.2d 832, 834-35 (4th Cir.), cert. denied, 459 U.S. 1014 (1982). Tort actions brought in federal courts under diversity jurisdiction can serve as deterrents to potential international abductors. See, e.g., Kajtazi v. Kajtazi, 488 F. Supp. 15, 21-22 (E.D.N.Y. 1978) (court awarded over $30,000 in compensatory damages and $150,000 in punitive damages against relatives who aided a child abduction).
\textsuperscript{199} A further consideration is the conflict between the Hague Convention and the UCCJA, which is state law. Treaties are a part of the supreme law of the land, U.S. Const. art. VI, § 2, and therefore, the Hague Convention's statutes of limitations and exceptions would be "read into the international provisions of the UCCJA." Bodenheimer, supra note 150, at 112.
\textsuperscript{200} Pfund Interview, supra note 1.
\textsuperscript{201} See supra notes 88-90 and accompanying text. The Study Group intends to discuss the possibility of the use of the FPLS in implementing the Hague Convention's requirement that the Central Authority assist in locating abducted children. Pfund Interview, supra note 1. See Comment, American Responses, supra note 2, at 470-71.
III. Conclusion

This comment has described two United States attempts to curtail the burgeoning problem of international child snatching. The UCCJA effectively addresses the problem of interstate child snatching by those parents who remove their children in an attempt at forum-shopping for a favorable custody determination. The PKPA supplants the UCCJA by adding the "muscle" of the FBI and the Justice Department to aid in locating and apprehending the abducting parent and the children. As the Justice Department becomes more involved in parental child kidnapping, the PKPA should also serve as a tremendous deterrent to would-be child snatchers.

The United States legislation, however, is not without problems. The UCCJA only addresses those cases in which the parents seek to legitimize the wrongdoing, and therefore, parents who abduct with no intention of pursuing a new custody determination are not affected. Additionally, the jurisdictional provisions of the UCCJA invoke the trial judge's discretion, and therefore, are subject to abuse.

The PKPA also has weaknesses. The Justice Department can be called in as a last resort only if the state has a felony parental child abduction statute. Furthermore, the FPLS will aid only in locating the absconding parents in limited circumstances.

Neither the PKPA nor the UCCJA is particularly helpful in cases of international abduction. It is clear, therefore, that there is an immediate need for an international agreement that addresses the problems peculiar to international child snatching. Although there are merits to both the Strasbourg Convention and the Hague Convention, the Hague Convention affords the most efficient solutions. Pragmatically, more nations will be able to ratify and thereby enjoy the protection afforded by the Hague Convention, thus limiting the number of potential havens for child snatchers.

The Hague Convention provides some solutions to problems of international child snatching that are not addressed by United States legislation. Because of the severe problems encountered by United States citizens in seeking return of their children abducted overseas, the United States should ratify the Hague Convention as soon as practicable. Furthermore, ratification by the United States should serve as a catalyst to other nations to ratify the Convention. Wide-

the reservation of court costs under article 42 of the Convention. The Study Group intends to place the burden of paying legal expenses on the wrongdoer, which can be ordered under both the UCCJA and the PKPA. Id. The possibility that the United States will extend the Hague Convention protection until the child reaches 18 will be discussed by the Study Group. Id.

202 One-half of the active files of unsolved international child abductions reported to the State Department involve child snatchings to the countries represented at the Hague Conference in 1980. This further demonstrates the need for ratification of the Convention. Pfund Interview, supra note 1.
spread adoption of the Hague Convention is essential if it is to be successful in its objectives.

—Barbara R. Morgenstern