THE HAGUE CONVENTION ON PARENTAL CHILD ABDUCTION: AN ANALYSIS OF EMERGING TRENDS IN ENFORCEMENT BY U.S. COURTS

I. INTRODUCTION

A Canadian court issued a divorce judgment terminating the marriage of Michelle, a Canadian citizen, and Fred, a U.S. citizen.[1] The court awarded custody of the couple's only child, five-year-old Kareem, to Michelle.[2] Noting that Kareem would soon be starting school, the court decided that the child should reside with Michelle in Canada during the school year, with summer visitation at his father's home in New Jersey.[3]

However, during the following visitation period, Fred commenced an action in a New Jersey court, which granted him sole custody of Kareem and ordered that the child not be removed from the state.[4] Thus, the separate litigation of this dispute on opposite sides of the border resulted in two conflicting custody orders. Prior to 1988, it would have been difficult to predict which parent would "win" in this situation.[5] In all likelihood,

---

1. This is a true story, the facts of which are described in Duquette v. Tahan, 600 A.2d 472, 473 (N.J. Super. Ct. App. Div. 1991), *appeal after remand*, Tahan v. Duquette, 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992).

2. *Duquette*, 600 A.2d at 474.

3. *Id.*

4. *Id.*

5. Obviously, only one parent can win in these types of situations. But the children will almost always lose when they become trapped in prolonged custody battles, which are often waged for reasons other than concern for the best interests of the children. *See* GEOFFREY L. GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 11 (1993).

> Many abducting parents sustained losses as children that seem to shape their behavior as adults. Some of the left-behind parents appear to be repeating in adulthood patterns of victimization or abandonment begun early in life. With marriages characterized by unhappiness, pain, anger, violence, and substance abuse, a few of these parents may be products of families that also struggled with substance abuse and violence. . . . Thus, underlying the reported reasons for abduction--such as unhappiness with custody, visitation, or child support arrangements; anger and a desire for revenge; or the belief that the child is being harmed--are both the societal changes that provide a context for abduction and the personal histories of the parents involved.

Id. (footnote omitted). Children abducted by a parent face not only the failure of their parents' marriage, but also the strain of "life on the run." *Id.* at vi. These children exist in an environment of instability and insecurity. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT, Prefatory Note, 9 U.L.A. 116 (1988 & Supp. 1993) [hereinafter UCCJA]. "A child who has never been given the chance to develop a sense of belonging and whose personal

Michelle's only recourse in her attempt to regain custody would have been to "snatch" Kareem and secretly return the child to Canada.[6] Parents like Michelle often resorted to this form of "self-help" due to the uncertainties

---

attachments . . . are cruelly disrupted, may well be crippled for life . . . ." *Id.*

6. Parents in Michelle's situation could seek enforcement of foreign country custody decrees under the UCCJA. Section 23 of the UCCJA provides for extension of this domestic act to the international arena. UCCJA, *supra* note 5, § 23, at 326. However, problems still exist in recognition and enforcement of these foreign decrees. *See* Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and The International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 TRANSNAT'L LAW. 589, 606 (1989). Under the UCCJA, courts may find reasons to avoid enforcement of foreign decrees, such as changed circumstances or the best interests of the child. *Id.* at 607-08. Also, variations may exist in enactment of the UCCJA from state to state. *Id.* at 608. For example, South Dakota has not enacted Section 23, perhaps due to uncertainty about the effects of the international provision upon cases involving conflicts between state courts and tribal courts governing Indian tribes in that state. *See* Roger M. Baron, *Child Custody Jurisdiction*, 38 S.D. L. REV. 479, 492 (1993).

Furthermore, the UCCJA is not equipped to provide a remedy when non-custodial parents abduct their own children from the United States to another country. *See* Brenda J. Shirman, Note, *International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L.J. 188, 195 (1991); Caroline LeGette, Note, *International Child Abduction and The Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L L.J. 287, 293-94 (1990).

Another weakness of the UCCJA is that it applies only to cases where custody decrees have been issued. *See* Legette, *supra* at 294. This presents a significant problem because approximately half of the child abduction situations occur where there are no outstanding custody orders. *Id.* (citing Adair Dyer, Remarks at the Briefing on the Hague International Child Abduction Convention and the International Child Abduction Remedies Act, at 4 (Pub. L. 100-300) (Washington, D.C., Jan. 6-7, 1989)).

In 1980, Congress enacted the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A (1988), in order to complement the UCCJA. *See* Rivers, *supra*, at 608. However, the United States Supreme Court has determined that Congress' intent in enacting the PKPA was to require the states to grant full faith and credit to *domestic* decrees. *See* Rivers, *supra*, at 609 (citing Thompson v. Thompson, 484 U.S. 174, 182-87 (1988)). Thus, as one author stated:

> [T]he PKPA has not had an affirmative impact on international child custody disputes because it does not address enforcement of foreign country custody decrees. The absence of such a provision allows each state to determine its own recognition and enforcement guidelines regarding international abductions. Consequently, foreign parents faced with international abductions to the United States will not benefit from a uniform, national standard for affording full faith and credit to foreign country custody decrees.

Rivers, *supra*, at 611.

inherent in domestic legislation in the United States and the propensity of U.S. courts to assume jurisdiction in order to modify foreign country decrees.[7] Likewise, Fred hoped to benefit from this uncertain legal atmosphere when he violated the Canadian decree by retaining his child in the United States, believing the state court would prove to be a friendlier forum.[8]

Fortunately for Kareem and his mother, this custody dispute arose after the United States, Canada, and other countries had signed an international treaty designed to deal with situations where non-custodial parents violate custody rights by either abducting or retaining their children in foreign countries. Frustrated in their attempts to stem the growth of parental child abductions through their own domestic laws, countries began turning to each other for help.[9] In response, the Fourteenth Session of the Hague Conference on Private International Law drafted the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").[10] The Hague Convention was signed by the United States on December 23, 1981,[11] and subsequently ratified by the U.S. Senate in 1986.[12]

---

7. Rivers, *supra* note 6, at 611. "For a case in which the aggrieved parent is foreign, forum shopping often could mean protracted and burdensome litigation in the United States." *Id.* at 593-94.

In addition, the parent whose child is abducted from the United States to another country met numerous difficulties as well. *See* Shirman, *supra* note 6, at 197-98.

> Prior to . . . 1980 . . . no single agency monitored international child abduction. . . . [O]nce custodial parents found their abducted children in a foreign country, they typically found themselves relitigating custody suits in the foreign jurisdiction, a process which often resulted in inconsistent and disappointing outcomes. . . . Even those countries which recognized foreign custody decrees applied their laws inconsistently, or avoided them altogether by employing prohibitive procedural conditions. Thus . . . the very laws which were enacted to deal with the dilemma of child abduction actually increased the problem.

Id. (footnotes omitted).

8. Rivers, *supra* note 6, at 593. "Historically, 'forum shopping' has proven lucrative in the United States, thus encouraging abductions." *Id.* (footnote omitted). Initially, forum shopping did pay off for Fred, because he obtained what he wanted from the New Jersey court.

9. *Id.* at 611.

10. Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, S. TREATY DOC. NO. 11, 99th Cong., 1st Sess. (1985), 19 I.L.M. 1501 [hereinafter Hague Convention].

11. Letter of Submittal, Oct. 4, 1985, *reprintedin* 51 Fed. Reg. 10,494, 10,496 (1986) [hereinafter Letter of Submittal].

Legislation implementing the Hague Convention, the International Child Abduction Remedies Act ("ICARA"), was enacted on April 29, 1988.[13]

In drafting the Hague Convention, the intent of the signatory nations was to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[14] The U.S. Congress, in enacting the ICARA, found that "[t]he international abduction or wrongful retention of children is harmful to their well-being. . . . The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals

---

12. Monica Marie Copertino, Comment, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Its Efficacy*, 6 CONN. J. INT'L L. 715, 721 (1991) (footnote omitted).

13. 42 U.S.C. §§ 11601-11610 (1988).

14. Hague Convention, *supra* note 10, 19 I.L.M. at 1501. Article 3 of the Hague Convention provides:

> The removal or the retention of a child is to be considered wrongful 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 removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph *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.

Id. Additionally, Article 5 of the Hague Convention provides:

> For the purposes of this Convention --
>
> *a* '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;
>
> *b* 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Id. In other words, "rights of access" relate to visitation. *See* Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986) [hereinafter Legal Analysis]. It should be noted that neither the Hague Convention nor the ICARA define the phrase "habitual residence." *See* Hague Convention, *supra* note 10; ICARA, *supra* note 13. It is also undefined in Legal Analysis, *supra*. This potential problem is addressed in more detail below.

and retentions."[15]

Returning to the plight of Kareem and his feuding parents, the Hague Convention directly affected the outcome of this dispute. The treaty provided Michelle with a cause of action for establishing the jurisdiction of the Canadian court in deciding the custody dispute. Eventually, a New Jersey appellate court ordered that Kareem be returned to Michelle pursuant to the Canadian custody judgment.[16]

In his letter accompanying transmittal of the Hague Convention to the U.S. Senate for ratification, President Ronald Reagan stated that "by establishing a legal right and streamlined procedures for the prompt return of internationally abducted children, the Convention should remove many of the uncertainties and the legal difficulties that now confront parents in international child abduction cases."[17] At present, only a limited number of cases address the issues covered by the Hague Convention,[18] and only

---

15. 42 U.S.C. § 11601(a)(1), (4).

16. *Tahan*, 613 A.2d at 489-90. Kareem's case is, itself, an example of some of the problems federal and state courts may encounter when enforcing the Hague Convention. Initially, the trial court balked at returning Kareem to Michelle for fear that Fred would not be able to see his child again. *Duquette*, 600 A.2d at 474. The appellate court upbraided the trial judge, however, for failure to apply the Hague Convention, although Michelle had specifically sought relief under the treaty. *Id.* at 475. The matter was remanded, but the trial judge was rebuked again during a second appeal for delaying the case for at least another seven months. *Tahan*, 613 A.2d at 488. The court stated, "In remanding, it was our expectation that this issue would be resolved promptly and that the situation of the parties would, juridically at least, be quickly stabilized." *Id.* The opinions indicate that Kareem was five years old when the case was first heard by the trial court. *Duquette*, 600 A.2d at 474. However, by the time the matter was resolved on appeal after remand, Kareem had reached the age of nine. *Tahan*, 613 A.2d at 490. The delay in Kareem's case was in contravention of the intent of the Hague Convention, which provides under Article 1(a) for the "prompt return" of children who have been wrongfully removed or retained. *See* Hague Convention, *supra* note 10, at 1501. Under Article 11, courts may be required to provide reasons for delays in cases where a decision is not made within six weeks. *Id.* at 1502. The New Jersey court system addressed other issues involving the Hague Convention in Kareem's case. Yet, this case is perhaps noteworthy due to the stern language of both appellate court opinions in dictating that the trial judge adhere to the provisions of the Hague Convention, and in scolding the judge for further delay following remand. Likewise, parents who attempt to delay proceedings may be subject to similar rebukes in court, but here the appellate courts took a trial judge to task for failing to implement the law properly. Hopefully, trial courts hearing future disputes will address the need for prompt action in a serious manner, and avoid unnecessary delays in attempting to re-establish stable environments for these children.

17. Letter of Transmittal, Oct. 30, 1985, *reprinted in* 51 Fed. Reg. 10,494, 10,495 (1986) [hereinafter Transmittal Letter].

18. Baron, *supra* note 6, at 494.

one federal case has reached the appellate level.[19] Therefore, the purpose of this Comment is to examine existing case law to determine whether courts in the United States—both on the state and the federal level—are strictly adhering to the objectives of the Hague Convention when interpreting and enforcing this international law. Furthermore, this Comment analyzes the manner in which courts are coping with the perceived weaknesses of the Hague Convention[20] and the development of precedent in this emerging area. In so doing, the focus is upon the case law and issues surrounding custody rights under the Hague Convention, as opposed to issues involving visitation.

II. ENFORCEMENT OF THE HAGUE CONVENTION

A. *Demonstrated Need for an International Solution*

Parental abduction is a troubling and emotionally devastating event, whether the wrongdoer remains within the country or escapes with the children to a foreign nation. However, the problems facing the parent left behind are exacerbated when wrongful removal or retention of children progresses from a domestic matter to one encompassing the international legal domain.[21] For example, these parents encounter increased costs in travel and in overcoming obstacles presented by different languages and legal systems.[22] Also, assistance from the authorities in foreign countries

---

19. Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993). *See generally* Mark Dorosin, Note, *You Must Go Home Again:* Friedrich v. Friedrich, *The Hague Convention and The International Child Abduction Remedies Act*, 18 N.C. J. INT'L L. & COM. REG. 743 (1993).

20. For an overview of opinions regarding weaknesses of the Hague Convention, *see generally* Shirman, *supra* note 6, at 214-16; Copertino, *supra* note 12, at 729-42; 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, 144-46 (1987); Esther Levy Blynn, Comment, *In re: International Child Abduction v. Best Interests of the Child: Comity Should Control*, 18 INTER-AM. L. REV. 353, 382 (1986).

21. Rivers, *supra* note 6, at 590-91.

22. *Id.* at 591. Recall that the distance involved in the case of the custody battle between Fred and Michelle was not particularly burdensome, as one parent resided in Canada and the other lived in New Jersey. *See supra* notes 1-4 and accompanying text. However, the left-behind parent often must face greater distances, and the parent abductor may take the child to any country in the world, if he or she so chooses.

often proves to be ineffective.[23]

Statistics highlight the gravity and magnitude of the international parental kidnapping dilemma. Between 1973 and 1991, the U.S. State Department received about 4,000 reports of international parental abduction, but estimated that the actual total could be as high as 10,000.[24] Two researchers in the United States found that more than one-fifth of the total number of parental abductions studied involved instances where children were known or believed to have been abducted to other countries. However, another study put this statistic as high as forty percent.[25]

Other statistics indicate that the success rate for recovery of children who are taken abroad by U.S.-born parents is about the same as the recovery of other children who are never taken outside the United States by their parental kidnappers.[26] This similar rate of recovery may be attributed, in part, to the fact that many of these parental abductors travel to other signatory nations recognizing the Hague Convention. In these situations, American parents are able to obtain assistance in regaining custody of their children through the reciprocal mechanisms of the Hague Convention.[27] Another possible reason is that the abductors themselves are handicapped in finding financial support, family or legal assistance, and

---

23. Rivers, *supra* note 6, at 591. In describing the plight of these parents prior to the Hague Convention, one author wrote:

> Most Americans who experience the abduction of a child across international frontiers are at a complete loss about what to do and where to turn. There is no office in this country that is equipped to give them the necessary aid and direction. If they travel to the country where they presume the child to be, seeking help from the authorities, they find themselves shunted from one agency to another with no one office charged with responsibility to assist them. Attorneys in both countries run into the same difficulties, especially when the whereabouts of the abductor and child are unknown. They can attest to the enormous expenditures for travel, detective services, and other costs incurred by their clients in foreign abduction cases, not to speak of the emotional stress and strain involved.

Id. at 591 n.9 (quoting Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 110-11 (1980)). *See also supra* note 7.

24. GREIF & HEGAR, *supra* note 5, at 179 (footnote omitted).

25. *Id.* at 180 (citing Rosemary F. Janvier et al., *Parental Kidnapping: A Survey of Left-Behind Parents*, 41 JUV. & FAM. CT. J. 1-8 (1990)).

26. GREIF & HEGAR, *supra* note 5, at 183.

27. *Id.*

employment. As a result, many eventually return to the United States.[28]

On the other hand, researchers in the study found that 13.2% of the abducting parents investigated were foreign-born (*i.e.*, born outside of the United States), compared to 6.2% of the general population.[29] Compared to U.S.-born parents, foreign-born parents are no more successful at eluding authorities when they and their children remain within the United States' borders. However, they more often escape recovery when they take their children across the border.[30] Unlike the U.S.-born parental kidnappers, the foreign-born abductors enjoy a major advantage in foreign countries and often choose countries which do not recognize the Hague Convention.[31] Also, the foreign-born parents receive more ready assistance from family, friends, and the court systems while abroad than do their U.S.-born counterparts.[32]

Cultural differences may play a role as well, as is apparent when children are abducted from their mothers in the United States and taken to Middle Eastern countries.[33] These mothers encounter legal favoritism of the fathers in the Middle East, where it is assumed that fathers make the important decisions concerning the upbringing of their children.[34] Another reason for the high number of international parental kidnappings may be due to the fact that the number of international marriages themselves (*i.e.*, marriages between people of different nationalities) are escalating.[35] Greater social equality and acceptance have led to more racial and ethnic

---

28. *Id.* "If they remained abroad, they frequently stood out as foreigners to neighbors and law enforcement officials, and as such they were unlikely to receive special protection or preferred treatment." *Id.*

29. *Id.*

30. *Id.* at 186 (footnote omitted). The recovery rate for foreign-born parents was 35.7 percent, compared to 59.2 percent for United States-born parents. *Id.* (footnote omitted).

31. *Id.*

32. *Id.*

33. *Id.* at 186-87.

34. *Id.* at 187. One example offered by the authors is that of Betty Mahmoody, a mother who fled Iran with her daughter. Her story was portrayed in a well-known book and movie. *Id.* (citing BETTY MAHMOODY & WILLIAM HOFFER, NOT WITHOUT MY DAUGHTER (1987)). *See also International Child Abduction: Hearing Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 101st Cong., 2nd Sess. 8 (1990) [hereinafter *Hearing*] (statement of Carmen DiPlacido, Director, Office of Citizens Consular Services, Bureau of Consular Affairs, U.S. Department of State) ("Without a doubt, the Middle East is troublesome primarily because of the culture and the religious issues, and that is an overriding impact on their courts, the Sharia law system.").

35. GREIF & HEGAR, *supra* note 5, at 191.

inter-marriages.[36] In addition, increased immigration and the ease of international travel in the modern-day world has led to a higher rate of international marriages.[37] Another factor is the more liberal granting and recognition of divorces.[38]

B. *Effectiveness Increases as Number of Signatories Grows*

One interesting conclusion from the recent United States study previously discussed was that foreign-born abductors tended to return to their home countries with their children.[39] In that study, only nine of the twenty-four different countries which were the birthplaces of foreign-born abductors recognized the Hague Convention, and the legal systems of many of those countries were dissimilar to that of the United States.[40] The authors of the research study concluded:

> [O]ur findings suggest that the Hague Convention is an important factor in the recovery of children who are abducted and taken abroad. Three destination countries in our study subscribed to the convention at the time of the abductions: Canada, the United Kingdom, and Australia. Eighty-four percent of the abductions to these countries after the Hague Convention rules were in effect resulted in recovery, compared to a recovery rate of 43% for international abductions to non-Hague destinations. . . . Although the Hague Convention now holds promise for recovery of children from countries that participate in it, the only hope for many parents is that more countries will subscribe and enforce it in the future. Unfortunately, such international cooperative efforts sometimes are made on the basis of national political expediency, rather than on consideration of the welfare of children and families.[41]

---

36. *Id.*

37. *Id. See also* Sheikh v. Cahill, 546 N.Y.S.2d 517, 518 (N.Y. Sup. Ct. 1989).

38. Rivers, *supra* note 6, at 616 (citing Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV 285, 291-92 (1985-86)).

39. GREIF & HEGAR, *supra* note 5, at 194.

40. *Id.* In contrast, U.S.-born abductors tend to choose English-speaking countries where the Hague Convention is recognized and the legal systems share a common heritage with and respect for that of the United States. *Id.*

41. *Id.* at 194-95 (footnote omitted).

As noted previously, many of the legal uncertainties and difficulties of international parental kidnappings were due to the absence of a central monitoring agency in the United States and other countries.[42] The Hague Convention directly addresses this problem in Articles 6 and 7 by providing for the establishment of a "Central Authority" in each Contracting State. The purpose of the Central Authority is to receive applications under the Hague Convention and cooperate with other signatory nations in achieving the objectives of the treaty.[43]

Parents are frustrated to learn that courts in the United States cannot provide relief for them in foreign lands not recognizing the Hague Convention.[44] However, the Hague Convention must be recognized by both countries before either nation's court can act to return a child.[45] This threshold obstacle is perhaps best demonstrated by the 1989 federal court decision of *In re Mohsen*, one of the earlier cases decided pursuant to the Hague Convention and the ICARA.[46] In *Mohsen*, the court dismissed a petition by a citizen of Bahrain who was seeking the return of his child from the United States, where the mother had physical custody.[47] However, Bahrain was not a signatory to the Hague Convention.[48] Consequently, the court held that "the [ICARA] in itself provides no substantive rights. The [ICARA] plainly states that it 'empower[s] courts in the United States to determine *only rights under the Convention*. . . . '"[49] Finding that the Bahrainian father had no rights under the ICARA, the court never reached the issue of whether the child had been wrongfully removed or retained.[50]

Logically, the Hague Convention's success rate depends upon the number of nations which become signatories.[51] The number of countries adopting the Hague Convention has grown since the United States implemented the treaty. For example, only four countries—Canada, France, Greece, and Switzerland—signed the treaty after it was opened for signature

---

42. *See supra* notes 7 & 23 and accompanying text.

43. Hague Convention, *supra* note 10, at 1501-02. The Office of Citizens Consular Services, Bureau of Consular Affairs, U.S. Department of State, has been designated as the Central Authority of the United States. *See* 42 U.S.C. § 11606(a); International Child Abduction, 22 C.F.R. § 94.2 (1993).

44. *Hearing*, *supra* note 34, at 1.

45. Helzick, *supra* note 20, at 146.

46. 715 F. Supp. 1063 (D. Wyo. 1989).

47. *Id.* at 1064.

48. *Id.*

49. *Id.* at 1065 (alteration and emphasis in original) ((citing 42 U.S.C. § 11601(b)(4)). *See supra* note 15 and accompanying text.

50. Mohsen, 715 F. Supp. at 1065.

51. Helzick, *supra* note 20, at 146.

on October 25, 1980.[52] The number of signatory nations grew to fourteen by 1990[53] and to twenty-four by the summer of 1992.[54] As of January 1, 1994, thirty-one nations had become signatories to the treaty.[55]

While the number of adopting countries has grown steadily, the rate of growth is very slow. A number of factors contribute to this slow growth, including differences in legal systems and social norms between signatory and non-signatory nations, nationalism, differing priorities, finances, and possibly even unawareness of the existence of the Hague Convention.[56] Perhaps these considerations will prevent some countries from ever signing the treaty. However, it is vital that many more countries adopt the Hague Convention in order to achieve a truly effective, international treaty. Continual growth is critical due to the large number of non-signatory nations which can serve as havens for parental abductors.[57]

C. *Where Are U.S. Courts Headed?*

> The [Hague] Convention operates on the assumption that courts in the 'home' country have primary responsibility for settling any outstanding issues concerning custodial rights and determining what arrangements are in the child's best interest. The Convention allows few exceptions to the requirement that the child be returned forthwith. If these exceptions are interpreted broadly, parents will have a greater incentive to resolve difficult custody problems by abducting the child and hoping that a court in the country of asylum will prove to be sympathetic. . . . It

---

52. Letter of Submittal, *supra* note 11, at 10,496.

53. *Hearing*, *supra* note 34, at 3.

54. GREIF & HEGAR, *supra* note 5, at 193.

55. The following list of party countries was provided by the United States Central Authority, Office of Citizens Consular Services, Child Custody Divisions, U.S. Department of State. These countries are: Australia, Canada, France, Hungary, Luxembourg, Portugal, Spain, Switzerland, United Kingdom, United States, Austria, Norway, Sweden, Belize, The Netherlands, Germany, Argentina, Denmark, New Zealand, Mexico, Ireland, Israel, Croatia, Ecuador, Poland, Burkina Faso, Greece, Monaco, Romania, Mauritius, Bahamas.

56. Copertino, *supra* note 12, at 732 (footnotes omitted).

57. LeGette, *supra* note 6, at 288-89. For example, New Zealand, an English-speaking country, had become a haven for parental abductors prior to its adoption of the Hague Convention. *Id.* at 289. The fact that the country was not a party to the treaty likely influenced Elizabeth Morgan's decision to hide her daughter, Hilary, in New Zealand. *See* GREIF & HEGAR, *supra* note 5, at 193. *See generally* Suzanne McGrath Dale, Note, *Little Hilary: Happy at Last? New Zealand's Family Court and the Matter of Hilary Foretich*, 9 DICK. J. INT'L L. 411 (1991).

> remains to be seen if courts of the United States, where the Convention has recently come into force, will act with . . . sensitivity and dispassion when such cases enter American courts.[58]

The above commentary by a U.S. lawyer[59] accompanied his summary of an English case concerning an Australian father who successfully sought the return of his child under the Hague Convention.[60] It also expresses the author's concern that state and federal courts in the United States should attempt to give due consideration to the judgments of English courts when interpreting and enforcing the treaty. This is due to the fact that England implemented the Hague Convention prior to the United States[61] and had already begun building a body of case law construing the treaty. Federal court judges refer to English case law when interpreting the treaty in at least five opinions.[62] Although few court cases addressing the Hague Convention have been decided in the United States,[63] it appears that these courts are enforcing the Hague Convention consistently with its objectives and purposes.[64] A summary of the Hague Convention's objectives follows, along with an analysis of attempts by U.S. courts to execute the treaty in light of these objectives.

1. *Objectives of the Hague Convention*

Article 1 of the Hague Convention sets out two simple goals for signatory nations. They are: "[1] to secure the prompt return of children wrongfully removed to or retained in any Contracting State . . . and . . . [2] to ensure that rights of custody and access under the law of one Contracting

---

58. Mark P. Kindall, *United Kingdom Case Note*, 83 AM. J. INT'L L. 586, 590 (1989).

59. *Id.*

60. *Id.* at 586 (construing C. v. C., [1989] 1 W.L.R. 654 (1988)).

61. Child Abduction and Custody Act, 1985, ch. 60 (Eng.).

62. *See Friedrich*, 983 F.2d at 1401; Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993); Slagenweit v. Slagenweit, 841 F. Supp. 264, 268 (N.D. Iowa 1993); Ponath v. Ponath, 829 F. Supp. 363, 368 (D. Utah 1993); Prevot v. Prevot, 855 F. Supp. 915, 920 (W.D. Tenn. 1994). *See also supra* note 19 and accompanying text. The reliance by these courts upon British case law in its interpretation of the phrase "habitual residence" is discussed in detail below.

63. It should be noted that the ICARA provides for concurrent jurisdiction of the state and federal courts over matters brought under the Hague Convention. 42 U.S.C. § 11603(a).

64. Baron, *supra* note 6, at 494.

State are effectively respected in other Contracting States."[65]

In achieving these goals, Article 10 stresses a preference for voluntary return of the children, providing that "all appropriate measures in order to obtain the voluntary return of the child" should be taken.[66] Where the voluntary return cannot be obtained, however, the Hague Convention provides for judicial or administrative recourse, with Article 11 mandating that "[t]he judicial or administrative authorities . . . shall act expeditiously in proceedings for the return of the children."[67]

In addition, Article 17[68] has been interpreted as follows:

> [T]he person who wrongfully removes or retains the child in a Contracting State cannot insulate the child from the Convention's return provisions merely by obtaining a custody order in the country of new residence, or by seeking there to enforce another country's orders. Nor may the alleged wrongdoer rely upon a stale decree awarding him or her custody, the provisions of which have been derogated from subsequently by agreement or acquiescence of the parties, to prevent the child's return under the Convention.[69]

Article 16 appears to complement the above purpose in returning the child to the position he was in immediately prior to the abduction by stipulating that the court "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention . . . ."[70] This supports the second objective discussed above regarding respect for the laws and decrees of other signatory nations.[71]

---

65. Hague Convention, *supra* note 10, at 1501.

66. *Id.* at 1502.

67. *Id.* *See supra* notes 1-4, 16 and accompanying text for a discussion of a case where a trial court judge was rebuked at the appellate level for causing delay upon remand. *See also* Sortomme v. Sortomme, No. 92-4218-SAC, 1993 WL 105144, at *2-*5 (D. Kan. Mar. 10, 1993) (court refuses to recognize mother's rights under the Hague Convention where she did not act as though she had such rights and where her actions unnecessarily delayed the final resolution of the custody dispute).

68. *Id.* at 1503. Article 17 states: "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention . . . ." *Id.*

69. Legal Analysis, *supra* note 14, at 10,504-05. Recall that the state appellate court deciding the custody case of Kareem would not permit Fred to rely upon a New Jersey custody decree in the father's attempt to evade the Canadian order granting custody to the boy's mother, Michelle. *See supra* notes 1-4, 16 and accompanying text.

70. Hague Convention, *supra* note 10, at 1503.

71. *See supra* note 65 and accompanying text.

Hence, Article 16 specifically requires courts *not* to delve into the merits of the custody case, while Article 17 puts the alleged wrongdoer on notice that he cannot benefit from his actions by seeking a favorable custody order in a more friendly forum. However, Article 17 also provides that courts may take into account the reasons underlying the order from the more friendly forum in applying the Hague Convention.[72]

Consequently, it appears that courts are allowed some flexibility under Article 17 in deciding whether to look at the merits of the underlying custody dispute. Yet, this may be desirable, especially under circumstances where the abductor has new, relevant evidence that was either not available at the time of the foreign custody decree, or the foreign court would not consider the evidence for some reason when making its decision. Still, courts should approach this built-in flexibility with caution to "prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties,"[73] thus resulting in an outcome which contravenes the purposes of the Hague Convention.[74]

For a parent seeking redress in a U.S. court for the abduction or wrongful retention of his or her children, the Hague Convention has several advantages over the Uniform Child Custody Jurisdiction Act ("UCCJA") and the Parental Kidnapping Prevention Act ("PKPA").[75] A significant advantage is the fact that the treaty applies in situations where a custody decree has not been issued (unlike the UCCJA and PKPA), permitting courts to deal with situations where parents abduct their children out of fear that they will not receive a favorable or fair custody order.[76]

Still, the UCCJA and the PKPA serve one useful purpose in conjunction with the Hague Convention. The ICARA states that notice shall be provided in accordance with the local applicable law governing such notice in international child custody proceedings,[77] indicating that notice must be made consistently with the dictates of the UCCJA and the PKPA.[78]

---

72. Hague Convention, *supra* note 10, at 1503. *See also* Meredith v. Meredith, 759 F. Supp. 1432, 1435 (D. Ariz. 1991).

73. Legal Analysis, *supra* note 14, at 10,506 (citation omitted).

74. "Inherent in the philosophy of the Convention is the notion that strict application of the . . . provisions is necessary to deter future abductions." Rivers, *supra* note 6, at 617.

75. *See supra* notes 5-6; Helzick, *supra* note 20, at 144. For a summary of the UCCJA's and PKPA's weaknesses in dealing with international parental kidnappings, *see supra* note 6.

76. Legal Analysis, *supra* note 14, at 10,505; Helzick, *supra* note 20, at 144.

77. 42 U.S.C. § 11603(c).

78. David Jackson, *What Really Counts is Time and Place; Jurisdiction and notice requirements ensure an opportunity to be heard*, FAM. ADVOC., Fall 1989, at 20, 23.

2. *Threshold Requirements*

a. *Grappling with "Habitual Residence"*

Article 4 of the Hague Convention requires that "[t]he [Hague] Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights."[79] However, as noted earlier, the phrase "habitual residence" is not defined by the treaty.[80] Consequently, existing case law must be examined to determine and analyze the approaches courts of the United States are taking in determining the habitual residence of the child.

In *Friedrich*, the Sixth Circuit Court of Appeals was faced with determining the habitual residence of a child born in Germany to a German father and an American mother stationed in Germany as a member of the United States Army.[81] The mother brought the child to the United States following the couple's separation, and the father alleged that his son should be returned pursuant to the Hague Convention.[82] In reaching its finding that Germany was the child's habitual residence, the court found no helpful guidance in American case law, and thus applied an earlier English case, *In re Bates*, in its analysis.[83]

Bates offers an explanation for the absence of an explicit definition of "habitual residence" in the Hague Convention. That court stated:

> No definition of 'habitual residence' has ever been included in a Hague Convention. This has been a matter of deliberate policy, the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies as between legal systems. . . . It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions. . . . and there must be a degree of 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,

---

79. Hague Convention, *supra* note 10, at 1501.

80. *See supra* note 14 and accompanying text.

81. 983 F.2d at 1398-99. *See also supra* notes 19 and 62 and accompanying text.

82. *Friedrich*, 983 F.2d at 1399.

83. *Id.* at 1401 (citing In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct., Royal Court of Justice, United Kingdom (1989)).

> employment, health, family or merely love of the place spring to mind as common reasons for a choise of regular abode, and there may well be others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.[84]

The *Friedrich* court adopted this flexible, fact-sensitive approach to defining "habitual residence," agreeing that it must be distinguished from the common law concept of "domicile."[85] "To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."[86]

The court pointed out that the child was born in Germany and had lived in Germany all his life except for short vacations to the United States.[87] It was not enough that the mother had always intended to return to the United States with her child at the end of her tour of duty in Germany, nor that she had even established citizenship and a permanent address for her son in the United States.[88] The court stated:

> Although these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence. A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward. All of the factors listed by Mrs. Friedrich pertain to the future. Moreover, they reflect the intentions of Mrs. Friedrich; it is the habitual residence of the child that must be determined. . . . Any

---

84. *Quoted in* Brian L. Webb and Diana S. Friedman, Address at the North American Symposium on International Child Abduction, Sept. 30-Oct. 1, 1993.

85. 983 F.2d at 1401.

> During the nineteenth and early twentieth centuries, the domicile of the child provided the sole basis for jurisdiction in custody cases. Although the domicile theory was advantageous in that it established jurisdiction in only one state at a time, it was criticized for not taking the child's welfare into proper account. Critics believed that the state of the child's domicile was not necessarily the best forum to decide custody of the child. Another state might share an equal or greater interest in the dispute, as well as greater access to necessary evidence, in which case that state should be able to exercise jurisdiction.

Rivers, *supra* note 6, at 595-96 (footnotes omitted).

86. *Friedrich*, 983 F.2d at 1401.

87. *Id.*

88. *Id.*

> future plans that Mrs. Friedrich had for [her child] to reside in the United States are irrelevant to our inquiry.[89]

In *Levesque*, a federal district court again encountered the issue of determining the habitual residence of a child brought to the United States from Germany by the father.[90] In so doing, the *Levesque* court relied upon *Friedrich* and earlier English case law as well.[91] In harmony with *Friedrich* regarding the "fluid and fact based" approach to establishing the habitual residence of the child, the *Levesque* court found that both parents intended that the mother and child should leave the United States to live in Germany.[92] Although the length of the time period for the stay in Germany was left open, there was "a purpose with a sufficient degree of continuity to enable it properly to be described as settled" that Germany was to be the habitual residence of the child.[93]

The analysis of the *Levesque* court would appear to conflict with that of *Friedrich* in one aspect. While the *Friedrich* court cautioned against taking into account the future intentions of the mother to eventually return with her child to the United States,[94] the *Levesque* court considered the parents' future plan for the child to eventually return to Germany with his mother.[95] Perhaps the court emphasized its consideration of future intention in *Levesque* because *both* parents had agreed upon the child's indefinite stay in Germany. Consequently, the agreement rendered the father's surreptitious removal of the child to the United States a wrongful act.[96] In contrast, the mother in *Friedrich* appeared to allege her intent *alone* to return with her child from Germany to the United States, which apparently conflicted with the intentions of the father.[97] The *Friedrich* court stated:

> The district court . . . found that [the child]'s habitual residence was 'altered' from Germany to the United States when Mr. Friedrich forced Mrs. Friedrich and [their child] to leave the family apartment. Habitual residence cannot be so easily altered. . . . [The child]'s habitual residence in Germany is not

---

89. *Id.*
90. 816 F. Supp. at 663. *See also supra* note 62 and accompanying text.
91. 816 F. Supp. at 666.
92. *Id.*
93. *Id.* (quoting *Bates*, *supra* note 83).
94. *See supra* note 89 and accompanying text.
95. *See supra* note 92 and accompanying text.
96. 816 F. Supp. at 666.
97. 983 F.2d at 1401.

> predicated on the care of protection provided by his German father nor does it shift to the United States when his American mother assumes the role of primary caretaker. [The child]'s habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility. . . . 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.[98]

After the *Friedrich* decision was handed down, another federal court case, *Ponath,* utilized the same analysis in addressing the habitual residence issue. In so doing, the *Ponath* court relied upon *Levesque* and prior English case law.[99] In *Ponath*, the father invoked the Hague Convention, alleging that the mother had wrongfully removed the child from Germany to the United States.[100] The court stated:

> [T]he more credible testimony . . . is that of [the mother] who testified that she, and the minor child, were detained in Germany against her desires by means of verbal, emotional and physical abuse. The court cannot conclude under such circumstances that [the mother] and the minor child were habitually resident in Germany within the meaning of the Hague Convention. Although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant. The concept of habitual residence must, in the court's opinion, entail some element of voluntariness and purposeful design. Indeed, this notion has been characterized in other cases in terms of 'settled purpose.'[101]

Thus, it is clear that the *Ponath* court considered all the facts and circumstances (including the actions of the father in using physical means to coerce the mother and child to remain in Germany) in determining whether there was a sufficient "settled purpose" as to the child's habitual

---

98. *Id.* at 1401-02.
99. 829 F. Supp. at 365.
100. *Id.* at 364.
101. *Id.* at 367.

residence. The court concluded that there was no wrongful removal because the father consented to the return of mother and child to the United States, supported by the fact that the father had made no "meaningful effort" to seek the child's return to Germany.[102]

Unlike the courts deciding *Bates* and *Friedrich*,[103] a later decision in a lower New York state court, *Cohen v. Cohen*, reflected an effort to define "habitual residence" through a comparison with "domicile."[104] However, it is apparent that the New York court ultimately relied upon the facts and circumstances of the case in reaching its decision. The *Cohen* court ruled that Israel was not the children's habitual residence and refused to allow relocation of the children to Israel for resolution of the custody dispute.[105] The court stated: "The question of whether there has been a change of domicile is a mixed question of fact and law 'and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals.'"[106] The court relied upon *Meredith*, which held earlier that habitual residence "must be determined by the facts and circumstances presented in each particular case."[107]

In *Cohen*, the court determined that the mother consented only to her children visiting Israel with their father. The court based its conclusion upon the fact that the mother, who had always cared for the children, had no ties with Israel and probably would not have consented to the permanent move of her children there without accompanying them.[108] The court also took into account that there was no farewell party for the children and that the father took few of the children's belongings with him, indicative of a short trip rather than a permanent move thousands of miles away.[109]

Although courts in the United States appear to differ in some ways in their approach to the issue of habitual residence of the children—whether falling back on an analogy with "domicile" or determining the parents' "settled purpose"—it is apparent that the courts are considering the facts and circumstances of each case rather than attempting to apply any black letter rule of law. While this "totality of the circumstances" approach may appear vague and undefined, its result is an equitable method of determining habitual residence which permits courts to consider the realities of distressing situations and extenuating circumstances. In so doing, the courts

---

102. *Id.* at 368.
103. *See supra* notes 84 and 85 and accompanying text.
104. 602 N.Y.S.2d 994, 998 (N.Y. Sup. Ct. 1993).
105. *Id.* at 999.
106. *Id.* at 998 (citations omitted).
107. *Id.* (quoting *Meredith*, 759 F. Supp. at 1434).
108. 602 N.Y.S.2d at 999.
109. *Id.*

are not determining the merits of the underlying custody disputes;[110] rather, the establishment of the habitual residence of these children is merely a step in addressing whether the children have been wrongfully removed, in keeping with the objectives of the Hague Convention.[111] After all, where there is no habitual residence, there can be no wrongful removal.

b. *The Exercise of Custody Rights*

Another threshold requirement of the Hague Convention which must be met before a court will order the return of a child is found in Article 3.[112] This condition, pertaining to custody rights, is a two-step inquiry. First, a breach of a parent's custody rights must have occurred under the law of the child's habitual residence.[113] Second, at the time of the wrongful removal or retention, the parent from whom the child is taken must have been actually exercising those custody rights.[114]

Under the ICARA, the parent petitioning for return of the child has the burden of proving by a preponderance of the evidence that (1) the removal or retention was wrongful under the law of the country of habitual residence, and (2) he or she actually possesses visitation rights.[115]

Furthermore, Article 5 of the Hague Convention provides that rights of custody shall include "the right to determine the child's place of residence."[116] Therefore, when a child is abducted from a caretaker entrusted with the child's care, the custodial parent is entitled to invoke the provisions of the Hague Convention.[117] Also, it is presumed that the parent with custody of the child was actually exercising it.[118] Article 13 of the Hague Convention places the burden of proof upon the abducting parent to show that the petitioning parent was not actually exercising custody rights at the time of the removal or retention.[119]

---

110. "The [Hague] Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4).

111. *See supra* note 65 and accompanying text.

112. *See* Hague Convention, *supra* note 10, at 1501. *See also supra* note 14.

113. *See supra* note 14.

114. *Id.*

115. 42 U.S.C. § 11603(e)(1).

116. Hague Convention, *supra* note 10, at 1501.

117. Legal Analysis, *supra* note 14, at 10,507.

118. *Id.*

119. Hague Convention, *supra* note 10, at 1502; Legal Analysis, *supra* note 14, at 10,507.

An examination of case law dealing with the issue of custody rights indicates that courts in the United States are careful to ensure that those rights are determined by the law of the child's habitual residence. Perhaps the best example of a court's rigid adherence to this aspect of the Hague Convention can be found in *Friedrich*.[120] In this case of a family living in Germany, the father had allegedly ordered his wife to take their son and leave, putting most of their belongings into the hallway of the apartment building.[121] The cost of residing on the military base with her son was too expensive for Mrs. Friedrich,[122] and she was unable to find other living accommodations within her budget in Germany.[123] So, without the permission, consent, or knowledge of the father, Mrs. Friedrich returned to the United States with her son.[124] Consequently, in response to the father's petition for the return of his son under the Hague Convention, Mrs. Friedrich argued that her husband was not exercising custody rights when she brought her child to the United States.[125]

First, the *Friedrich* court expressed doubt that the father had "*unilaterally* expelled Mrs. Friedrich and [their son] from the family apartment."[126] The court noted that Mr. Friedrich continued to maintain contact with his son and helped Mrs. Friedrich establish initial living quarters on the U.S. Army base.[127] Next, the court stated:

> Under the [Hague] Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residence. . . . We have determined that [the child] was a habitual resident of Germany. . . . Neither the district court, nor either party on appeal, applied German custody law to the above facts. . . . We would be surprised if Mr. Friedrich's actions terminated his custody rights under German law, but we do not make that factual determination. Instead, we remand to the district court with instructions to make a specific inquiry as to whether, under German law, Mr. Friedrich was exercising his custody rights at the

---

120. 983 F.2d 1396.

121. *Id.* at 1399.

122. Recall that Mrs. Friedrich was a member of the United States Army stationed in Germany. *See supra* text accompanying note 81.

123. *Friedrich*, 983 F.2d at 1399.

124. *Id.*

125. *Id.* at 1398.

126. *Id.* at 1402.

127. *Id.*

time of [his son]'s removal.[128]

The dissent disagreed with the ruling to remand the case for determination of custody rights under German law, believing instead that testimony by both the mother and father supported the district court's finding that the father was not exercising his custody rights.[129] Judge Lambros argued that only a clearly erroneous finding of fact by the district court could be set aside on appellate review, and that the appellate court should not reverse "simply because it is convinced that it would have decided the case differently."[130] However, as the majority emphasized, the lower court could not determine the father's exercise of custody rights without first applying the proper law regarding those rights. In this case, German law was appropriate.[131]

In this instance, the *Friedrich* court remained faithful to the mandates and objectives of the Hague Convention. If the lower court was to subsequently apply German law and conclude that Mr. Friedrich was exercising custody rights at the time his son was removed from Germany, then the Hague Convention would mandate the return of the child to Germany for disposition of the custody dispute.

Tyszka v. Tyszka presents another good example of a state court heeding the dictates of the Hague Convention.[132] A lower court held that a father wrongfully retained his children in the United States in violation of the Hague Convention, and it ordered that they be returned to their mother in France "until such time as the appropriate French court adjudicates the issue."[133]

Notwithstanding the ruling that the French judiciary should decide the outcome of the custody dispute, the trial court awarded joint legal custody to both parents in a later divorce and custody action.[134] On appeal, the higher court agreed with the mother that the custody decision should have been left to the French courts, and it vacated the custody portion of the trial court's order.[135] The appellate court emphasized that where a wrongful retention is found and the exceptions of Article 13 do not apply, the court

128. *Id.* (citation omitted).
129. *Id.* at 1403 (Lambros, J., dissenting).
130. *Id.*
131. *Id.*
132. 503 N.W.2d 726 (Mich. App. 1993).
133. *Id.* at 727.
134. *Id.*
135. *Id.* at 728.

"shall order the return of the child forthwith."[136]

A New York court encountered the custody rights issue when a mother violated a Canadian court order by taking her children to the United States shortly after the birth of her daughter.[137] Prior to their daughter's birth, the couple had separated. The separation agreement granted custody of their older son to the mother and visitation rights to the father.[138] The agreement also provided that the mother make the son available to the father for visitation purposes within the Toronto area.[139] However, the separation agreement was silent as to the then-unborn daughter.[140]

After the daughter's birth, the father obtained an interim order from a Canadian court prohibiting the mother from moving the children from Ontario.[141] Despite the order, the mother moved with her children to Brooklyn.[142] The Supreme Court of Canada ruled that the mother wrongfully removed the children from the jurisdiction.[143] As a result, the father brought an action in the New York court for return of his children.[144]

In ordering the mother to return with her children to Canada, the New York court took judicial notice of Ontario law regarding child custody.[145] The court stated:

> Respondent's [the mother's] contention that the petitioner [the father] is not entitled under the Hague Convention to have their son returned, because he only had visitation ('access') rights and not custody, might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario. . . . Moreover, respondent's argument overlooks the fact that their daughter was not included in the provisions of the separation agreement. Therefore, the petitioner had an equal right to custody of their daughter when the respondent left Ontario. Under . . . ICARA, this Court can find there was a

---

136. *Id.* (quoting Article 12 of the Hague Convention, *supra* note 10, at 1502). Exceptions under Article 13 whereby a court has the discretion to return a child to his or her habitual residence are discussed below.

137. David S. v. Zamira S., 574 N.Y.S.2d 429, 430-31 (N.Y. Fam. Ct. 1991).

138. *Id.* at 430.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 431.

143. *Id.*

144. *Id.*

145. *Id.* at 432.

'wrongful removal' in the absence of any formal declaration of custody.[146]

This small sampling of recent case law addressing the issue of custody rights under the Hague Convention demonstrates that courts in the United States are cognizant of the treaty's objective, whereby the country of the child's habitual residence should resolve custody disputes. This goal is justifiable and logical because it considers the probability that courts in the child's nation of habitual residence are better equipped to deal with the merits of custody issues. This is due to the availability of evidence and witnesses concerning the child's home life in the child's habitual residence. Family and other state courts, accustomed to hearing evidence on and deciding the merits of custody disputes, must remain especially prudent when finding a wrongful removal or retention under the Hague Convention.

c. *Age of the Child*

Besides the two requirements pertaining to establishment of the child's habitual residence and the parents' custody rights under the laws of that country, there is a third threshold requirement which must be met before a court may invoke the Hague Convention. Article 4 provides that the Hague Convention no longer applies once the child reaches the age of 16 years.[147] Even where a child is under 16 at any point during the proceedings—whether it be at the time of the wrongful removal or retention, or when a petition for the return of the child is filed—the treaty will cease to apply once that child reaches the age of 16.[148]

Accordingly, the Hague Convention would not be applicable in the case of an older child, even though that child may be mentally or physically dependent on a parent.[149] However, the fact that the treaty ceases to be effective once the child reaches the age of 16 does not prevent a country (or a state within the United States) from applying other local or state principles and laws.[150]

---

146. *Id. See also supra* note 67 regarding another case where a mother's actions in contempt of a court's order also resulted in her loss of rights under the Hague Convention.

147. Hague Convention, *supra* note 10, at 1501.

148. Legal Analysis, *supra* note 14, at 10,504.

149. Shirman, *supra* note 6, at 214.

150. Copertino, *supra* note 12, at 731-32. *See also* Legal Analysis, *supra* note 14, at 10,504 ("Absent action by governments to expand coverage of the Convention to children aged sixteen and above . . . the [Hague] Convention itself is unavailable as the legal vehicle for securing return of a child sixteen or older. However, it does not bar return of such child

For example, Article 18 of the Hague Convention states that "[t]he provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."[151] Therefore, a court could authorize the return of a child for any reason under other laws, procedures, or comity, whatever the child's age.[152] Also, Article 29 of the Hague Convention permits a person to circumvent the treaty altogether by invoking any other applicable law for the child's return.[153] Finally, Article 34 permits flexibility as well, providing that the country or state may obtain the child's return or arrange visitation rights by applying any local applicable law.[154]

3. *Exceptions to the Hague Convention*

The Hague Convention is not necessarily the exclusive means by which a parent may seek legal relief for the return of a child; the treaty provides some built-in versatility for the courts.[155] Besides allowing for application of other laws, the Hague Convention provides exceptions whereby a parental abductor may avoid application of the treaty altogether. Such an evasion is possible under a court's discretion, even where a wrongful retention or removal has been determined under the laws of the child's habitual residence.

These broad exceptions may be subject to misuse by the courts unless they are strictly construed to avoid frustration of the Hague Convention's

---

by other means.")

151. Hague Convention, *supra* note 10, at 1503.

152. Legal Analysis, *supra* note 14, at 10,504.

153. *Id.* Article 29 states: "The Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights . . . from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention." Hague Convention, *supra* note 10, at 1504.

154. Legal Analysis, *supra* note 14, at 10,504. Article 34 states:

> This Convention shall take priority in matters within the scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Hague Convention, *supra* note 10, at 1504.

155. *See supra* notes 72, 149-153 and accompanying text.

objectives.[156] When confronted with affirmative defenses under these exceptions, however, it appears that courts in the United States are aware that they must sparingly exercise their discretion in order to safeguard those objectives.[157] A discussion of these discretionary exceptions follows.

a. *Grave Risk of Physical or Psychological Harm*

Article 13(b) of the Hague Convention provides:

> [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -- . . .
>
> *b* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. . . . [158]

This discretionary exception, like others in the treaty, is the result of a compromise concerning differences in legal systems and family law principles of the countries involved in negotiating the treaty.[159] "[I]t 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 parent opposing return had met the burden of proof."[160]

Under the ICARA, a parent opposing the return of the child to the habitual residence has the burden of proving his defense under Article 13(b) by the standard of clear and convincing evidence.[161] This establishes a higher burden of proof for the parental kidnapper than that which is required for the parent seeking return, who must prove by a preponderance of the evidence that a child has been wrongfully removed or retained[162] or that the parent has visitation rights.[163] However, this difference in the burdens of proof between that required of the parental abductor and the parent

---

156. *See supra* note 58 and accompanying text. *See also* Rivers, *supra* note 6, at 624; Shirman, *supra* note 6, at 215-16; Helzick, *supra* note 20, at 145.

157. *See supra* text accompanying note 64.

158. Hague Convention, *supra* note 10, at 1502.

159. Legal Analysis, *supra* note 14, at 10,509-10.

160. *Id.* at 10,509.

161. 42 U.S.C. § 11603(e)(2)(A).

162. 42 U.S.C. § 11603(e)(1)(A).

163. 42 U.S.C. § 11603(e)(1)(B).

seeking return appears consistent with the objectives of the Hague Convention.

A lower burden of proof for the parent seeking return simplifies the means by which the child can be returned to his habitual residence, where the laws of that country can be applied to resolve the custody dispute. At the same time, a higher standard of proof for the parental abductor assures that a court will return a child to the habitual residence unless the parental kidnapper is able to present more than general or negligible evidence that the child will likely be harmed if returned.

Also, determining the habitual residence of the child and a breach of parental custody rights is a simple and straightforward factual inquiry, for which proof by preponderance of the evidence is sufficient. In contrast, establishing that an intolerable situation or a grave risk of psychological or physical harm awaits the child upon return to the habitual residence involves an inquiry into a more emotional kind of evidence. To conclude that such a grave risk exists, the court must inquire into the merits of the underlying custody dispute, which is contrary to the overriding objective of the Hague Convention.[164] Thus, to justify such an inquiry, the parental abductor should be required to meet a higher burden of proof before the court exercises its discretion to block the return of the child.

Yet, American sensibilities favor the Article 13(b) exception. Moreover, the premise of the Hague Convention is to reduce or deter the emotional trauma of parental abduction.[165] If the child is to be the beneficiary of this treaty's effects, the Hague Convention should protect the child where invocation of the international law would result in greater emotional trauma. The discretionary exception appears especially appropriate where new evidence comes to light, or where the court in the child's habitual residence cannot or will not consider such evidence when deciding a custody dispute.[166]

---

164. *See supra* text accompanying notes 65-71.

165. *See supra* note 5.

166. *But see* Shirman, *supra* note 6, at 218-19.

> Although an abducting parent has established by clear and convincing evidence that the return of the child would expose him or her to an intolerable situation or grave risk of psychological or physical harm, return should not be denied automatically. Instead, the child should be returned to the custody of a third party in the state of the child's habitual residence. The courts in that state would then be responsible for resolving the issue, and either ordering the return of the child to the original custodial parent or modifying the custody decree.

Id. However, attention must be focussed upon the child in this situation. Ordering the child back to another country to be placed in a third party's hands (which could be either a foster

A study of relevant case law addressing the Article 13(b) exception shows that American courts are cautious in applying discretion to return the child. For example, one court went so far as to interview the child *in camera* before ruling on the defense. The court found nothing in either the interview or other evidence presented by the opposing parent to indicate that the child would be exposed to psychological or physical harm if returned to his habitual residence.[167]

An earlier California opinion addressed the same issue. Only eight days after the father filed a petition, the court ordered the return of the children from the United States to his custody in Spain. This order came despite testimony of a court-appointed doctor that the daughter might face the risk of permanent psychological damage if returned.[168] The court was swayed by the doctor's testimony that the negative effects of a return to Spain would be lessened if the mother returned with them, which she had already agreed to do.[169]

In rendering its judgment, the court stated:

> The [Hague] Convention exception in this area speaks of 'exposing' the children to psychological harm by return to the country of habitual residence. In this sense, this court firmly believes that neither child will be 'exposed' to harm by returning the children to Spain. Certainly one must be a realist and understand that any abducted child will suffer trauma to some extent when moved about the world by an ill-advised parent. But returning the children to Spain will serve, in this court's opinion, to allow the Spanish courts to determine what is in the best interest of the children. . . . To retain the children in the United States guarantees that the mother will continue to frustrate the

---

home or some type of foster-care institution) would only result in even more disruption in the short life of a young child, especially where the court has good reason to believe that the child has already experienced an emotionally traumatic family life. Furthermore, it may be unnecessary to order the child back. The court ordering the child back will doubtless make available to the courts of the child's habitual residence the reasons for finding clear and convincing evidence of the risk of grave harm. Thus, the court in a child's country of habitual residence may simply order the return of the child. Where a court is convinced that a grave risk of harm awaits the child upon return, but that the child is comparatively safe and happy with the parental kidnapper, the only fair decision would be *not* to return the child, and to permit both the mother and child to get on with the rest of their lives.

167. *Sheikh*, 546 N.Y.S.2d at 521.

168. Navarro v. Bullock, No. 86481 (Cal. Sup. Ct. Sept. 1, 1989), *reported in* 15 FLR 1576, 1577 [hereinafter Navarro].

169. *Id.*

> custodial and visitation rights of the father, and to undermine his relationship with his children. . . . To allow this to happen would be to allow [the] mother to profit by her own wrong, and to continue to damage the children psychologically by her unwillingness to allow the father access to his children.[170]

The court in *Tahan* also undertook an analysis of the Article 13(b) exception when Fred, the father, invoked this defense to the return of Kareem from the United States to his mother in Canada.[171] Evidence such as psychological profiles, evaluations of parental fitness, and lifestyle and relationships was offered in support of invoking the exception.[172] The *Tahan* court pointed out that Article 13 permits inquiry into the surroundings and the basic personal qualities of the people to whom the child will be exposed in determining whether apprehensions for the child's safety and welfare upon return are realistic and reasonable.[173] The court commented, "Here, however, the [father] indicated no intention to address the surroundings. . . . Every element of his proffer went to issues which . . . may only be addressed in a plenary custody proceeding in Quebec."[174]

Thus, the *Tahan* court acknowledged that "Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint."[175] Nevertheless, it limited the *type* of evidence which may be heard to that pertaining to the surroundings to which the child would be exposed upon return.[176]

Thus far, it appears that courts in the United States have recognized the danger of giving too broad an interpretation to the Article 13(b) exception. Hopefully, U.S. courts will continue to follow England's example and "act with . . . sensitivity and dispassion" when deciding whether to exercise this discretionary power.[177]

b. *Protection of Human Rights and Fundamental Freedoms*

Another discretionary exception to application of the Hague Convention is found in Article 20, which provides that "[t]he return of the child . . .

---

170. *Id.*
171. 613 A.2d at 489.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *See supra* text accompanying notes 58-62.

may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[178] As with the Article 13(b) exception discussed above, the ICARA requires that a parent opposing the return of a child under Article 20 meet the burden of clear and convincing evidence.[179]

Although the Article 20 exception has not been addressed in reported U.S. case law and there is no precedent in other international agreements to guide the courts, it is intended, like Article 13(b), to be narrowly interpreted.[180] It appears that the treaty may not have survived the negotiating process without the addition of this public policy exception.[181] "To prevent imminent collapse of the negotiating process . . . there was a swift and determined move to devise a different provision that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[182]

This provision is not intended to be an automatic default device whenever it is raised as a defense. The parental abductor first must show that the fundamental principles of the country where the child has been taken will not permit the return. It is not enough to show that the return would be "incompatible, even manifestly incompatible, with these principles."[183]

In addition, the country hearing the petition may not exercise the Article 20 exception "any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters."[184] In other words, the courts should avoid discriminatively invoking this provision more often than a similar exception would be invoked under other laws of that country.[185]

c. *Child's Preference, Age, and Maturity Considered*

As noted, the Hague Convention ceases to apply once a child reaches the age of 16. Courts are then free to apply any other applicable law to effect the return of the older child.[186] Article 13 of the treaty also

---

178. Hague Convention, *supra* note 10, at 1503.

179. 42 U.S.C. § 11603(e)(2)(A). *See also supra* notes 161-66 for a discussion of the differences in burdens of proof required of the parental abductor and the left-behind parent and why this is consistent with the objectives of the Hague Convention.

180. Legal Analysis, *supra* note 14, at 10,510.

181. *Id.*

182. *Id.*

183. *Id.* at 10,511.

184. *Id.*

185. *Id.*

186. *See supra* text accompanying notes 146-53.

contains a provision whereby the wishes of the mature child who is under the age of 16 may be taken into account in the court's discretion.[187]

The parent raising this exception in opposition to the return of a child to the habitual residence must present a preponderance of the evidence to prevail.[188] The burden is lower than that required for other exceptions to the Hague Convention.[189] Still, courts are cautioned to watch for undue influence or "brainwashing" by the parental abductor when considering the wishes of the mature child.[190] "A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child."[191]

Very little case law has been written which addresses this defense. In *Sheikh*, the court carefully rejected the father's assertion that his nine-year-old son preferred to remain in his custody.[192] The court concluded that the son's preference was the result of "being wooed by his father during the visitation. Given Nadeem's age and maturity, this reaction to the summer vacation is to be expected."[193]

Family courts and other lower state courts accustomed to resolving custody disputes will readily recognize situations where children have been subject to undue influence by their parental kidnappers. The Hague Convention provides flexibility where a court feels justified under the facts and circumstances in giving weight to a mature child's wishes.

d. *One-Year Statute of Limitations*

Finally, parental kidnappers may be able to escape the application of the Hague Treaty pursuant to Article 12. Exception is provided where more

---

187. Legal Analysis, *supra* note 14, at 10,504. Article 13 states: "The judicial or administrative authority may also refuse to order the return of the child 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 its views." *See* Hague Convention, *supra* note 10, at 1502.

188. 42 U.S.C. § 11603(e)(2)(B).

189. *See supra* text accompanying notes 161-64, 178; 42 U.S.C. § 11603(e)(2)(A). *See also* Dorosin, *supra* note 19, at 752. "This reduced burden of proof makes it easier for a respondent to prevent the child's return from the United States and indicates a retreat from the U.S. commitment to the essential anti-abducting purpose of the Convention." *Id.* (footnote omitted).

190. Legal Analysis, *supra* note 14, at 10,510.

191. *Id.*

192. 546 N.Y.S.2d at 521-22.

193. *Id.* at 522.

than a year has passed since the wrongful removal or retention and the parent can show by a preponderance of the evidence that the child is settled in the new environment.[194] This provision may sometimes put the parent who is seeking return of a child at a disadvantage, particularly where there is difficulty locating the abducting parent and child.[195] While certain provisions permit a court to return a child at any time,[196] a judge may be reluctant to do so once the child has become acclimated to his or her new surroundings for fear that a return may cause further psychological harm.[197]

Once again, courts are warned to apply this one-year limitation narrowly, in that "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof."[198] Furthermore, courts are urged to consider the reasons for any delay in filing a petition, particularly where the parental abductor has caused a long search by concealing the child's presence.[199]

The limited case law in this area pinpoints the accrual of the action as the time of the wrongful removal or retention. In other words, where a parent takes physical custody of a child pursuant to a lawful visitation period, the one-year period will commence at the end of the visitation period, as there can be no wrongful removal or retention during the visitation.[200] U.S. courts should continue to carefully apply this one-year limitation for filing a petition, considering extenuating circumstances when applicable.

---

194. Hague Convention, *supra* note 10, at 1502. Article 12 provides:

> Where a child has been wrongfully removed or retained . . . and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. . . .

Id. *See also* 42 U.S.C. § 11603(e)(2)(B).

195. Shirman, *supra* note 6, at 214.

196. *See supra* text accompanying notes 150-53.

197. *See generally* Copertino, *supra* note 12, at 729-30; Helzick, *supra* note 20, at 143-45.

198. Legal Analysis, *supra* note 14, at 10,509.

199. *Id.*

200. *See Duquette*, 600 A.2d at 475; Navarro, supra note 168, at 1576.

Ultimately, concern must focus on the child. However unfair the actions of a parental abductor may appear, it may be unjust to order a child's return to the habitual residence if it would cause greater emotional harm or trauma.

III. CONCLUSION

The emotional distress of a marital separation or breakup is often devastating to a child. The potential for trauma is intensified when one parent resorts to the self-help remedy of abduction and takes the child to a foreign country. The Hague Convention was drafted to protect children from the harmful effects of parental kidnappings. The treaty provides an effective legal device for return of the abducted child to the habitual residence. It is vital that more nations adopt the treaty to decrease the number of "haven" states where parents go to escape the mandates of the Hague Convention.

It appears that the judiciary of the United States has embraced the spirit and goals of the Hague Convention by strictly interpreting its provisions to achieve the prompt return of abducted children whenever appropriate. Lower courts, therefore, should be cautious when applying certain exceptions to the Hague Convention. Moreover, appellate courts should continue to uphold the objectives of the treaty by promptly policing the actions of the lower courts whenever they deviate from these stated goals.

*Peggy D. Dallmann**

---

* J.D. Candidate, 1995, Indiana University School of Law—Indianapolis; B.S., Ball State University.