Taking Away the Pawns: International Parental Abduction & the Hague Convention

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## Comments

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I. Introduction

Any parent who has ever lost sight of his or her child for even five minutes has experienced heart-stopping terror. Imagine, in comparison, losing a child for five days, five months, or five years.1 Yet thousands of American parents suffer this agony.2 "They are partners in failed marriages who have legal custody rights of their children [b]ut their former spouses have defied those rights, kidnapped their own children and taken them abroad."3 In so doing, they have made the life of the parent left behind a living hell, and have potentially scarred the children for the remainder of their lives.4

The need for a global solution to the problem of international parental abduction had become urgent by the 1970s. Therefore, in 1976 the Hague Conference on Private International Law5 began to formulate the idea of a convention whose intended purpose was to promote international cooperation amongst states6 in order to secure the prompt return of children wrongfully taken out of their jurisdictions.7 The end result of this Conference was the creation of the Hague Convention on the Civil Aspects of International Child Abduction (Convention) which was unanimously adopted on October 25, 1980.8 On April 28, 1988, the U.S. Congress implemented the Interna-

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1 139 CONG. REC. H10,313 (daily ed. Nov. 20, 1993) (statement of Mr. Schumer).
2 Id.; see also infra note 11.
3 139 CONG. REC. H10,313 (daily ed. Nov. 20, 1993) (statement of Mr. Schumer).
4 See generally SALLY ABRAHMS, CHILDREN IN THE CROSSFIRE (1983).
5 See generally GLORIA F. DeHART, INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS 9 n.23 (2d ed. 1993) [hereinafter GUIDE] (describing the historical roots of the Conference as well as its current status in the international community). The Hague Conference is a 100-year-old international organization of member governments whose permanent bureau is located at the Hague, the Netherlands. Id. The United States joined the Conference in 1964. 22 U.S.C. § 269g (1988).
6 "States" refers to either states or countries depending on the context throughout the remainder of this Comment.
tional Child Abduction Remedies Act (ICARA). ICARA enacted the Hague Convention in the United States. The Hague Convention was designed to respond to the growing problem of international abduction.

The ratifying countries, as of April 15, 1993, include: Argentina, Australia, Austria, Canada, Denmark, France, Germany, Greece, Ireland, Israel, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, the United States of America, and Yugoslavia. At the time of publication, one additional country—the Czech Republic—had also become a signatory to the Hague Convention.

The countries which have acceded to the Convention and have had their accessions accepted by member countries (with indicated number of members accepting in parenthesis), as of April 15, 1993, are: Belize (16), Burkina Faso (8), Ecuador (11), Hungary (18), Mexico (18), Mauritius (0), Monaco (5), New Zealand (17), Poland (7), and Romania (6). Bruch, supra at n.5. In addition, at the time of publication, the following countries have also joined the aforementioned states in acceding to the Convention: Slovenia, Judicial Procedure Convention on the Civil Aspects of International Child Abduction, Mar. 22, 1994, U.S.-Slovenia, 5 Dep't of St. Dispatch, No. 27, at 459, 459 (July 4, 1994); Chile, Judicial Procedure Convention on the Civil Aspects of International Child Abduction, U.S.-Chile, 5 Dep't St. Dispatch, No. 20, at 323, 323 (May 16, 1994); Panama, Judicial Procedure Convention on the Civil Aspects of International Child Abduction, U.S.-Pan., 5 Dep't of St. Dispatch, No. 16, at 223, 223 (Apr. 18, 1994); Honduras, Judicial Procedure Convention on the Civil Aspects of International Child Abduction, Dec. 20, 1993, U.S.-Hond., 5 Dep't of St. Dispatch, No. 10, at 134, 134 (Mar. 7, 1994).

The purpose of the distinction between accession and ratification is that only nations which have ratified the Convention can become signatories under Article 37. Hague Convention, supra, art. 37. Accession, on the other hand, binds a country only as to those other nations that declare their acceptance of the particular accession under Article 38. Id. at art. 38.


The Senate gave its advice and consent on October 9, 1986. Congressional hearings on the international abduction problem were held in connection with the legislation. See International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. of the Judiciary, 100th Cong., 2d Sess. (1988). The ratification of the Convention was subject to two reservations: (1) that the United States would not assume the court costs and counsel availability under the Convention; and (2) that all documents submitted to the U.S. Central Authority should be in their English translation. Pfund, supra note 9, at 37-38. The Hague Convention was designed to enter into effect, after the passage of the ICARA, see supra note 9, on July 1, 1988. See 53 Fed. Reg. 23,843 (1988). On August 11 of the same year, the State Department's Bureau of Consular Affairs was designated the U.S. Central Authority. See Exec. Order No. 12,648, 53 Fed. Reg. 50,637 (1988). For a detailed chronological summary of the Hague Convention's ratification in the United States, see Guide, supra note 5, at 14.

Parental abduction has become an international predicament of great magnitude within the last decade. From 1975 to October 9, 1986, 2,184 international child abduction cases were reported to the State Department. Over 1,500 of these abductions occurred in the three year period between 1983 and 1986. 192 Cong. Rec. S15,771 (daily ed. Oct. 9, 1986)
child abduction by parents.\textsuperscript{12} Parties to the Hague Convention are expected to promptly return an abducted child to his country of "habitual residence"\textsuperscript{13} without addressing the merits of the competing parental claims.\textsuperscript{14} In this way, the Convention seeks to reduce the incentive for parents to seek alternative rulings from other courts (i.e., forum shopping).\textsuperscript{15}

Since its enactment, the Hague Convention has proven to be an effective weapon in the struggle against parental abduction.\textsuperscript{16} Tentative results seem to indicate that the Convention has not only been successful in deterring parental kidnapping\textsuperscript{17} but also in expediting, through the judicial system, the return of children who have

\begin{quote}
(statement of Sen. Denton). The State Department further estimates that since the 1970s over 5,200 American children have either been abducted from the United States or prevented from returning to the United States by one of their parents. \textit{Bureau of Consular Affairs, U.S. Dep’t of State, International Parental Child Abduction} ii (Aug. 1993). As of August 1993, the State Department had a total of over 1,000 active cases on file. \textit{Id.} Furthermore, it is estimated that every week more than 8 children in the United States alone will become the object of a parental abduction. \textit{Dateline: Against Their Will} (NBC television broadcast, Sept. 8, 1992).
\end{quote}

\textsuperscript{12} Although "abduction" typically appears in the criminal context, the Convention deals only with the civil issues arising from international child abduction. The Convention, on the other hand, speaks in terms of "wrongful removal" and "wrongful retention." Wrongful removal, under the Convention, refers to the taking of a child from the person actually exercising custody of the child whereas wrongful retention occurs when a child is kept, usually after a visit to the noncustodial parent, without the consent of the custodial parent. 51 Fed. Reg. 10,503 (1986). Throughout this Comment, the term "child snatching" will also be used interchangeably with these terms.

"Child snatching" occurs when a child has been removed or retained in breach of a parent’s custody rights. \textit{Sanford N. Katz, Child Snatching: The Legal Response to the Abduction of Children} 90 (1981). The breaching parent can either remove the child from the child's habitual residence and take the child to a second jurisdiction, or retain the child in the second jurisdiction after an authorized visit. Robin J. Frank, Comment, \textit{American and International Responses to International Child Abductions}, 16 \textit{N.Y.U. J. Int’l L. & Pol.} 415, 415 (1984).

\textsuperscript{13} See infra notes 135-63 and accompanying text.

\textsuperscript{14} Hague Convention, supra note 8, art. 1. \textit{See also} Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, at 10,504 (1986) [hereinafter Legal Analysis].


The U.S. State Department reports that during the first 3 years of the Convention’s operation in the United States, 96% of the completed cases involving a request for the child’s return from the United States resulted in the child’s return (either by agreement or by court order), and 86% of applications seeking return of children to the United States were similarly successful.

\textit{Id.}

\textsuperscript{17} See Andy N. Khan, \textit{Child Abduction and Custody}, 16 \textit{FAM. L.} 114, 116 (1986) (arguing that the impact in Switzerland has had a deterrent effect). \textit{See also} Adair Dyer, \textit{The Hague Child Abduction Convention - Past, Present and Future}, in \textit{North American Symposium on Inter-
been abducted.\textsuperscript{18}

Despite glowing statistical assertions,\textsuperscript{19} the fact remains that many children are still being used as pawns in the adult game of divorce.\textsuperscript{20} While the Hague Convention has the potential to become a most effective weapon against international parental abduction, public and judicial awareness are required in order to achieve this result. "Judges must become familiar with the [C]onvention and its procedures because they take precedence in any case where they are applicable."\textsuperscript{21} Family law lawyers, likewise, must acquaint themselves with the Convention’s provisions in order to "intelligently advise clients."\textsuperscript{22} Subsequent case law must be disseminated effectively to all of the Convention’s party states so that the treaty’s tenets can be consistently applied across international boundaries.\textsuperscript{23} Ultimately, it is through these publicized activities and a general heightened awareness that many would-be abductors will hopefully be swayed.\textsuperscript{24}

This Comment is intended to provide an overview of the basic information necessary to adequately understand the Hague Convention from the viewpoint of both the bench and the practitioner. The analysis begins by examining the state of U.S. law prior to the adoption of the Convention, including a brief overview of two statutory enactments—the Uniform Child Custody Jurisdiction Act (UCCJA)\textsuperscript{25} and the Parental Kidnapping Prevention Act (PKPA).\textsuperscript{26} The Comment will then proceed with an in-depth discussion of the Hague Convention’s provisions by focusing on the language of the instrument, its underly-
ing principles and aims, and an analysis of the current case law. Finally, the remaining obstacles to enforcement will be briefly examined and suggestions will be made regarding how the Convention's scope and efficacy can be fully optimized.

II. Child Abduction Prior to the Hague Convention in the United States

In recent years, the problem of international child abduction has received the increased attention of many family law scholars. The primary intent of this Comment is not to focus on the history of the international child abduction problem and possible legal remedies; these topics having been thoroughly and expertly discussed elsewhere. Instead, the Hague Convention constitutes the ultimate focus of this work. However, in order to place the passage of the Hague Convention and its main provisions in proper context, a brief overview of the growth of the problem of international child abduction is required.

A. Historical Development of Custody Jurisdiction: Pre-1968

Historically, the problem of parental child abduction was dealt with primarily on the national level. In the United States, prior to the adoption of uniform national law, i.e., the UCCJA, child custody law was fraught with much ambiguity and confusion. State courts often refused to enforce the custody decisions of other jurisdictions, and justified not extending comity to another state’s or country’s awards on the basis of the interlocutory nature of the grant and the “best interests of the child.”

The non-deferential treatment of foreign custody orders created a non-terminal nature of the grant and the “best interests of the child.”

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31 Morgenstern, supra note 15, at 465 (“[A]wards are not final, but remain modifiable based on the current best interests of the child.”). See also Middleton v. Middleton, 314 S.E.2d 362, 366 (Va. 1984) (discussing problems prior to the adoption of the Uniform Child Custody Jurisdiction Act). The courts felt free to modify custody decrees on the grounds that circumstances surrounding the home environment had changed. Id. Courts of several states acted in isolation of one another, often simultaneously awarding custody of the same child to different parents. Id.
conducive environment for child snatching.\(^{32}\) Parents who were disgruntled with a custody decision in one state had only to move to another state to receive an opportunity to obtain a more favorable outcome. Forum shopping was further facilitated by the jurisdictional rules\(^ {33}\) which allowed for custody jurisdiction to be established on a number of different grounds: "(a) the child's physical presence; (b) the child's domicile; (c) the physical presence and/or domicile of one or both parents; or (d) the continuing rights or jurisdiction in a court rendering an initial decree."\(^ {34}\) Moreover, the United States Supreme Court, in a series of cases decided between 1947 and 1962, further encouraged such self-help remedies\(^ {35}\) by declining to interpret the full faith and credit clause of the United States Constitution\(^ {36}\) as a mandate to the states to recognize and enforce the custody decrees of other states.\(^ {37}\)

### B. The National Uniform Legislation Emerges: Post-1968

Because states were not required as a matter of comity to enforce other states' custody decrees, a "no-mans land" was created in the law where parents could escape an adverse ruling and secure a more favorable decision simply by going to a neighboring state or country.\(^ {38}\) As a result of this increased risk of self-help procedures, in the late 1960s practitioners and the states began to address the confusion that had been prevalent in this area of the law. The focus of this attention culminated in passage of two acts of legislation: the Uniform Child Custody Jurisdiction Act (UCCJA),\(^ {39}\) which was framed in a combination effort by the ABA Family Law Section and the Commissioners of Uniform Laws,\(^ {40}\) and has subsequently been adopted by all fifty

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\(^{33}\) The parent who had physical possession of the child often had a tactical advantage because courts based their jurisdiction on the mere presence of the child. *Middleton*, 314 S.E.2d at 366-67. Therefore, parents would often kidnap a child in order to obtain possession. *Id.* Once the child was abducted, the custodial parent would have to relitigate in the forum where the child was now present. Scherwin, *supra* note 32, at 168. If a foreign country was involved, the alien parent would be confronted with additional problems: added expense, language barriers, a less sympathetic court system, and obtaining local counsel. *Middleton*, 314 S.E.2d at 367. The abducting parent, therefore, had a strong motivation to take the child to a more sympathetic forum. *Id.*

\(^{34}\) *Guide*, *supra* note 5, at 4.

\(^{35}\) Scherwin, *supra* note 32, at 166; *Guide*, *supra* note 5, at 3-4.

\(^{36}\) U.S. Const. art. IV, § 1.


\(^{38}\) *Guide*, *supra* note 5, at 4.

\(^{39}\) UCCJA, *supra* note 25.

\(^{40}\) See Bridgette M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 Fam. L.Q., 304, 304 (1969). For a discussion of the jurisdictional nature of the UCCJA, see also
states; and the Parental Kidnapping Prevention Act (PKPA), which was enacted in 1980 and was designed to supplement the UCCJA.

The UCCJA was enacted to address primarily the problems of interstate abductions, but also extended its reach to international abductions. In particular, section 23 of the UCCJA states that:

[T]he general policies of this Act extend to the international arena. 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.

Importantly, the Act eliminated many of the advantages that parental abductors had gained from forum shopping, and provided greater certainty that prior custody hearings would not be disregarded. The UCCJA attempted to achieve this objective by limiting jurisdiction of custody suits to a single state. The Act only allowed a state court to assert jurisdiction under a limited number of circumstances: (1) if it sits in the child’s home state, (2) if the state had a


41 Guide, supra note 5, at 5.


43 Since the primary focus of this Comment is the Hague Convention, a discussion of the PKPA will not ensue. Such an omission is justified by the fact that the PKPA is limited to domestic abductions. See Elizabeth C. MacDonald, Note, More Than Mere Child’s Play: International Parental Abduction of Children, 6 DICK. J. INT’L L. 283, 295 (1988) (“While the PKPA contains several provisions that may assist a parent whose child has been wrongfully taken, application of these provisions is confined to cases arising within the United States; the PKPA is not applicable to international parental abduction disputes.”). In addition, the discussion of the UCCJA’s provisions should provide the reader with an adequate contextual basis for understanding U.S. legislation. However, if additional information is sought, see Cathy S. Helzick, Note, Returning United States Children Abducted to Foreign Countries: The Need to Implement the Hague Convention on the Civil Aspects of International Child Abduction, 5 B.U. INT’L L.J. 119, 125-32 (1987) (discussing the relationship between, and differences in, the UCCJA and the PKPA).

44 For a discussion of the purposes sought to be achieved by the passage of the UCCJA, see Scherwin, supra note 32, at 168-69. See also supra notes 29-37 and accompanying text.

45 UCCJA, supra note 25, § 23.

46 However, it is important to note that not all states adopted this section of the model act. See Walter J. Wadlington, Virginia Domestic Relations Law: Recent Developments, 68 VA. L. Rev. 507, 515 n.57 (1982).

47 Morgenstern, supra note 15, at 467.

48 Id. See also UCCJA, supra note 25, § 1(3):

[The main purpose of the UCCJA is to] assure that litigation concerning the custody of a child take[s] place ordinarily in the state with which the child and his family have the closest connection and where significant evidence . . . is most readily available, and that courts . . . decline the exercise of jurisdiction when the child and his family have closer connection with another state.

Id. “Home state” is defined as “the state in which the child immediately preceding the time involved lived with his parents . . . for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned.” Id. § 2(5).
significant connection with the child and its family, if the child was present in the state and was abandoned or subject to or threatened with abuse or neglect, or no other state would have or assume jurisdiction under section (1), (2), or (3). Regardless of which of these jurisdictional bases is used to establish the authority of the court to hear the matter, the child's presence alone is not determinative.

Although the UCCJA effectively eliminates some instances of forum shopping, it still contains many legislative and judicial loopholes. While it has generated cooperation among sister states, it has failed to achieve uniformity in judicial determinations and interpretations and thus its deterrent effect has been undermined. In addition, the courts have avoided the provisions of the UCCJA by raising constitutional questions as to its preconditions. Judges have inconsistency and narrowly construed some of the UCCJA's provisions and expanded their discretionary reign in other areas so as to allow themselves authority to hear the merits. The states have also added to the confusion, and further decreased the effectiveness of the UCCJA, by adopting varying versions of the act.

In international custody disputes, additional problems as to the scope of the UCCJA exist and effectively leave many cases outside of the periphery of the law. The UCCJA applies only to international custody cases where the custodial parent asks the forum state to recognize and enforce a foreign decree. The Act fails to provide a remedy where the noncustodial parent takes a child from the United States to another country. Additionally, the Act applies only when an official custody order existed prior to the abduction and the abducting parent

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50 Id. § 3(a)(2).
51 Id. § 3(a)(3).
52 Id. § 3(a)(4).
53 Id. § 3(a).
54 GUIDE, supra note 5, at 6.
55 Rivers, supra note 15, at 607-08.
56 Id. at 606. For example, the law is currently unsettled as to how the "reasonable notice and opportunity" requirement of § 23 of the UCCJA is to be interpreted in light of constitutional due process constraints. Id. at 606-07 (citing Miller v. Superior Court, 587 P.2d 723, 745 (Cal. 1978)).
57 See, e.g., Klien v. Klien, 533 N.Y.S.2d 211, 214 (Sup. Ct. 1988) (refusing to consider Israel a "state").
58 MacDonald, supra note 43, at 294 (discussing the dilution of the UCCJA's deterrent effect due to the broad discretion granted the courts).
59 For a general discussion of the problems still faced under the UCCJA, see Morgenstern, supra note 15, at 469-70.
60 Id. at 470.
61 Id. at 469-70.
62 See UCCJA, supra note 25, Prefatory Note (UCCJA not a reciprocal law). See also, Morgenstern, supra note 15, at 472-73:

When children are taken from the United States, however, it is less likely that a United States custody order will be enforced abroad. . .

Most countries adhere to the principle that their courts have jurisdiction to render custody decisions despite a foreign judgment, if the child is in that country. Although the "best interests of the child" standard is applied in most
tries to legitimize his or her custody in another forum. It fails to deter those who had no intention of legitimizing their custody in a foreign country. Despite the enactment of the UCCJA and other domestic legislation, there remained, up until the passage of the Hague Convention, the need for international cooperation to address the problem of international child abduction since national legislation had proven itself to be an inadequate remedy.

III. An International Solution: Analysis of the Hague Convention

The underlying principle of the Hague Convention is to secure a swift return of the abducted child to the state in which the child was a habitual resident without undertaking a full investigation of the merits of the abductor’s case. The aim is to restore the status quo.

Moreover[,] the Convention creates a very strong presumption that the child’s interests are harmed by wrongful removal or retention as defined in the Convention, and that the appropriate place for tranquil consideration by a court of the child’s best interests is in the place of habitual residence before the removal or retention.

The Hague Convention has been heralded as a novel and unique approach to the problem of parental abductions because it avoids the difficulties encountered in requiring the enforcement of an existing custody decree; instead, it allows a court to determine whether to order a child returned irrespective of whether a decree exists or not. Therefore, unlike the European Convention, the Inter-American

countries, the United States cannot compel a foreign country to honor a United States award based on the same standard.

Id. (citations omitted).

63 UCCJA, supra note 25, § 1(a)(2).
64 Morgenstern, supra note 15, at 470.
65 In addition to the Hague Convention, there are two other conventions designed to deal with the problem of international abduction: the European Convention on Recognition and Enforcement of Decisions Concerning Child Custody and on Restoration of Custody of Children, May 20, 1980, 19 I.L.M. 273 [hereinafter European Convention], and the Inter-American Convention on the International Return of Children, July 15, 1989, 29 I.L.M. 63. Both require an enforceable decree for their application. The United States, in addition, is not a party to either convention. For a discussion of these conventions, see GERALDINE VAN BUEREN, THE BEST INTERESTS OF THE CHILD - INTERNATIONAL CO-OPERATION ON CHILD ABDUCTION 25-32 (1993) and Morgenstern, supra note 15, at 475-78.
66 See supra notes 13-14 and accompanying text. See also Anton, supra note 27, at 543 ("These wider objects, however, are subsidiary to the primary purpose of the Convention, namely, as Article 1(a) states, to secure the prompt return of children wrongfully removed to or retained in any Contracting State.").
67 Legal Analysis, supra note 14, at 10,505.
69 See, e.g., Eekelaar, supra note 28, at 905.
70 European Convention, supra note 65, at 273.
Convention, the UCCJA, and the PKPA, the Hague Convention does not require the existence of an enforceable custody order for it to operate. The Convention is further designed to compel the abducting parent to return the child voluntarily to the place of habitual residency; if the abductor refuses, the Convention provides procedures for the court to order a child's return. Succinctly put, the objectives of the Convention are as follows:

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to a country of the child's habitual residence where any disputes in custody rights can be heard and settled.

Inherent in the philosophical underpinnings of the Convention is the notion that strict application and interpretation of the provisions are paramount to deter future abductions. If the courts fail to consistently interpret the Convention, it would result not only in the undermining of its value in deterring parental abductions but could also allow the Convention to become subject to varying national approaches and perspectives which would hinder the attainment of the core objectives set forth in the treaty. Therefore, it is imperative

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71 Inter-American Convention on the International Return of the Child, supra note 65, at 65.
72 UCCJA, supra note 25.
74 See Eekelaar, supra note 28, at 305.
75 Hague Convention, supra note 8, art. 7.
76 Id.
78 As George Schultz, in his capacity as Secretary of State, stated:
If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring parental kidnapping, as the legal and other incentive[s] for wrongful removal or retention will have been eliminated. Indeed, while it is hoped that the Convention will be effective in returning the child in individual cases, the full extent of its success may never by [sic] quantifiable as an untold number of potential kidnappings may be deterred.
79 Silberman, supra note 23, at 7.
80 The stated objectives of the Hague Convention are:
   a. [T]o secure the prompt return [of] children wrongfully removed to or retained in any Contracting State; and
   b. [T]o insure the rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.
Hague Convention, supra note 8, at art. 1.
that the judiciary, family law practitioners, and others who are involved in the process of this type of "particularized litigation" exhibit a firm grasp on the "intricacies" of the Convention and the mounting case law that has been accumulating since its inception. The following analysis attempts to provide those individuals confronted with the issue of international parental abduction, in the legal context, with an overview of the Hague Convention and its application.

A. The Structure of the Convention—An Overview

The actual text of the Hague Convention consists of six chapters and contains forty-five articles. The preamble states that "the interests of children are of paramount importance" in custody matters and right of access. The underlying purpose for accomplishing the child's swift return is to avoid assimilation of the child into the strange environment which could lead to subsequent separation difficulties. In addition, because the safety of the child is the paramount concern, the Convention envisions the child's prompt return to his or her habitual residence. Hence, the Hague Conference proceeded with a convention that is procedural and jurisdictional in nature. The Convention does not offer uniform international standards for determining custody rights nor does it provide for the enforcement of custody decrees rendered by another foreign state.

81 Silberman, supra note 23, at 77.
82 It has been noted by some commentators that the knowledge of the family law attorney is especially important in this regard because he or she often will be faced with the responsibility of educating the bench on the provisions and proper application of the Convention. See Robert D. Arenstein, The Anatomy of a Hague Case When a Child[ren] has been Abducted to the United States, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES 1 (Sept. 30, 1993). This is imperative in countries, such as the United States, where custody disputes are heard at the district court level and where the judges expertise is expected to span a multitude of civil and criminal issues and who generally may not hear many cases of this sort. Interview with Betty Mahmoody, Co-Author of NOT WITHOUT MY DAUGHTER and FOR THE LOVE OF A CHILD as well as President and Co-Founder of One World : For Children (Jan. 5, 1994) [hereinafter Mahmoody Interview] (Ms. Mahmoody has been certified by many state courts as an expert witness on international child abductions and the Hague Convention.).
83 Garbolino, supra note 21, at 28.
84 Id.
85 Since 1980, over 300 court decisions from at least 15 different countries have examined the Hague Convention's provisions. Dyer Remarks, supra note 17, at 11.
86 Hague Convention, supra note 8.
87 Id. at pmbl.
88 VAN BUEREN, supra note 65, at 17.
89 Anton, supra note 27, at 543-44 ("The Commission started from the assumption that the abduction of a child will generally be prejudicial to its welfare.... Th[e] return should be prompt.").
91 Compare this approach to that of the European Convention, supra note 65, whose main thrust is the enforcement of decrees and which only applies if there is a custody deci-
merely designed to address the issue of whether there has been a “wrongful removal” of a child from one country to another or a “wrongful retention,” and if so, to provide adequate procedures by which to obtain the presence of the child in the place of “habitual residence.” Then, and only then, may the issue of the underlying merits be considered. Countries adhering to the Convention agree to return all wrongfully removed or retained children to the state of the child’s habitual residence so that the authorities there may officiate the custody dispute.

The crux of the Convention is set forth in Articles 3 and 12. Article 3 defines a “wrongful removal or retention” as a breach of rights of custody under the habitual residence state’s laws if those rights have been actually exercised, either jointly or alone, or would have been so if the removal or retention had not occurred. Article 12 provides the remedy once a “wrongful removal or retention” has been found to have occurred. The remedial action ordered depends upon the time frame in which the action has been brought. If the proceeding was initiated within one year of the child’s abduction, judicial authorities within the Contracting State are required to return the child “forthwith.” On the other hand, if proceedings were initiated subsequent to the one year deadline, the authorities are only required to return the child if the child has not settled in its new environment.

Persons who oppose the return of the child to the “habitual residence” under the treaty are limited in their number of possible defenses. Articles 12, 13, and 20 set forth the available exceptions to the return of the child. Such defenses include alleging that: (i) the petitioner had no right of custody or access at the time of the removal or retention; (ii) the petitioner acquiesced to the removal or retention; (iii) the petitioner failed to exercise his or her right of custody; (iv) a “grave risk” of harm to the child would
result from the return of the child to the state of habitual residence or the child would be placed "in an intolerable situation";\(^{106}\) (v) the child is settled in a new environment;\(^{107}\) (vi) return "would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms";\(^ {108}\) or (vii) the child is of the appropriate age and maturity and objects to the return.\(^ {109}\) Although these exceptions are provided within the ambit of the Convention, in light of Article 19, they are meant to encompass a narrow focus so as to prohibit the making of custody decisions at this level.\(^ {110}\)

Procedurally, the Convention sets forth the creation of a Central Authority within each Contracting State to facilitate the parental abduction proceedings.\(^ {111}\) The Central Authority is responsible for various receiving and outgoing duties.\(^ {112}\) The incoming request duties, which are defined in Article 7, include locating an abducted child, instituting proceedings to effect a return, assisting in the administrative technicalities of a safe return, providing information concerning the laws of a state or background of a child in conjunction with an application, providing legal assistance and counsel, and endeavoring to amicably resolve a kidnapping situation.\(^ {113}\) Responsibilities of the Central Authority also arise in relation to outgoing applications (i.e., application seeking the return of children who have been taken to one of the Convention's Contracting States).\(^ {114}\) Article 8 states that a complainant may file an application at either the Central Authority of the

\(^{106}\) Id. at art. 13(b).

\(^{107}\) Id. at art. 12.

\(^{108}\) Id. at art. 20.

\(^{109}\) Id. at art. 13.

\(^{110}\) Article 19 of the Convention provides that "[a] decision under this Convention concerning the return of that child shall not be taken to be a determination on the merits of any custody issue." Id. at art. 19. See also Legal Analysis, supra note 14, at 10,509:

"[T]he representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. . . . The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." Id.

\(^{111}\) Hague Convention, supra note 8, at art. 6. In the United States, there is a single Central Authority—the Office of the Citizens' and Consular Services which is located within the State Department's Bureau of Consular Affairs. For an in-depth discussion of the operation of the Central Authority in the United States, see Pfund, supra note 9, at 45-51.

\(^{112}\) Hague Convention, supra note 8, at arts. 7-9. "Central authorities" are the administrative, channeling bodies within each Contracting State designed to process applications under the Convention and ultimately assist in the procurement of the child within the "habitual state" by assisting in the legal aspects of a Hague application. Anton, supra note 27, at 547.

\(^{113}\) Hague Convention, supra note 8, at art. 7.

\(^{114}\) Id. at arts. 8 and 9.
child's habitual residence or with any other Contracting State. If the application is received by the "habitual residence" state's Central Authority, it must forward the complaint to the Contracting State where the child is believed to be. It is important to note that the use of a Central Authority under the Convention is optional, and a party may bypass these authorities by bringing an action on their own behalf.

B. General Conditions for the Applicability of the Convention: The Substantive Issues and Elements

Certain conditions must be present for the Convention to be applicable. These conditions are enumerated in articles 3, 4, and 35 of the Convention and require the complainant to show: (1) that a child under the age of sixteen (16) years; (2) was removed from the child's state of "habitual residence," in breach of a "right of custody" attributable to the left-behind parent which the parent had been exercising at the time of the wrongful removal; and (3) the Convention must have been in effect between the state of habitual residence (i.e., home state) and the haven state immediately preceding the child's wrongful removal or retention.

1. Wrongfulness of the Removal or Retention

Courts deciding the merits of an application made pursuant to the Hague Convention will be determining in each instance whether a child should be returned to a foreign jurisdiction. Most cases will require the court to rule on the threshold issue of whether the removal or retention was wrongful.

Wrongful removal typically occurs where a child who habitually resides within the home state is taken to another Contracting State, the

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115 Id. at art. 8.
116 Id. at art. 9.
117 Id. at art. 29. See also GUIDE, supra note 5, at 59 ("Where the location of the child is known, an attorney has been retained, and immediate action is necessary or desirable, direct application to a court . . . may be the best and most expeditious way to proceed. In such a case, the United States Central Authority wishes to be advised . . . ").
118 Under the implementing legislation of the United States, the burden of proof required to make a case in chief under the Hague Convention is a "preponderance of the evidence" standard. See 42 U.S.C. § 11603(e) (1988).
119 Hague Convention, supra note 8, at art. 4.
120 Id. at art. 1.
121 Id. at arts. 3 and 5.
122 Id. at art. 3.
123 Id.
124 "Home state" is used to refer to the state of habitual residence.
125 "Haven state" is used to refer to the country to which the child was taken.
126 Hague Convention, supra note 8, at art. 35.
127 Dyer Remarks, supra note 17, at 3.
128 Perea-Vera Report, supra note 8, ¶ 64.
Wrongful retention, on the other hand, typically results when a parent who has legal visitation with the child keeps the child out of the home state beyond the period for which access rights have been agreed upon or set. The Convention defines a "wrongful retention or removal" to exist where:

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b. at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Furthermore, the rights of custody mentioned in subparagraph a above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State.

In order to determine whether the action committed by one party was wrongful within the meaning of the Convention, the court, in turn, must rule on several distinct questions: (1) which state constitutes the child's habitual residence; (2) what are the sources of custody rights under which the applicant claims a right to return; and (3) whether those rights were actually being exercised at the time of removal or retention.

a. What Constitutes "Habitual Residence"?

The Hague Convention applies only if the child was a "habitual resident" of a "Contracting State immediately before any breach of custody or access rights." Neither the Convention nor the accompanying legal analysis, however, define the term habitual residence, and according to the Commentators, this was not an oversight. The Convention instead chose to characterize habitual residence as a "well-
established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile."\textsuperscript{137} The term, thus, was left to be flexibly applied by the courts without the unnecessary constraints of a standardized meaning.\textsuperscript{138}

Habitual residence is not necessarily defined by a specific period of time; instead, it is more a state of being or a state of mind.\textsuperscript{139} In this regard, the Convention differs from other schemes which require a minimum period of time for a state to become the child's home state.\textsuperscript{140} Habitual residence could technically be established after only one day.\textsuperscript{141} The general view, however, is that "habitual residence" is the place which is the focus of the child's life, where the child is permanently and physically present, and where the child's day-to-day existence is centered.\textsuperscript{142} Therefore, cases interpreting the term have deemed the question to be a factual inquiry which depends upon the particular case's circumstances.\textsuperscript{143} Factors which courts have considered relevant include: whether the custodial parent actually consented to allow a child to live with the other parent;\textsuperscript{144} whether a custodial parent was candid and truthful in his stated intentions to live separately in another state;\textsuperscript{145} and the length of time the child has been a resident of the jurisdiction.\textsuperscript{146} In short,

there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place may spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the pur-

\textsuperscript{137} Pérez-Vera Report, supra note 8, ¶ 66.
\textsuperscript{138} See supra note 136 and accompanying text.
\textsuperscript{139} Pérez-Vera Report, supra note 8, ¶ 78.
\textsuperscript{140} Compare UCCJA, supra note 25, § 3, and Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982), which allow the court to exercise jurisdiction if it is the child's home state for a continuous period of six months.
\textsuperscript{141} See Zenel v. Haddow, 1993 S.L.T. 975, 979 (Scot. 1st Div.) ("A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it. . . ."); Cohen v. Cohen, 600 N.Y.S.2d 996, 996 (Sup. Ct. 1993) (The Cohen court raised, but left unanswered, the following question: whether one party may change their mind as to a move to another country and thereby negate an apparent change in the child's habitual residence.).
\textsuperscript{142} Webb & Friedman, supra note 92, at 10 (citing Adair Dyer, Remarks at Briefing at Hague Child Abduction Convention and Related Federal Legislation (Jan. 6-7, 1989)).
\textsuperscript{145} Levesque, 816 F. Supp. at 666.
pose of living where one does has a sufficient degree of continuity to be properly described as settled.\(^{147}\)

The concept of habitual residence, however, should not be confused with the concept of "domicile."\(^{148}\) The drafters of the Convention expressly rejected this approach because they feared the formal technicalities used in determining domicile would hamper the courts in attempting to determine habitual residence.\(^{149}\) The rejection of the domicile approach was reemphasized in Friedrich v. Friedrich,\(^{150}\) which concluded that the aims of the Convention should prevail in defining habitual residence.\(^{151}\) In Friedrich, the child's mother was a U.S. citizen and member of the armed forces stationed in Germany, and the father was a German citizen.\(^{152}\) Although the child had resided exclusively in Germany until he was removed to the United States by his mother in the absence of his father's knowledge, the mother argued that her child was a habitual resident of the United States because he was a U.S. citizen, his permanent address for U.S. documentation was in the United States, and the mother intended to return to the United States upon her discharge from the armed forces.\(^{153}\) The district court refused to return the child.\(^{154}\) The lower court ruled that because the father had ordered his wife to leave the house with their son, thus forcing the mother to obtain temporary housing on a U.S. army base, the child's habitual residence instantly became the United States. As a result, relief under the Convention was deemed unavailable to the father.\(^{155}\)

The Court of Appeals for the Sixth Circuit reversed the district court. The court rejected the mother's arguments\(^{156}\) and noted that


\(^{148}\) Domicile is defined as follows:

The home of the parents. That which arises from a man's birth and connections. The domicile of the parents at the time of birth, or what is termed 'domicile of origin,' constitutes the domicile of an infant, and continues until abandoned, or until the acquisition of a new domicile in a different place.


\(^{149}\) See supra note 136 and accompanying text. See also Silberman, supra note 23, at 29.

\(^{150}\) 983 F.2d 1396 (6th Cir. 1993). The Friedrich court stated: "[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions." Id. at 1401.


\(^{152}\) Friedrich, 983 F.2d at 1998.

\(^{153}\) Id. at 1401.

\(^{154}\) Id. at 1400.

\(^{155}\) Id.

\(^{156}\) See supra text accompanying note 153.
while such arguments may be persuasive to find legal residence (i.e., domicile), they fell far short of establishing a habitual residence claim. In reaching this conclusion, the Sixth Circuit relied heavily upon the fact that the child had resided almost exclusively in Germany until he was removed, without his father’s knowledge or consent, to the United States. Similarly, the court of appeals also rejected the mother’s contention that habitual residence is based on which parent is providing the care and support for the child. In this regard, the court noted the following:

More fundamentally, [the child’s] habitual residence in Germany is not predicated on the care or protection provided by his German father nor does it shift to the United States when his American mother assumes the role of primary caretaker. Habitual residence can be “altered” only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removable; here, the removal precipitated the change in geography. If we were to determine that by removing [the child] from his habitual residence without Mr. Friedrich’s knowledge or consent Mrs. Friedrich “altered” [the child’s] habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence.

Therefore, under the Friedrich approach, it appears that a determination of habitual residence rests upon considerations which pertain to the settlement of the child in a certain geographic location. Such a determination should focus upon the actual recent history of the child, and not on the parent’s intentions as to the child’s welfare. Moreover, the geographic locus must be accompanied by a showing that there has been a significant passage of time so as to enable the child to become accustomed to and acclimated to the location. While many courts have looked favorably upon the Friedrich rationale, other courts have taken a somewhat dissimilar view. The distinction in the courts’ approaches turns on the speed with which habitual residence changes, with the courts holding contra to Friedrich finding the concept of habitual residence to be readily adaptable.

[Given the express][ion] ‘habitual[ ] residen[ce]’ . . . its ordinary and natural meaning, such residence of a person in a particular country . . . could be lost in a single day by that person leaving the country with a settled intention not to return, that the habitual residence of a child would be that of the parent in whose sole custody he was . . . . It may take time — I do not say it does — to establish habitual residence, but

157 Friedrich, 983 F.2d at 1401.
158 Id.
159 Id. at 1401-02.
160 Id.
161 See, e.g., Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993). See also Dorosin, supra note 151, at 755-56 (stating that the Friedrich holding represents a “reiteration of the policies of the Convention” as well as a “triumph of the[se] policy considerations”).
I cannot see that it takes any time to terminate it. James' intentions must, of course, be those of his mother since he is two and a half, there is no doubt at all in my mind that the mother ceased to be habitually resident in Western Australia from the moment she left... bound for England with the intent of remaining permanently in this country.162

Regardless of the view taken by the court, the issue of habitual residence should always be at the forefront of the petitioner's mind in a Hague proceeding. The issue often is the controlling factor in the outcome of the case.163 If the issue of habitual residence is misinterpreted by the court, the result will not only be a decisive defeat for the petitioner but it may also represent a defeat for the Convention because it is a circumvention of its goals.

b. What Are "Custody Rights"?

Having arrived at a determination of the child's habitual residence, the next step is to determine whether the left behind parent had a "right of custody" within the ambit of the Convention. Rights under the Hague Convention are triggered only when there has been a breach of "rights of custody."164 Article 5 of the Convention defines rights of custody to include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence,"165 as defined by the laws of the habitual resident State.166 This concept must be distinguished from rights of access (visitation rights) since the remedy afforded the party turns on the distinction.167 Rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence."168

When a child has been removed or retained in breach of rights of custody, and no exceptions set forth in Article 13 have been estab-

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162 Webb & Friedman, supra note 92, at 10 (quoting C. v. S., 3 W.C.R. 492 (1990) (U.K)).

163 See, e.g., In re Marriage of Collopy and Christodoulou, No. 90 DR 1138 (D. Colo. 1991), available in Hilton House BBS, File Collopy. In Collopy, a Greek man and a Colorado woman were married in Colorado but returned to England for educational pursuits. Id. Shortly after the birth of a child, the wife returned to the United States with the child, to which the father objected. Id. He then brought a Hague Convention proceeding. Id. Because the child had been in the United States for longer than a year, the court exercised its Article 12 discretion not to return the child. Id. However, as to the issue of habitual residence, the court stated that England was the habitual residence because it was the residence of the father. Id. This language indicated that the court was reverting back to comparing habitual residence with domicile. Id.

164 Hague Convention, supra note 8, at art. 3.

165 Id. at art. 5(a).

166 The intent of the Convention was to protect those relationships which would have been protected by the habitual state's laws prior to the child's removal. Pérez-Vera Report, supra note 8, ¶ 65.

167 Id. See also Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991) (party seeking mandatory return must satisfy the threshold requirement of proving "lawful rights of custody at the time of the removal or retention").

168 Hague Convention, supra note 8, at art. 5(b).
lished, the Convention mandates that the nation to which the child has been taken order the return of the child to its habitual residence "forthwith." In contrast, the Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access. Rather, nations are instructed to "promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject," as well as to "take steps to remove, as far as possible, all obstacles to the exercise of such rights."

In ascertaining whether custody rights exist, three possible sources should be examined: (1) judicial or administrative decisions; (2) legally binding agreements between the parties; and (3) operation of the law of the home state.

i. Rights by Judicial/Administrative Decision

Custody rights can be found to exist in a judicial or administrative decision, established prior to, or even after, the removal. As the Convention history demonstrates, the decision regarding custody rights may be that of the state of the habitual residence or one of a third country. All that is required of the decree is that it "contain in principle certain minimum characteristics which are necessary for setting in motion the means by which it may be confirmed or recognized"; a formal recognition of the third country's decree is unnecessary. However, custody orders which have been rendered by a court in the child's habitual residence always take precedent over an order which has been obtained in another jurisdiction if dual orders have been issued. The decree recognized by the law of the child's habitual residence is the decree upon which the validity of the order is to be determined.

169 See infra notes 217-80 and accompanying text.
170 Hague Convention, supra note 8, at art. 12.
171 Id. at art. 21.
172 Id.
173 The word "possible" is purposefully used in this context. The source of "rights of custody" which may give rise to a Hague petition are intrinsically tied to the determination of the "habitual residence." See Silberman, supra note 23, at 21. This is because custody rights are determined by looking towards the law of the home state. Hague Convention, supra note 8, at art. 3(a); see also supra notes 165-66 and accompanying text.
174 Hague Convention, supra note 8, at art. 3 ("The rights of custody mentioned in subparagraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.").
176 Pérez-Vera Report, supra note 8, ¶ 69.
178 Legal Analysis, supra note 14, at 10,507 (citing Pérez Vera Report, supra note 8, ¶ 69): [T]he court order need not have been made by a court in the State of the child's habitual residence. It could be one originating from another country. As the reporter points out, when custody rights were exercised in the State of
Acquiescence has played a role in some parental abduction cases, with the courts placing great weight on the fact that a party has acquiesced to a jurisdiction other than that of the habitual residence.\(^7\) If the parties agree that the law of a certain forum should be utilized in the custody proceeding, then it is logical to refer to that law as if it were the law of the habitual residence in determining custody rights.\(^8\) In such cases, the parties' agreement plays a pivotal role in determining what forum should be used to return the parties to the status quo for purposes of custody litigation.\(^1\) In addition, the obvious rationale for favoring the agreed upon jurisdiction versus the de facto "habitual residence" is that neither party will be prejudiced or inconvenienced by mandating the return of the child to that jurisdiction.\(^1\) However, it is important to note that this principle conflicts with the commonly held notion, in the United States, that subject matter jurisdiction cannot be conferred on a court by agreement of the parties.\(^1\)

the child's habitual residence on the basis of a foreign decree, the Convention does not require that the decree has been formally recognized.\(^1\)

\(^7\) See, e.g., Surtomme v. Surtomme, No. 92-4218-SAC, 1993 WL 105144, at *5 (D. Kan. 1993). For an illustrative example of a court utilizing acquiescence as a basis for determining which law is to govern, see also Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct. 1989). In Sheikh, after a series of abductions and counterabductions, the mother reopened the divorce proceedings in New York, and custody was jointly awarded some two years later. Id. at 519. The mother subsequently moved with the child to England without notifying the father. Id. Two years later, the father tracked down the child and instituted proceedings in England to which he did not bring forth the custody decree issued by the New York court. Id. at 519-20. The father was awarded liberal visitations with the child in the United States, and in one such period, retained the child in violation of the decree. Id. at 520. In a New York proceeding to determine the "habitual residence," the court noted the following:

The court is faced with a facially valid order of a court from a country which is a co-signatory of the Convention. Plaintiff [the father] raises the issue, however, that since the initial custody decree was made in New York and defendant violated it, the [English] High Court of Justice's decree is a nullity. He argues that this court's orders should control.

The problem with this analysis is that plaintiff did not take this court's order to the High Court of Justice to petition for enforcement under the Hague Convention. . . . He thereby submitted himself to the jurisdiction of the foreign court so that it could make a de novo custody award in part based upon defendant's actions in New York. . . . [P]laintiff cannot now come back to this court to ask it to ignore the custody/visitation decision and order of a court of a Hague Convention signatory . . .


\(^1\) Recall that one of the underlying purposes of the Hague Convention was to return the parties to the status quo before the removal. See supra notes 66-68 and accompanying text.

\(^1\) What the Convention seeks to avoid is disadvantaging one parent, either economically, physically, or legally, by requiring them to litigate in an adverse forum which was obtained through wrongful removal and is not the habitual residence. See Friedrich v. Friedrich, 983 F.2d 1402 (6th Cir. 1993) ("[T]he Hague Convention was aimed: [at] situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country . . . .")

\(^1\) See, e.g., Evicks v. Evicks, 607 N.E.2d 1090, 1092 (Ohio Ct. App. 1992) ("It is axio-
ii. Rights by Parties' Agreement

Agreements about custody which have legal effect in the state of habitual residence also form a source of custody rights under the Convention.\(^\text{184}\) The legal effect of such agreements arise from the internal law of the state of habitual residence or its choice of law rules.\(^\text{185}\) The parties' agreements, in and of themselves, however, are not required to carry the force of law to confer custody rights on a party (i.e., such agreements need not be incorporated into a court decree or judgment).\(^\text{186}\) Legally recognizable agreements may in fact exist outside Contracting States' judicial framework.\(^\text{187}\)

iii. Rights by Operation of Law

Absent an agreement or formal custody order, custody rights may also arise by operation of law. Thus, a party may be afforded the protections of the Convention by virtue of interpreting the law of the child's habitual residence as conferring on the party a right of custody.\(^\text{188}\) The Convention seems to assume that such pre-decree rights exist in both parents, at least where the parties are married.\(^\text{189}\) However, in order to determine if rights arise under the operation of law, a careful analysis of the habitual residence country's law may be required. Where the court is in doubt as to whether rights of custody are granted, under Article 15 of the Convention a decision or other determination of a breach of custody rights may be obtained from the state of habitual residence.\(^\text{190}\) On the other hand, if no doubts exist, Article 14 empowers the trial court to recognize the law of the Contracting States without mandating that the cumbersome requirements of judicial notice be observed.\(^\text{191}\)

\(^\text{184}\) For an examination of a case finding custody rights based upon agreements between the parties, see David S. v. Zamira S., 574 N.Y.S.2d 429, 432 (Fam. Ct. 1991).

\(^\text{185}\) Péréz-Vera Report, supra note 8, ¶ 70.

\(^\text{186}\) Id.

\(^\text{187}\) Legal Analysis, supra note 14, at 10,507.

\(^\text{188}\) Hague Convention, supra note 8, at art. 3(b); Legal Analysis, supra note 14, at 10,506 ("Thus, a person whose child is abducted prior to the entry of a custody order is not required to obtain a custody order in the State of the child's habitual residence as a prerequisite to invoking the Convention's return provisions."). Also, see supra notes 69-74 and accompanying text (distinguishing the Hague Convention from other child custody jurisdiction acts).

\(^\text{189}\) Several courts' interpretations of the Convention bear out this assumption. See, e.g., Dickson v. Dickson, 1990 S.C.L.R. 692 (Sess. 1990) (Scot.), available in LEXIS, Intlaw Library, Scoonas File (Australian parents share joint custody of child under age of eighteen); In re RPW, No. 106SP (High Court Feb. 19, 1992), available in LEXIS, Intlaw Library, Ireacas File (under English law, parents share joint parental responsibility over minor child).

\(^\text{190}\) Hague Convention, supra note 8, at art. 15.

\(^\text{191}\) Id. at art. 14.
c. Are Custody Rights Actually Exercised?

To invoke the Convention, not only must the holder of custody rights establish that the rights in fact exist but that party must also allege that the custody rights were actually being exercised or would have been had it not been for the wrongful removal or retention. The most prevalent fact pattern arises where a parent who has had the primary parenting role accedes to a request to allow the child to visit the noncustodial parent. The child is given to the parent generally with the explicit or implicit promise of return. At the conclusion of the visitation period the child is retained in the foreign jurisdiction. Faced with such a scenario, the courts must ultimately determine whether the removal of the child was an exercise of custodial rights or a relinquishment of them. Courts, however, generally are reluctant to find an abandonment of custody rights by the custodial parent in cases such as this.

Embodied within the concept of actual exercise of custody rights is the principle that the party is controlling the residence of the child. As such, the party claiming that they are exercising custody rights is also deemed to have declared the child's abode to correspond with their own. A parent may place a child in another's care for short periods of time and still be considered to be exercising custodial rights. This fact is further exemplified by the Convention itself which is "built upon the tacit presumption" that the person who has custody rights was actually exercising that custody. In so holding, the Convention places the burden of proof on the abductor if he wishes to prevent the return of the child.

Correspondingly, very little is required of the applicant to support an allegation that custody rights were actually being exercised prior to the abduction. The pleadings and proof requirements are informal

192 Id. at art. 3(b).
195 Cf. Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993). The court in Friedrich stated that a finding of abandonment would be unlikely even under circumstances in which the father ordered the mother and son from their family home. Id. at 1402.
196 Hague Convention, supra note 8, at art. 5 ("'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence").
197 Legal Analysis, supra note 14, at 10,506.
199 Hague Convention, supra note 8, at art. 13; Pérez-Vera Report, supra note 8, ¶ 73.
200 Pérez-Vera Report, supra note 8, ¶ 73 (only preliminary evidence is required).
in nature and require little more than a statement as to "the grounds on which the applicant's claim" rests.\textsuperscript{201}

\textbf{2. The Child Is Under the Age of 16}

A second requirement for the Convention to be applicable concerns the age of the child. This requirement, found in Article 4 provides that: "The Convention shall cease to apply when the child attains the age of 16 years-old."\textsuperscript{202} The rationale behind the age requirement is that "a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority."\textsuperscript{203} The choice of this age limit also reflects the determination of the drafters to provide the Convention with an internal consistency between provisions:

\textquote{[T]he decision taken in this regard cannot be isolated from the provision in [A]rticle 13, second paragraph, which allows the competent authorities to have regard to the opinion of the child as to its return, once it has reached an appropriate age and maturity. Indeed, this rule leaves it open to judicial or administrative authorities, whenever they are faced with the possibility of returning a minor legally entitled to decide on his place of residence to take the view that the opinion of the child should always be a decisive factor.}\textsuperscript{204}

Because the Convention sets forth a bright-line rule, the interpretation of the 16-year age limit has not produced particular difficulties.\textsuperscript{205} Even so, the provision has met with some resistance. During the drafting of the Convention, the United States objected to this article and put forth the following alternative—"that the Convention cover any child who was under 16 at the time of the breach of custody or access rights."\textsuperscript{206} The proposal was considered necessary by the United States because "it fear[ed] that abductors could take advantage of the article by using various delaying tactics both before and during judicial or administrative proceedings."\textsuperscript{207} In the end, nevertheless, the Convention adopted the more restrictive approach.\textsuperscript{208}

\textbf{3. The Convention Is in Effect Between the Home and Haven State}

The final element that must be established in order to state a prima facie case is that the Convention is in force between two Contracting States. To be binding, the Convention must have been ratified between the country of the child's habitual residence and the country

\textsuperscript{201} Hague Convention, \textit{supra} note 8, at art. 8(c).
\textsuperscript{202} Id. at art. 4.
\textsuperscript{203} Pérez-Vera Report, \textit{supra} note 8, ¶ 77.
\textsuperscript{204} Id.
\textsuperscript{205} See \textit{supra} notes 202-05 and accompanying text.
\textsuperscript{206} Silberman, \textit{supra} note 23, at 54.
\textsuperscript{207} Id. at 54-55.
\textsuperscript{208} Id. at 55 (citing Pérez Vera Report, \textit{supra} note 8, ¶ 77).
to which the child has been abducted at the time of the abduction.\textsuperscript{209} This requirement is formulated in Article 35 of the Convention which postulates that only those "wrongful removals or retentions occurring after its entry into force" in the Contracting State will fall within the auspices of the treaty.\textsuperscript{210} Some contention has been raised as to the issue of retroactivity, as some applicants have argued that a wrongful retention is a "continuing offense" such that an order for return could still be granted once the Convention became effective between Contracting States.\textsuperscript{211} The case law on this point makes it explicit that such a contention will not prevail. The leading case on point is \textit{Kilgour v. Kilgour}.\textsuperscript{212} In \textit{Kilgour}, the Scottish court rejected a "continuing offense" claim of retroactivity. The court believed that the Convention's likely intent was to mandate that removals or retentions should occur on a specific date so that an effective date of the treaty could be measured.\textsuperscript{213} In addition, the \textit{Kilgour} Court noted that it made no difference that a permanent decree had been issued after the effective date because the transition from an interim to a permanent decree should not create a new retention.\textsuperscript{214} Since \textit{Kilgour}, the door to a retroactive claim has been closed.\textsuperscript{215} However, it should be noted that retroactiv-
ity may apply if an agreement is achieved among the Contracting Parties themselves. 216

C. Grounds for Opposing the Return of the Child

Where a child under the age of 16 has been wrongfully removed or retained, and a Hague Convention proceeding is brought within a year, the duty of the judicial authority of a Contracting State to order the immediate return of a wrongfully retained child is mandated under Article 12 of the Convention. 217 However, the Convention also grants certain exceptions to this duty. Articles 12, 218 13, 219 and 20 220 of the Convention set forth the defenses available in a Hague proceeding. Such defenses include alleging that:

- The child objects to being returned and is of an appropriate age and maturity to make such a determination; 221
- The child is settled in his new environment; 222
- The custodial parent has consented or acquiesced in the removal or retention of the child; 223
- There is a grave risk that return would expose the child to harm or an intolerable situation; 224
- Return of the child is not permitted "by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms"; 225
- The child's legal custodian has failed to exercise his or her rights of custody. 226

"These exceptions permit the court to exercise its discretion as to

The Australian court did not agree and held that wrongful retention existed where there was breach of custody rights under the law of the habitual residence. Id. Based on this, the court went on to conclude that Australia, not Alaska, constituted the "habitual residence" of the children, since it was their settled environment. Id. 216

Pérez-Vera Report, supra note 8, ¶ 145. Elisa Pérez-Vera commented on Article 35 as follows:

The provision [Article 35] certainly has the merit of being clear. However, it cannot be denied that its application is fated to frustrate the legitimate expectations of the individuals concerned. But since in the last resort it is a limitation on the duty to return the child, it in no way prevents two or more States agreeing amongst themselves to derogate from it in terms of [A]rticle 36, by agreeing to apply the Convention retroactively.

Id. 217 See supra notes 97-99 and accompanying text.

218 Hague Convention, supra note 8, at art. 12.

219 Id. at art. 13.

220 Id. at art. 20.

221 Id. at art. 13. See infra notes 229-39 and accompanying text.

222 Hague Convention, supra note 8, at art. 12. See infra notes 240-46 and accompanying text.

223 Hague Convention, supra note 8, at art. 13(a). See infra notes 247-54 and accompanying text.

224 Hague Convention, supra note 8, at art. 13(b). See infra notes 255-74 and accompanying text.

225 Hague Convention, supra note 8, at art. 20. See infra notes 275-80 and accompanying text.

226 Hague Convention, supra note 8, at art. 13(a). This topic has been dealt with previously in this Comment. For a discussion, see supra notes 192-201 and accompanying text.
whether or not the child should be returned. . . . [Exceptions under these articles do] not mandate that the court shall not order the return of that child, but that the court may not order the return.” However, it should always be kept in mind that these exceptions are to be narrowly construed so as to give effect to the Convention's aim under Article 19.

1. Objection by the Child to Being Returned

The first exception to mandatory return allows for the administrative and judicial authorities to consider the child's wishes when determining whether to return the child. Under the second paragraph in Article 13(b), the court may refuse to order return “if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views.” The courts in interpreting this defense generally require evidence which demonstrates more than just a child's preference to remain with the abducting parent. The word 'objects' the courts conclude must amount to more than just a mere preference; it must take the form of a strong objection. Furthermore, the judicial authorities have held that consideration must be given to the particular facts of each case to determine whether the child is in fact expressing an objection that has arisen out of his or her own free will or whether the objection has been influenced by other parties. In evaluating this determination, the courts have concluded that if the child's view has been influenced by the abducting parent, or the objection to return was based on a wish to remain with the abducting parent, then

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227 Hilton, supra note 198, at 7.
228 Hague Convention, supra note 8, at art. 19 (“A decision under this Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.”). See also Silberman, supra note 23, at 37:
Perhaps the most important aspect for [the] success of the Convention will be the ability to limit the use of defenses. If the Convention procedures result in return of the child for a custody determination, parties will be encouraged to invoke them. But, if certain Contracting States invoke the defenses to avoid return, the return mechanism will be thwarted. International cooperation will be frustrated, and parties will once again resort to self-help.

Id.
229 Hague Convention, supra note 8, at art. 13(b). This discretionary authority, or exception, of the Convention is closely related to the age limit requirement contained in Article 4. At one point in the Convention's drafting it was thought that the Convention should be held inapplicable in cases of children under 16 who, under the laws of their state, were entitled to choose their own residence. See Perez-Vera Report, supra note 8, ¶ 78. However, given this exception under Article 13(b)—to consider the child's wishes—the drafters chose not to make the Convention inapplicable in such situations since the same result could be achieved without an overall reduction in the scope of the Convention. Id.

230 See, e.g., In re R. (1992) 21 Fam. Law 475, 475 (Eng. Fam. Ct.) (“[T]here must be more than a mere preference expressed by the child [and] [t]he word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute.”).

231 Id.
232 Id.
little or no weight should be given to the request.\textsuperscript{233}

Additionally, for the exception to apply, the court must find that the child has reached such an age and degree of maturity so that his or her views should be considered in the process.\textsuperscript{234} The Convention, however, does not set forth an age at which the child's wishes must be considered by the court. Furthermore, some courts and commentators have suggested that such a threshold should not be, either formally or informally, established.\textsuperscript{235} However, case law does provide some guidance on this point. For example, in \textit{Bickerton v. Bickerton}, the Superior Court of California concluded that neither a 10 year-old boy nor the 12 year-old girl were of sufficient age and maturity for the court to take account of their request.\textsuperscript{236} This view is further shared by other cases which have held that 9 and 11 year-old children are of insufficient age.\textsuperscript{237} However, it should be noted that several cases have refused to return the child, even though the child has expressed an objection, and thus allowed the exception to stand, involving 11, 12, and 13 year-old children.\textsuperscript{238}

2. \textit{The Child Has Settled in a New Environment (One Year Elapse)}

Article 12 provides that if a Hague proceeding has been commenced after the expiration of one year, the return of the child is discretionary "unless it is demonstrated that the child is now settled in its new environment."\textsuperscript{239} The rationale behind this "new environment/lapse of time" exception is rooted within the Convention itself. The

\textsuperscript{233} \textit{In re S.} [1993] Fam. 242, 252 (1992) (Eng.). \textit{See also Legal Analysis, supra note 14, at 10,510.}

\textsuperscript{234} Hague Convention, \textit{supra} note 8, at art. 13(b).

\textsuperscript{235} \textit{See, e.g., In re S.} [1993] Fam. at 251.


\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{See, e.g., Sheikh v. Cahill, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. 1989) (child, who is 9 years old, has not obtained an age and degree of maturity to warrant the court to make the child's view dispositive); Tahan v. Duquette, 19 Fam. L. Rep. (BNA) 1003 (1992) (9 year-old child is of insufficient age and maturity). \textit{See also Silberman, supra note 23, at 56 (recounting Rajarantnam v. Rajarantnam-Hertig, where the Swiss lower court refused to return children, who had expressed an objection, ages 14 and 12).}

\textsuperscript{239} \textit{Van Bueren, supra note 65, at 19. Cf. In re John Arthur Urness, 1993 Outer House Cas. (Oct. 28, 1993) (Scot.), available in LEXIS, Intlaw Library, Scocas File. In Urness, the court stated that a 12-year-old, but not a 9-year-old, child is of a sufficient age and maturity to object to return. The Scottish court, however, went on to deny the return of both children on the grounds that the separation of the siblings would create an "intolerable situation" under art. 13(b) of the Convention. On appeal, the decision was upheld by an Inner House panel which noted that the "special circumstances" of the case justify the lower court's intolerable situation analysis. Urness v. Urness, 1993 Inner House Cas. (Dec. 17, 1993) (Scot.), available in LEXIS, Intlaw Library, Scocas File.}

\textsuperscript{240} Hague Convention, \textit{supra} note 8, at art. 12. For an analysis of the approach taken by the courts in determining whether a child has settled into the new environs, see Perrin v. Perrin, 1993 S.C.L.R. 949 (Scot. Sess.), available in LEXIS, Intlaw Library, Scocas File ("[T]he crucial factor in determining settlement in the new environment [is] not the length of time which C ha[s] spent in Scotland but how long she ha[s] lived in her new home... ").
Hague Convention operates on the basis that it is in the best interest of the child to be returned to that jurisdiction with a minimum delay and thus emphasizes the immediate restoration of the status quo. It is presumed that if the child remains too long in a new residence, the child will undergo another major uprooting if he or she is returned.241 Therefore, arguably, the exception seems to be justified under the ambit and spirit of the Convention.

The time limits and discretion addressed in the Article 12 exception have been hotly debated and arose solely as the product of treaty compromise.242 Proposed early drafts of the Convention varied greatly regarding the specific time frame within which a Hague proceeding should be commenced in order to effectuate mandatory return.243 Likewise, the United States vehemently expressed its deep concern throughout the Convention process about the one-year time limit because they feared that such a provision might encourage some parents "to arrange for life underground for a limited period in order to circumvent the Convention."244 However, in the final version of the Convention, the apprehension over further psychological and emotional problems that might be imposed on an abducted child prevailed as the delegates instituted the one-year/new environment exception.245 In hindsight, these contentions and concerns surrounding Article 12 may not have been justified because of the sparsity of case law on this point.246

3. Acquiescence in the Removal/Retention

If a party consented or subsequently acquiesced to the other parent's removal or retention of the child, the Court is not bound to order the return of the child.247 Thus, the effect of this provision is that

241 See supra note 88 and accompanying text.
242 This debate existed not only in the drafting phase, see infra notes 243-45 and text accompanying, but has also been carried over in the literature. See Monica M. Coperino, Comment, Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of its Efficacy, 6 CONN. J. INT'L L. 715, 729-31 (1991).
243 Silberman, supra note 23, at 58.
244 Id.
245 Pérez-Vera Report, supra note 8, ¶ 108 (The Pérez-Vera Report indicates that the single-time limit was preferable in order to decrease confusion.).
246 See, e.g., David S. v. Zamira S., 574 N.Y.S.2d 429 (Fam. Ct. 1991). In David S., the mother, after having been served to appear in court, left the Toronto area in violation of a separation agreement limiting visitation. Id. at 431. The Supreme Court of Ontario held the mother in contempt and awarded temporary custody to the father. Id. The father, over the course of the next year, was unsure of the children's whereabouts. After the one year time frame had passed, a Hague application was filed by the father. The court, however, relying on the mother's prior abduction and seclusion of the children, held that "[u]nder the[se] circumstances ... this Court does not find the petitioner's proceeding to return the children was untimely ... ." Id. at 433. For additional discussion on the case law interpretation of the "settled into a new environment" exception, see Bruch, supra note 8, at 13-15; Neault, supra note 129, at 18-22.
247 This ground for opposing return of the child is found in Article 13, paragraph (a), which states:
the consent or acquiescence acts as a catharsis which makes the initial abduction "lose its wrongful character."248 Hence, return of the child to the state of habitual residence, under these circumstances should not be a mandated duty of the judicial or administrative authority.249

"Most courts, which have addressed the issue of acquiescence, because of their wish to discourage loopholes in the Convention, have been very reluctant to find it, even where there has been ambiguous behavior by the parent who was left behind."250 Many commentators, and judging from their reluctance, perhaps the courts, feel that by broadly construing acquiescence in an array of circumstances, the Convention may in fact be undermined because a large amount of discretion would be placed in the hands of the judicial authorities.251 Abductors would then have at their fingertips a tool by which they could "exploit judicial discretion" and ultimately, use it to turn the summary nature of the Hague Convention's proceedings into a discussion of the merits.252 While this fear may be warranted, the courts have yet to place themselves in this position because the claims of the other parent's acquiescence have generally fallen on deaf ears.253 This trend is illustrated most readily in the recent overturning of several lower court opinions in France which had "liberally" interpreted acquiescence.254

4. Grave Risk of Harm

The most commonly raised defense under the Convention is found in Article 13(b).255 Article 13(b) authorizes, but does not require, a court to return an abducted child if "there is a grave risk that

Hague Convention, supra note 8, at art. 13(a).

The courts, in determining whether a parent has acquiesced to the child's removal, have tended to look at both the subjective and objective circumstances surrounding the particular case. See, e.g., In re S., 1 F.L.R. 819 (Eng. C.A. 1994), available in LEXIS, Intlaw Library, UK-Case File. However, the courts have attempted to not place "undue emphasis" on this subjective portion of their analysis. Id. 248 Neault, supra note 129, at 23.

Id. 249

Bruch, supra note 8, at 8. 250

See, e.g., Frank, supra note 12, at 452. 251

Id. 252

See supra note 250 and accompanying text. 253


Id. 255

Bruch, supra note 8, at 9. The abundance of litigation that has resulted from this provision of the Convention has been suggested to arise because "it is the one that comes closest to allowing the court in the haven country to examine the merits of the case." LeGette, supra note 68, at 297.
his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." 256 The 13(b) exception arose out of the necessity to provide the courts some discretion from the realities of ordering a child to return to the state of habitual residence. Even in some cases of wrongful removal or retention, the ordering of a return could be more disastrous to the child than the consequences of allowing the foreign jurisdiction to decide the case. 257

In defining the exception, the Convention's drafters intended that 13(b) be construed narrowly by the judicial authorities. 258 The drafters wereadamant that this defense would not give rise to an examination of the abducted child's "best interests." 259 The exception was to be raised only where it had been established "that the child itself, and not the abductor, would be placed in an intolerable situation." 260 The risk of harm was to exceed the level of triviality and constitute an "intolerable situation" that is of an extreme and compelling nature. 261

"Proof of a high degree of risk of positive harm is therefore required; not just proof that it would be better for the child if he were not returned." 262 Hence, the mere fact that a financial or educational disadvantage is created by the mandate of the child's return does not amount to an intolerable harm. 263 Instead, the courts have generally required a much stronger showing of harm in order to narrowly tailor the 13(b) exception. 264 In fact, in only one instance—MacMillan v.

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256 Hague Convention, supra note 8, at art. 13(b).

257 LeGette, supra note 68, at 297. See also Pérez-Vera Report, supra note 8, ¶ 29:

Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

Id.

258 Legal Analysis, supra note 14, at 10,509-10,510. See also Pérez-Vera Report, supra note 8, ¶ 34:

[It would seem necessary to underline the fact that the three types of exceptions to the rule concerning the return of the child must be applied only so far as they go and no further. This applies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child-removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them recognition.]

Id.

259 Legal Analysis, supra note 14, at 10,510.

260 Anton, supra note 27, at 551.


263 LeGette, supra note 68, at 297-98.


If the submissions made on behalf of the father had been accepted, the effect would have been to drive a coach and horses through the provisions of this Convention, since it would be open to any abducting parent to raise allegations under [A]rticle 13 and then to use those allegations as a tactic for delaying the
MacMillan—has a court found the evidence to be persuasive enough to deny the return of the child. In MacMillan, a mother abducted her daughter from her father in Canada and brought her to Scotland. The Scottish court found that there was a grave risk of harm posed by the father’s alcoholism and depression and denied the father’s request for the return of his daughter.

In determining whether a grave risk of harm situation exists, courts have emphasized not only the degree of requisite harm but have also placed a significant emphasis on the source of the harm. In order to determine whether facts of a particular case present a grave risk of harm, the court is first faced with the question of whether the harm is posed by the country to which the child is to be returned, or alternatively, if the risk is created by mandating that the child be returned to the non-abducting parent. The rationale behind this distinction centers on the fact that if the risk is posed by the parent, then the issue is really no different than a general custody case.

a. Risk Posed by the Country

The most narrow view in which courts have construed the 13(b) exception is by framing the question in terms of whether the child’s return to the other country—not the other parent—will pose a “grave risk” of harm to the child. In practical terms, therefore, there would only exist a few situations that would suggest that a child will be in danger if returned to the requesting (habitual resident) state. For instance, “a grave risk would be posed by the country if the habitual resident country was at war on its soil” or if the country was experiencing the aftermath of a nuclear or natural disaster. However, besides searching at the extremes, return would almost always be assured.

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hearing by saying that oral evidence must be heard, information must be obtained. That is precisely what the Convention [was] intended to avoid.


Id. at 354.

See Gsponer v. Johnstone, 12 Fam. L.R. 755 (Austl. Fam. 1988), available in Hilton House BBS, File Gsponer.Aus ("[The 13(b) exception] is confined to the "grave risk" of harm to the child arising from his or her return to a country .... Thus, allegations about inappropriate conduct on the part of the parent in the requesting state are irrelevant.").

Arenstein, supra note 82, at 23 n.104.

See supra note 267 and accompanying text. For a criticism of this approach, see Silberman, supra note 23, at 49-50:

This interpretation, though helpful in limiting the scope of 13(b), does not appear to be consistent with 13(b)’s focus on “conduct of the parties and the interests of the child.” Moreover, such interpretation appears redundant in light of the Article 20 exception, which excepts return when return is inconsistent with fundamental principles of the requested State relating to protection of human rights and fundamental freedoms. Thus, Article 20—but not 13(b)—is directed to concerns about harms arising from the child’s return to a particular country.

Id.

Webb & Friedman, supra note 92, at 16.
b. Risk Posed by the Parent

Even where the court interprets "grave risk" as risk posed by the parent, the burden is a "very heavy burden" for the abducting parent to fall within the ambit of Article 13.271 The case law demonstrates that the abductor has to prove more than the simple assertion that the other parent is merely an unfit parent because issues of parental fitness are appropriate only for the state of habitual residence.272 Instead, the courts have attempted to advance the Convention's goals through their interpretation of the exception by requiring "substantial" physical or psychological harm.273 Furthermore, the case law has made it clear that while it is not the court's place to penalize the abducting parent, because it is not a criminal proceeding, they will not allow the abducting parent to reap any benefits from a situation they have created.274

5. Return Endangers Human Rights

The final exception, provided under Article 20, allows for the court to refuse to order the return of the child "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."275 This provision was adopted as a compromise measure to resolve a debate among the drafters of the Convention concerning the role of "public policy" concerns. An alternative reservation had been suggested during the Convention's framing which would have permitted the Contracting States to deny the return of the child to the state of habitual residence when it was deemed "manifestly incompatible with the fundamental principles of the law relating to family" issues.276 The proposal was rejected, however, and the current provision was enacted

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273 See supra notes 258-66 and accompanying text. The 13(b) exception has received the attention of many commentators since the passage of the Convention. An extensive analysis of the case law on this point has been expertly exhausted and thus will not be re-examined in this Comment. For a thorough discussion of the cases, see LeGette, supra note 68, at 298-304 (discussing cases through 1989) and Silberman, supra note 23, at 41-50 (discussing cases through September of 1993).
274 See, e.g., C v. C, [1989] 2 All E.R. 465 (Eng. C.A. 1988). In C v. C, the mother wrongfully took her child from Australia to England and then claimed that the child would be psychologically harmed if the child was forced to return alone to Australia. Id. at 466. The mother claimed that she was unable to accompany the child because of her financial situation. Id. at 470. The court, in rejecting the mother's claim, stated that a parent could not rely on the psychological harm that results from her own refusal to return with the child. Id. at 471. The court, however, conditioned the return of the child on the father's promise to financially support both the mother and child while they were in Australia for the purposes of determining custody. Id. See also Navarro v. Bullock, 15 Fam. L. Rep. (BNA) 1576, 1577 (1989) ("To retain the children in the United States guarantees that the mother will continue to frustrate the custodial and visitation rights of the father .... To allow this to happen would be to allow [the] mother to profit from her wrongdoing .... ").
275 Hague Convention, supra note 8, at art. 20. At this point, neither the United Kingdom nor Finland are a party to this exception. See Van Bueren, supra note 65, at 19.
276 Pérez-Vera Report, supra note 8, ¶ 31-32.
because the drafters felt that a "public policy" exception per se might well have undermined the efficacy of the Convention.\textsuperscript{277} Under the current wording of Article 20, a limitation is placed on the role of the state of refuge since only matters of "human rights and fundamental freedoms" will qualify for the exception.

In determining matters of "human rights and fundamental freedoms," Article 20 "is not concerned with international human rights treaties per se but only if they have been incorporated in such a way as to amount to fundamental provisions of the requested state."\textsuperscript{278} The types of rights and freedoms that fall within the ambit of this exception, however, are presently undefined since there has been no case law to date on this provision.\textsuperscript{279} The test of Article 20 in the courts, thus, must come at a later date.\textsuperscript{280}

IV. Problems Remaining Under the Convention & Some Suggested Solutions

A. Broader Adoption of the Convention

The effectiveness of the Convention hinges upon its acceptance and ratification in a large number of countries.\textsuperscript{281} While at its present state it is a positive step forward in the protection of children from abduction by parents—with only 35 ratifying or acceding countries—\textsuperscript{282} a great portion of the globe is still not bound by the Convention's provisions.\textsuperscript{283} The large number of non-Hague countries provides abductors with an attractive haven and undermines its deterrent effect. Due to the large number of western nations which have already ratified,\textsuperscript{284} it remains especially important to encourage a diversified cross-section of the world to join the Convention.\textsuperscript{285} Tools of

\textsuperscript{277} Id. \textsuperscript{1} 33.
\textsuperscript{278} VAN BUEREN, supra note 65, at 19.
\textsuperscript{279} Id.
\textsuperscript{280} It has been suggested by at least one commentator that perhaps this test will be played out in the country which was once Yugoslavia. However, this hypothetical suggestion is only valid if Yugoslavia's ratification of the Convention is still in effect and is applicable to the newly formed states. See Arenstein, supra note 82, at 25.
\textsuperscript{281} Silberman, supra note 23, at 89-90.
\textsuperscript{282} See supra note 8.
\textsuperscript{283} The non-Hague countries, by region of the world, are: (i) in Asia, all countries except Israel; (ii) in Africa, all countries except Burkino Faso and Mauritius; (iii) in Eastern Europe, all countries except Poland, Hungary, Romania, and Croatia; (iv) in Western Europe, Belgium (awaiting ratification), Italy (awaiting ratification), Finland, Liechtenstein, and Malta are nonsignatories; (v) in North America, there are no nonsignatories; (vi) in South America, all countries except Argentina and Ecuador; and (vii) in the Caribbean, all countries except Belize. See Dyer Remarks, supra note 17, at 7-9.
\textsuperscript{284} See supra note 8.
\textsuperscript{285} In 1986, only 92 of the 276 abductions from the United States ended up in Europe and Canada, where the overwhelming number of treaty signatories are located. Helzick, supra note 43, at 120. But see Silberman, supra note 23, at 89 ("[A]n abducting parent does not usually just seek a safe haven, but often returns to his or her 'home country' where there is family or other support system(s).".).
persuasion, which could be used to encourage adoption, include selling the reasons for wide acceptance of the Convention: "its jurisdiction structure [which does not allow the court to reach the issue of merits], its goal of transcultural objectivity, and its sensitivity to national and judicial sovereignty." 286 Another possibility would be to use economic or political coaxing to obtain signatories. 287 Either way, this situation must be eliminated so that a consistent and uniform system for the return of children abducted abroad will be established.

B. An Education of the General Legal Community

Inherent in the philosophical underpinnings of the Convention is the notion that strict application and interpretation of the Convention's provisions is paramount to deterring future abductions. 288 Failure of the courts to acquire consistent interpretations would not only undermine the Convention's deterrent value 289 but could also allow the Convention to become subject to varying national approaches which would hinder the attainment of its core objectives. 290 It is imperative that both the judiciary 291 and family law practitioners 292 be-


286 Silberman, supra note 23, at 90.
287 Brenda J. Shirman, International Treatment of Child Abduction and the 1980 Hague Convention, 15 SUFFOLK TRANSNAT'L L.J. 188, 217 (1991). Economic coercion could take the form of either corporate influence in nations in which the foreign business is operating or foreign aid prerequisites. Id. Political persuasion could result from nations, such as the United States, refusal to recognize foreign decrees. Id. Another commentator has suggested the use of diplomatic coercion. See Caroline Milburn, THE AGE (MELBOURNE), June 1, 1994, at 1 (referring to a speech by Chief Justice Alastair Nicholson, Family Court of Australia).
288 Silberman, supra note 23, at 7:
Failure to acquire consistent interpretation of the treaty would undermine its value as a vehicle for the return of children wrongfully removed or retained in the international setting. It is in this sense that the Hague Conference, through its coordination with various (C)ontracting (S)tates and the institution of a Central Authority in each Contracting State, has been pivotal in achieving effectiveness of the treaty.

289 Id.
290 Id. at 77:
Implicit in this stated objective is a desire to avoid self-interested or advantageous resolutions by authorities in a country to which the parent took the child. While the primary rationale of the Treaty is its two-pronged, interrelated goal of deterring abductions and directing adjudication of the merits of custody issues to the state of the child's habitual residence, the quest for standardized application on the return issues is a prerequisite to the fulfillment of these objectives. If Convention cases became subject to national approaches or perspectives, neither of the core objectives of the treaty would be attainable.

291 The state courts and federal district court benches are responsible for the handling of Hague cases within the United States. ICARA, supra note 9, 42 U.S.C. § 11603(a) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."). The states must therefore understand that the Convention's tenets extend into its domain. Garbolino, supra note 21, at 28.
292 This is required so that the practitioner can fully and adequately advise his client as well as avoid a malpractice claim. Several malpractice claims in the last few years have been threatened, but not filed, over the failure to advise a client of the existence of the Hague
come familiar with this "particularized litigation" and exhibit a firm grasp on the "intricacies of the Convention" and its ever mounting case law.\textsuperscript{293}

Education of those who are likely to confront a Hague situation can take many forms. Courses in family law can incorporate lectures on the Hague Convention to provide future practitioners with at least the knowledge of its existence.\textsuperscript{294} National programs can be set up to provide comprehensive programs for judges and practitioners.\textsuperscript{295} The state and national American Bar Associations, and their Family Law Sections, can provide continuing legal education seminars.\textsuperscript{296} Another option would be for the U.S. Central Authority to undertake some sort of educational endeavor.

A further complicating factor in the education of the judiciary, who presides over Hague proceedings, is the fact that cases are heard at the district level.\textsuperscript{297} Judges at this level are generalists and may not either know of the Convention's existence or understand its intricacies.\textsuperscript{298} To alleviate this problem, it would be feasible to create "specialists" within each district by designating specific judges to preside over this type of specialized litigation when it arises.\textsuperscript{299} Education of the Convention's provisions and case law would then be required to be grasped by only certain jurists, reducing the costs to the governmental entity.\textsuperscript{300}

V. Conclusion

The Hague Convention on Civil Aspects of International Child Abduction conferred on the international community a legal device whose objective is precisely to avert international child abductions. Its tenets are consistent with the trend in international law toward making the courts of one country more accessible to the citizens of another. The Convention achieves this result by opening the doors to other Contracting States regardless of the existence of a custody order. Collaboration between the judicial and administrative authorities of Contracting States has further allowed the Convention to obtain its twin

\textsuperscript{293} Garbolino, supra note 21, at 28.
\textsuperscript{294} Id. at 29.
\textsuperscript{295} Id. The National Judicial College, while it does not currently sponsor such a program, "would be a logical institution to conduct a comprehensive course on the application of the [C]onvention" because it already provides comprehensive programs for judges. Id.
\textsuperscript{296} Id.
\textsuperscript{297} Mahmoody Interview, supra note 82 (Ms. Mahmoody indicated that many judges lack even the knowledge that the Convention exists in the first place and attributed much of this fact to the level at which the cases are heard because the judges are required to have an array of knowledge and not necessarily an in-depth understanding of family law specifically.).
\textsuperscript{298} See Arenstein, supra note 82, at 1.
\textsuperscript{299} Garbolino, supra note 21, at 29.
\textsuperscript{300} Id.
objectives: to secure the prompt return of the child to the State of its habitual residence and to ensure that the rights of custody under the law of a Contracting State are effectively respected.

Since its enactment some fifteen years ago, the Hague Convention has proven to be an effective weapon in the struggle against parental abductions and likewise has seen the return of many pawns—abducted children—who have been caught up in the adult game of divorce. The road to solving the problem of international parental kidnapping, however, is far from over. Not all nations are currently bound by the Convention’s provisions, and those that are continually face the problem of educating their judicial officers and the public. Additionally, all signatories must continually keep abreast of the case law under the Convention so that its provisions can be consistently applied across international borders. Ultimately, it is only through these publicized activities, a general heightened awareness, and a larger sphere of influence that the nightmare suffered by children, at the hands of would-be abductors, can be forestalled.

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