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## *The Implications of the Hague International Child Abduction Convention: Cases And Practice<sup>1,2</sup>*

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For many victims of domestic violence, the threat of continued violence can force them to cross international borders to achieve safety and peace. Moreover, when domestic violence is present in the relationship and the abuser is not U.S. born, abusers' threats to kidnap children and take them across international borders are a common practice. It is very important for battered women to understand the risks and to take threats of international kidnapping seriously. When a victim flees with children, the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)<sup>3</sup> can force a parent and her child to return to

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<sup>1</sup> "This Manual is supported by Grant No. 2005-WT-AX-K005 and 2011-TA-AX-K002 awarded by the Office on Violence Against Women, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women." We are grateful for the contributions of Bethany Sousa, Megan Reidy of Catholic University School of Law, Allyson Mangalonzo of the Boston College School of Law, and Joan Robinson of Brooklyn School of Law. For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/international-issues>.

<sup>2</sup> In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) ([United States v. Windsor](http://www.supremecourt.gov/opinions/12-307/wl20130528), 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

<sup>3</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html> [hereinafter Hague Convention].

the country she was fleeing, thereby returning the victim to her abuser and possibly heightening her danger. When the abuser kidnaps the children, the Hague Convention could be part of a protracted search for the abducted children. This chapter will provide an overview of the Hague Convention and its applications, as well as some practical recommendations to attorneys and advocates working with victims of domestic violence who are considering leaving the country with their children or who are fearful that their abuser may leave the country with their children.

### Preventing International Child Abduction<sup>4</sup>

Although the Hague Convention was created to assist in the prevention of international child abduction and the return of abducted children, it is difficult and expensive to use. Much of this expense is generated in legal fees. Oftentimes, good legal representation is essential in both countries to facilitate successful use of the Hague Convention in securing return of the children. Moreover, there are many countries in which the Convention does not apply because the country is not a signatory. As a result, it is very important that attorneys and advocates for battered women understand the risks involved, take threats of international kidnapping seriously, and advise their clients of the measures that can be taken to guard against international child abduction.

The ABA Center on Children and the Law worked in conjunction with three other missing children's organizations to conduct a survey of parents whose children had been abducted internationally by the other parent. The results of this survey provide some insight into common fact patterns that occur with abduction, as well as methods in which a parent might preemptively prevent abduction from taking place.<sup>5</sup> The survey found some commonalities in the way in which the child was abducted, as well as the preparation that went into the abduction. Nearly one-half of the abductions reported by left-behind parents occurred during a court-ordered visitation between the abducting parent and the child. Eighty percent of parents said they believed the abductor received some assistance from family members in carrying out the abduction or making it successful. One-fifth reported that the abductor moved the child from country to country.

Some survey respondents could identify ways in which the abductor planned for the abduction. Most of this planning indicates that the abductions were premeditated. Abductors prepared by saving money, waiting for tax refunds, liquidating assets, and quitting or changing jobs. They also prepared for longer-range needs by gathering legal documents. One-third of parents who reported on planning actions said the abductor received visits from friends or family members from another country prior to the abduction. One-third said the abductor made preparatory visits to the country to which the child was later abducted. Nearly one-fourth of left-behind parents reported that the abductor kept the child late after a visit prior to the actual abduction, perhaps to prevent the left-behind parent from immediately suspecting that there was a problem when the actual abduction occurred. One-fifth of parents said they believe the abductor secretly involved the child in planning the abduction.

In many cases, the abductor made serious threats prior to the actual abduction; and eighty percent of the left-behind parents reported that these previous threats included telling them that they would never see their child again. Sixty percent reported that the abductors threatened their lives; and twenty percent reported that the abductor threatened the life of the child.

Fifty-one percent of those surveyed took measures to prevent the abduction; including seeking supervised visits, custody orders prohibiting removal of the child from the jurisdiction, and passport denial or restrictions.

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<sup>4</sup> This section is adapted in part from Catherine Klein and Leslye Orloff, *International Kidnapping Prevention and the Hague Convention*, in AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE ATTORNEY'S MANUAL (2004).

<sup>5</sup> Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Dept. of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUVENILE JUSTICE BULLETIN (Dec. 2001) at 397, 399-402. The survey drew from 97 parents who had at least one child abducted.

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In addition to protection order and other family court proceedings, there are a number of actions that should be taken to prevent children from being removed from the United States. Legal remedies designed to stop international kidnapping should be taken in tandem with other advocacy strategies that help prevent children from being kidnapped internationally. This following section points out the various risk factors for international kidnapping of which a parent should be aware and highlight some U.S. based prevention strategies.

### ASSESSING RISK FACTORS FOR INTERNATIONAL CHILD ABDUCTION:<sup>2</sup>

In assessing a child's risk of international abduction, a parent should carefully consider whether the other parent:

- Is currently employed;
- Is a U.S. citizen;
- Is a citizen of another country;
- Has a dual citizenship;
- Has residency in another country, or work for a company that could transfer him to another country;
- Has family and/or other connections to the United States;
- Has strong connections to his country of origin; and/or
- Has threatened to take or hide the children.

### CHARACTERISTICS POSING A RISK FOR ABDUCTION:<sup>3</sup>

The following is a list of common characteristics found in a parent who poses a risk of international abduction:

- Possesses paranoid or delusional tendencies;
- Exhibits psychopathic behavior;
- Has strong ties to another country;
- Was involved in a marriage or intimate relationship with a partner who differs in ethnicity, culture and/or country of origin;
- Feels alienated from the U.S. legal system;
- Threatens to abduct or in some form has actually abducted; and/or
- Harbors suspicious beliefs that the child has been abused.

### MEASURES THAT CAN BE USED TO PREVENT PARENTAL KIDNAPPING:<sup>4</sup>

In preventing international abduction, there are a number of measures that a parent can take, including:

- Keeping a record of important information about the other parent, for example, his social security number, driver's license number, bank account information, passport number, or immigrant visa number;
- Obtaining the passports of the children and keeping these passports in a safe place;
- Compiling contact information, such as the addresses and phone numbers of the other parent's family and friends—both within the United States and in foreign countries;
- Keeping a detailed, written description of the child and taking color photos of the child every six months; and/or
- Teaching the child to make telephone calls (especially collect calls) and instructing the child to call home if unusual circumstances occur.

### CUSTODY DECREES AND FAMILY COURT PREVENTION REMEDIES:

Although it is not absolutely necessary to obtain a custody decree when using the Hague Convention to secure the return of an abducted child, a parent must still prove that she was exercising "the right of custody" when the child was taken out of the country. As a result, although a custody order is technically not

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necessary under the Convention, having a custody order facilitates the process of seeking the prompt return of the child.

“Right of custody” is not defined as sole custody<sup>5</sup>. Rather, the parent who possesses the “right of custody” has the right to determine where the child will live. If a parent has reason to believe that the other parent will attempt to abscond with the child to a foreign country, she should immediately seek a custody decree. When a parent has been abused, obtaining a custody award as part of a civil protection order is often the swiftest way to secure a court order granting the abused parent custody of the children. Whether the custody award is issued as part of a civil protection order or as part of another family court proceeding, the award should include certain key provisions, which contain specific preventive language. Such provisions could include language that:<sup>6</sup>

- Provides for supervised visitation with the child;
- Specifically prohibits the removal of the child from a particular jurisdiction, state or country without permission from either the court or the custodial parent;
- Transfers the children’s passports to the custodial parent;<sup>7</sup>
- Disallows the issuance of a passport on behalf of the child by the U.S. passport agency, or any country’s Embassy or Consulate;
- Orders the abuser to sign a statement, co-signed by the custodial parent and the court, stating that no Embassy or Consulate shall issue a travel visa for the children, absent further order of the court;<sup>8</sup>
- Provides for an agreement between the parties that the provisions of the Hague Convention shall apply in the event of international abduction;
- Requires the posting of a bond from the parent with connections to a foreign country;
- Allows law enforcement officials to assist in the recovery of the child if he/she is abducted

### The Hague Convention

The Hague Conference on Private International Law (Hague Conference) is an intergovernmental organization, the purpose of which is “to work for the progressive unification of the rules of private international law.”<sup>6</sup> To this end, the Hague Conference facilitates the negotiation and drafting of multilateral treaties (conventions) in the different fields of private international law. From 1893 to 2002, the Conference has adopted forty-five international Conventions.<sup>7</sup> Of these, the Hague Convention on the Civil Aspects of International Child Abduction has been among the most widely ratified.

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) is a multilateral treaty that was adopted into U.S. law on July 1, 1988.<sup>8</sup> Currently, at least fifty-four member countries<sup>9</sup> of the Hague Conference are signatories.<sup>10</sup> In addition, there are twenty non-member countries<sup>11</sup>

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<sup>5</sup> Article 5(a) of the Hague Convention defines “rights of custody” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” Hague Convention, Oct. 25, 1980, art. 5, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *available at* <http://hcch.net/e/conventions/text28e.html>.

<sup>6</sup> See <http://travel.state.gov/int'lchildabduction.html>.

<sup>7</sup> Upon receiving such an order as part of a protection order or other family court case, counsel for the custodial parent should send copies of the order to the passport-issuing agency, informing them not to issue duplicate passports to the children without the permission of the custodial parent and/or the court.

<sup>8</sup> Counsel for the custodial parent will need to take this order and forward it to the appropriate Embassies and/or Consulates of the countries of both parents.

<sup>6</sup> Statute of the Hague Conference on Private International Law, July 15, 1955, art. 1, *available at* <http://www.hcch.net/e/conventions/text01e.html>.

<sup>7</sup> For an overview of the multilateral treaties drawn up by the Hague Conference, see <http://www.hcch.net/e/conventions/index.html>.

<sup>8</sup> Hague Convention, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *available at* <http://www.hcch.net/e/conventions/text28e.html>. For more information see *generally* <http://www.hcch.net/e/conventions/menu28e.html>.

<sup>9</sup> Member States include: Argentina, Australia, Austria, Belarus, Belgium, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Chile, China (Hong Kong—Special Administrative Region only), China (Macao—Special Administrative Region only), Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, The former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco,

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that were not actual members of the Hague Conference, but who have chosen to uphold the Convention. The treaty only applies between countries when both countries are parties to the Convention. If a country has not formally joined the Hague Convention, either as a member country or a non-member adherent, the treaty does not apply and a parent must use alternate methods to have the child returned. Although the Hague Convention exists to assist in the prevention of international child abduction and the return of abducted children, it is difficult and expensive to use. Good legal representation is essential, sometimes in both countries, to successfully secure the return of the children, which adds to the cost of utilizing the Hague Convention.

The Convention provides civil legal remedies to protect children who have been abducted internationally. The Convention has two main goals: to establish procedures that allow for the prompt return of children who have been abducted to a foreign country, and to provide that the rights of custody and access under the laws of each member country are respected by other member countries.

Through the Convention, parents, rather than governments, may institute legal proceedings on their own behalf to seek the safe return of their children. The Convention is not meant to determine custody arrangements. Rather, it provides a process to accomplish the prompt return of children wrongfully taken. To institute proceedings for the return of a child, a parent must first file an application seeking the return of the child with authorities of the foreign country. Then, she needs to procure legal representation in the country where the child has been abducted to pursue the legal action through that country's legal system. The U.S. State Department<sup>12</sup> is available to assist parents in filing the application, locating the child abroad, and in providing parents with information about the foreign country's legal system and its attorneys. Each member country has a similar government office that serves as the authority to administer the duties of the Convention. The Convention provides for the return of the child if all the conditions of the treaty are met.

### REQUIREMENTS

To invoke the Convention, a child must be “wrongfully removed or retained” from his or her “habitual residence,” the abduction must be reported within one year of the abduction, and the child must be below the age of sixteen. It is possible that a judicial or administrative authority will order return of the child if it was not reported within one year, but it is not guaranteed under the Treaty.

### WRONGFUL REMOVAL

“Wrongful removal” is defined in Article 3 of the Convention. Wrongful removal is a central issue to proving a Hague Convention case. Article 3 states that there must be a breach of custody rights under the laws of the state of habitual residence.<sup>13</sup> Rights of custody may arise in a variety of situations: by operation of law or by reason of a judicial or administrative decision, by reason of an agreement having legal effect under the law of that country<sup>14</sup>, and by the rights relating to the care of the child, e.g. determining the child's

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Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, and Venezuela.

<sup>10</sup> This list of signatories to the Hague Convention on the Civil Aspects of International Child Abduction is current as of June 2004. For an up-to-date list, see <http://www.hcch.net/e/authorities/caabduct.html>.

<sup>11</sup> Non-Member States include: Bahamas, Belize, Burkina Faso, Colombia, Costa Rica, Ecuador, El Salvador, Fiji, Guatemala, Honduras, Mauritius, Moldova, Nicaragua, Paraguay, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, Turkmenistan, Uzbekistan, and Zimbabwe.

<sup>12</sup> See U.S. Department of State Homepage, International Parental Child Abduction, at <http://travel.state.gov/int'lchildabduction.html> (describing resources provided by the U.S. Department of State to assist in instances of international child abduction).

<sup>13</sup> Article 3 states that a removal or retention is wrongful when “it is in the 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 that “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.” Hague Convention, Oct. 25, 1980, art. 3, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

<sup>14</sup> The Hague Convention terminology uses the term, “state” to refer to member countries who uphold the Hague Convention. To avoid confusion with U.S. states, we use the term country in this chapter, rather than the Hague Convention terminology of “state.”

place of residence.<sup>15</sup> Thus, a formal custody decree is not necessary to use the Convention for the return of an abducted child. Nonetheless, a parent must prove that he/she was exercising “the right of custody” when the child was taken out of the country.

The trend has been to interpret custody rights broadly, thereby almost always finding that the left-behind parent had, and was exercising, custody rights.<sup>16</sup> The right of custody as defined in Article 5 of the Hague Convention is an expansive concept. For example, the Convention makes pre-decree removals (removals of children absent a court order) wrongful when the left-behind parent has custody rights under the internal law of the country of the child’s habitual residence, or the law designated by the conflicts-of-law rules of that country.<sup>17</sup> Pre-decree abductions are the most common type of abduction, and are likely disproportionately common among domestic violence victims who take their children.<sup>18</sup>

The U.S. Sixth Circuit Court of Appeals has held that in the absence of a ruling from a court in the country of habitual residence, the only acceptable solution is to “liberally find ‘exercise’ whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.”<sup>19</sup> The court held that if a person has valid custody rights to a child under the law of the country of the child’s habitual residence, “that person cannot fail to ‘exercise’ those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.”

In cases where there is a custody decree in place, it is clear when a breach of custody rights has occurred. When a decree grants visitation rights only, the return remedy is not triggered if the child is taken away from the parent with visitation rights.<sup>20</sup> The Second Circuit in *Croll v. Croll* held that, even if a right of access to the child is coupled with an *ne exeat* clause (which forbids a person from leaving a geographic area), it does not constitute rights of custody under the Convention.<sup>21</sup> Nevertheless, foreign courts had previously held otherwise, and have subsequently rejected this holding.<sup>22</sup> Although it is not guaranteed by the Convention, a parent can ask the foreign central authority to help arrange access to the children for visitation, pursuant to Article 21, either during the pendency of a return case, following the unsuccessful conclusion of a return proceeding, or instead of seeking return of the child. The central authority in a country upholding the Hague Convention has been designated by that country to carry out the special duties imposed by the Convention, in particular, to promote cooperation among their respective countries in securing the prompt return of children.<sup>23</sup> Under the Hague Convention, the central authority in the requested country has the primary responsibility for processing applications under the Convention.

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<sup>15</sup> Hague Convention, Oct. 25, 1980, art. 5, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

<sup>16</sup> See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 636 (2000).

<sup>17</sup> See *id.*; see also *In re Michael B.*, 80 N.Y.2d 299, 309 (N.Y. 1992).

<sup>18</sup> See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 636 (2000). Oftentimes, victims of domestic violence must make quick decisions regarding their safety and that of their children. Utilizing the court system may heighten their danger; thus many victims choose to leave with their children without a court order. The risk of domestic violence directed both towards the child and the victim is frequently greater after separation than during cohabitation; often the risk continues after legal interventions have been initiated.

<sup>19</sup> See *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996) [hereinafter *Friedrich II*]. The Court gave three reasons for its expansive interpretation: 1) American courts are not well-suited to determine the consequences of parental behavior under the law of a foreign country; 2) an American decision about the adequacy of one parent’s exercise of custody rights is dangerously close to the forbidden territory of the custody dispute; and 3) the confusing dynamics of quarrels and informal separations make it difficult to adequately assess the acts and motivations of a parent. *Id.* at 1065.

<sup>20</sup> Although the Convention provides remedies for a violation of access rights, these do not include the remedy of an order to return the child to their habitual residence. Hague Convention, Oct. 25, 1980, art. 21, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

<sup>21</sup> See *Croll v. Croll*, 229 F.3d 133, 135 (2nd Cir. 2000). The *ne exeat* clause in *Croll* provided that the child could not be removed from Hong Kong, her place of residence, without the permission of both parents. *Croll*, 229 F.3d 133 *Id.* at 135.

<sup>22</sup> See Merle Weiner, *Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 *COLUM. HUMAN RIGHTS L. REV.* 275, 316, 335 (2002) (citing subsequent rejections of *Croll*, including the South African Constitutional Court in *LS v. AT*, 2000 SACLR Lexis 20, 26-27 (CC Apr. 12, 2000) (rejecting *Croll* holding as “contrary to the weight of authority,” and quoting *Croll*’s dissent); *Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D. Va. 2001) (declining to follow *Croll* in finding that rights of non-custodial mother embodied in interim order and Scottish statutory law fall within “plain language” of Treaty)).

<sup>23</sup> Hague Convention, Oct. 25, 1980, art. 7, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

There are several cases in the United States and elsewhere, however, which have held that other types of parenting arrangements and custody orders can create custody rights. In a few decisions, U.S. courts have interpreted a restriction on a child and parent's movement to create custody rights, in some cases even if the left-behind parent only has visitation rights. In *David v. Zamira*, a New York court found that, when a mother moved her child to New York in violation of an interim order which prevented her from moving outside the Metropolitan Toronto area, the father's custody rights had been violated.<sup>24</sup> This was despite the fact that the mother had been granted custody, and the father granted visitation, in the earlier separation agreement.<sup>25</sup> In *C v. C*, the custodial parent took the child to England from New York.<sup>26</sup> Despite the fact that New York's custody order did not expressly forbid the mother from moving the child to another state or country, the English court found that the non-custodial parent's custody rights had been violated, since under New York case law, the custodial parent could not remove the child from the jurisdiction without applying for permission.

It is also possible that a right of custody can be established when the parents have deviated from the terms of their custody order, and their act is held to supercede the judicial order for purposes of the Convention. Article 3 allows rights of custody to arise, "by reason of an agreement having legal effect under the law of that [country]."<sup>27</sup>

There are a few ways in which a lawyer can establish the violation of custody rights before the courts of the requested country. Under Article 14, the requested country can take notice of the law of the habitual residence without "recourse of the specific procedures for the proof of that law."<sup>28</sup> Under Article 15, the requested country may request that the applicant obtain a decision or other determination that the removal or retention from the habitual residence was wrongful. Even if it has not been required by the requested country, it may be advisable for an applicant to obtain a ruling from the courts of the country of habitual residence that the other party has interfered with or violated their custody rights and introduce it in the Hague Convention proceeding.<sup>29</sup>

### HABITUAL RESIDENCE

The Convention does not define the term "habitual residence". The Convention's drafters intended this to be a factual determination. There are no technical regulations or even a list of factors that courts must consider. This makes it extremely difficult to advise clients when they want to prove where the child's habitual residence would be, if faced with a Hague Convention petition.

The majority of courts seem to focus on the child's life and how settled the child is in that residence, rather than the amount of time that the child has lived in one place or another. The general standard upon which most courts have relied comes from *In Re Bates*.<sup>30</sup> In this case, the English Court focused on the degree of "settled purpose." The court stated, "[a]ll that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."<sup>31</sup> Various American and foreign courts have followed this idea in determining their own loose definition of habitual residence in Hague Convention cases.<sup>32</sup>

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<sup>24</sup> See *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991).

<sup>25</sup> See *id.*

<sup>26</sup> See *C v. C*, [1992] 1 F.L.R. 163.

<sup>27</sup> Hague Convention, Oct. 25, 1980, art. 3, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

<sup>28</sup> *Id.* at art. 14.

<sup>29</sup> See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 20 (1994).

<sup>30</sup> See *Re Bates*, (Minor), No. CA 122/89 (Fam. Feb. 23, 1989).

<sup>31</sup> See *id.*

<sup>32</sup> See e.g., *Feder v. Evans-Feder*, 63 F.3d 217, 222-24 (3rd Cir. 1995); *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994); *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 268 (N.D. Iowa 1993); *In re Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993); *Levesque v. Levesque*, 816 F. Supp. 662, 666 (D. Kan. 1993).

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While courts have generally followed the idea of a “settled purpose,” rather than relying on a certain amount of time to establish a habitual residence, there is no one interpretation of “settled purpose” and the body of case law is contradictory and confusing. The Sixth Circuit in *Friedrich v. Friedrich (Friedrich I)* stated that, “habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.”<sup>33</sup> In *Friedrich I*, the child was born in Germany to a German father and an American mother and lived exclusively in Germany, before he was removed to the United States. The father had forced the mother and son, Thomas, out of their apartment in Germany and the mother claimed she could not find a place to live in Germany due to military restrictions. The court decided that, although Thomas was a U.S. citizen and his mother intended to return to the U.S. when she was discharged from the military, his habitual residence could not be the United States.<sup>34</sup> The court stated that the child’s habitual residence was not based on which parent was the primary caretaker, and could not shift due to who cared or provided for him. The child’s residence could only be altered, “by a change in geography and the passage of time, not by changes in parental affection and responsibility.”<sup>35</sup>

In *Levesque v. Levesque*, the court, citing *In Re Bates*, found that the arrangements the two parents had made for the mother and child to go to the United States for an indefinite amount of time amounted to a “settled purpose.”<sup>36</sup> Here, the mother had taken her child, who had been living alternately in the U.S. and Germany for her entire life, to Germany on a trip. The amount of time was left open and the father had agreed that the child would go with the mother.<sup>37</sup> The father then went to Germany and took the child back to the United States.<sup>38</sup> When the mother filed a petition in the United States, the court ordered the return of the child to Germany, stating that the child’s habitual residence had shifted with the most recent trip.<sup>39</sup> The court emphasized that, even if the father had been misled about the trip, it had been a mutually agreed-upon move, and therefore “amounted to a purpose with a sufficient degree of continuity to enable it properly to be described as settled.”<sup>40</sup> The court also considered the fact that the mother had not concealed where she was in Germany with the child, and had even made arrangements for the father to come to Germany to visit them.<sup>41</sup>

Since this type of agreement can constitute a shift in the child’s habitual residence, this is one possible way for victims of domestic violence to leave their batterer without violating the Convention. If the victim can get the abuser to consent to her and child leaving the country, even if the terms of the trip are unclear, it is possible that a Hague Convention petition, filed by the left-behind abusive father, could be defeated based on the fact that the habitual residence had shifted.<sup>42</sup> The success of this approach obviously depends on the specific circumstances of the arrangements and on which jurisdiction hears the petition.

The Third Circuit in *Feder v. Evans-Feder* also followed the general standard set forth in *In Re Bates* and *Friedrich I*, stating that the child’s habitual residence, “is a place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective.”<sup>43</sup> Unlike the Sixth Circuit in *Friedrich I*, the court found that the child’s circumstances in the new place as well as the parent’s shared intentions regarding the child’s presence must be considered.<sup>44</sup> Here, the parents had moved to Australia for six months with their four-year-old child. The mother argued that she never intended to remain in Australia permanently, and always believed she would leave if her marriage did not improve.<sup>45</sup> When she took their child back to the U.S., the father filed a Hague petition. The court found that although the mother did not intend to stay in Australia, the parents had agreed upon the

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<sup>33</sup> See *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) [hereinafter *Friedrich I*].

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 1402.

<sup>36</sup> See *Levesque*, 816 F. Supp. at 666.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 665-66.

<sup>42</sup> See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 649 (2000). Weiner warns that *Levesque*’s usefulness should not be overstated and that there are multiple reasons that this is a difficult way for domestic violence victims to circumvent the Convention’s habitual residence requirement.

<sup>43</sup> See *Feder*, 63 F.3d at 224.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*



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move and made arrangements to make a new home for themselves there. The court, in determining that Australia had become the child's habitual residence, considered the fact that six months spent in Australia is a significant amount of time for a four-year-old child, and that the child was enrolled in school. The court also noted that the lower court had erred in emphasizing the fact that the majority of the child's life had been spent in the United States and ignoring the fact that he had been in Australia immediately preceding the controversial return to the U.S. with the mother, and the filing of the Hague petition.<sup>46</sup>

In a recent case, *Mozes v. Mozes*, the Ninth Circuit summarized much of the case law surrounding the definition of habitual residence, categorized different relevant fact patterns, and drew its own conclusions regarding the role of the courts in determining habitual residence.<sup>47</sup> The court stated that, not only is a settled purpose to live in a new place important, but that a settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one.<sup>48</sup> The court also confronted the question of whether or not the parent's intentions should be a factor in the child's habitual residence, and found that, when intentions are relevant in the case, the intentions of the parents have to be considered. The court attributed this to the fact that it is the parents who usually decide where the child will live, and the child often has absolutely no role in this decision.<sup>49</sup> The court divided the various factual circumstances in which the question of habitual residence is discussed into three broad categories.

In the first instance, the parents decide to move their family to a new place but one parent has reservations about the move. Generally, when courts find that the family has taken all the necessary steps to abandon one habitual residence and take up another, the court is unwilling to let the one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.<sup>50</sup> In the second set of circumstances, one parent initially relocates the child from an established habitual residence for what is clearly intended to be a limited period of time, such as for vacation, but instead chooses to indefinitely stay there. In these cases, the Ninth Circuit concluded that courts have generally refused to find that the changed intentions of one parent led to a change in the child's habitual residence.<sup>51</sup>

The more challenging cases are those in which the petitioning parent had earlier consented to let the child stay abroad for an ambiguous amount of time. Sometimes the courts will find that if the parents had agreed to have the child stay indefinitely, there was a mutual abandonment of the prior habitual residence. In other cases, when the exact length of stay was left open, courts find that they cannot infer intent to abandon a previous habitual residence. The court reasons, that in these cases, the courts should examine the circumstances and defer to the district court's findings. The Ninth Circuit also has warned that the greater the ease with which habitual residence may be shifted, the greater incentive there is for parents to try. This goes against the Convention's purpose to prevent child abduction.<sup>52</sup>

As evidenced by the case law in both the United States and in foreign countries, it is not the amount of time spent in one country, but the quality of the time spent in the new country, that is determinative. Most courts look closely at the parent's shared intentions regarding moving or traveling with the child. In *Pesin v. Osorio Rodriguez*, the children were in Florida for twenty-three days, and the court found that their habitual residence had not shifted from Venezuela to the United States.<sup>53</sup> The court considered that the parents' settled purpose of the trip was a family trip to Florida, finite in its duration. They had packed only for a temporary visit rather than a permanent move; had purchased round-trip tickets; and the children were

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<sup>46</sup> See *id.*

<sup>47</sup> See *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

<sup>48</sup> The court does note that it is possible to effectively abandon a prior habitual residence without intending to occupy the next one for more than a limited period. One example of this is the case of *In Re Bates* where the family led a nomadic lifestyle. *Id.* at 1076.

<sup>49</sup> See *id.*

<sup>38</sup> *Id.* at 1077 (citing *Feder*, 63 F.3d at 224; *Walton v. Walton*, 925 F. Supp. 453, 457 (S.D. Miss 1996); *Prevot v. Prevot*, 855 F. Supp. 915, 920 (W.D. Tenn. 1994); *Harsacky v. Harsacky*, 930 S.W.2d 410, 415 (Ky. App. 1996); *Re F (A Minor)* (Child Abduction), 1 FAM. L. REP. 548, 555 (Eng. C.A. 1992)).

<sup>51</sup> *Id.* (citing *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1285 (S.D. Fla. 1999); *In re Morris*, 55 F. Supp. 2d 1156, 1159 (D. Colo. 1999); *Freier v. Freier*, 969 F. Supp. 436, 438 (E.D. Mich. 1996); *Flores v. Contreras*, 981 S.W.2d 246, 248 (Tex. App. 1998); *Brennan v. Cibault*, 227 A.D.2d 965, 965 (N.Y.A.D. 1996); *Toren v. Toren*, 26 F. Supp. 2d 240, 242 (D. Mass. 1998)).

<sup>52</sup> See *id.* at 1081.

<sup>53</sup> See *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277 (S.D. Fla. 1999).

enrolled for the entire school year in a Venezuelan school immediately prior to leaving for Florida.<sup>54</sup> Although the respondent had at one point enrolled the children in a school in Florida, the court determined that the parents lacked a shared intention to remain in Florida.<sup>55</sup>

Courts within the United States have issued conflicting decisions on whether the presence of domestic violence or coercion should be recognized in the determination of habitual residence. In *Ponath v. Ponath*, the court considered that the mother was coerced into staying in Germany rather than returning to the United States and stated that, “in the court’s view, coerced residence is not habitual residence within the meaning of the Hague Convention.”<sup>56</sup> The mother had testified that she and the minor child were detained in Germany against her wishes by means of verbal, emotional and physical abuse.<sup>57</sup> The court also stated that the concept of habitual residence must entail some element of purposeful design, often characterized as “settled purpose.”<sup>58</sup> The court agreed with other jurisdictions that while 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.”<sup>59</sup>

In *Tsarbopoulos v. Tsarbopoulos*, the court held that the “verbal and physical abuse of one spouse by the other is one of several factors in the Court’s determination of the existence of a ‘shared’ intent to make a place the family’s habitual residence.”<sup>60</sup> The court stated, “If this conduct is present in the marriage, it must be considered by the trial court in taking into account all the circumstances.”<sup>61</sup> The court considered that the verbal and physical abuse intensified during the couple’s time in Greece and the mother was almost completely isolated during her time there.<sup>62</sup> Although the family was in Greece for twenty-seven months, the court found that the mother did not acclimatize to Greece and, therefore, could not have made Greece her children’s habitual residence or joined her husband in his intent to do so.<sup>63</sup> The court took into account that the father dominated all decisions in the family’s life and controlled information in the marriage such that the mother lacked information regarding his true employment, as well as his intentions and actions taken by him to remain permanently in Greece.<sup>64</sup>

Other courts have refused to take any coercion or abuse into account when determining habitual residence. The Eighth Circuit completely rejected *Ponath* in *Nunez-Escudero v. Tice-Menley*, and cited *Friedrich I* for the proposition that the court must focus on the child, not the parents.<sup>65</sup> In this case, the mother, a U.S. citizen, took her child to the United States from Mexico, where she had resided with her Mexican husband. She argued that she had been a “virtual prisoner” in Mexico, and had no intention of living there. The court rejected her argument and said that, “to say the child’s habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child’s habitual residence is where the mother happens to be.”<sup>66</sup>

In *Friedrich I*, the court did not consider the alleged coercion that occurred which led to Mrs. Friedrich leaving Germany with her son and going to the United States. The court found that, even if it accepted the fact that Mr. Friedrich had forced Mrs. Friedrich and their son to leave the family apartment in Germany, their son’s habitual residence had not shifted to the United States.<sup>67</sup>

Another problem in deciphering the habitual residence case law is that, if a parent takes the child to a foreign country, the court in that country will be the one to decide which country is the habitual residence, not a court

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<sup>54</sup> See *id.* at 1286.

<sup>55</sup> See *id.*

<sup>56</sup> See *Ponath*, 829 F. Supp. at 368.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 367.

<sup>60</sup> See *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001).

<sup>61</sup> See *id.* (citing *Mozes*, 239 F.3d at 1080).

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995).

<sup>66</sup> See *id.*

<sup>67</sup> See *Friedrich I*, 983 F.2d at 1400-02.

in the United States. Foreign courts do not necessarily follow precedent set by courts in the United States or any other nation; thus, foreign determinations concerning what constitutes habitual residence are often conflicting. Because of these conflicts, some parents have chosen to go and take the child back after they were abducted from the United States so that they can have the habitual residence determined in a U.S. court. In *Meredith v. Meredith*, the mother took her minor child from Arizona on a visit to France, ultimately attempting to conceal the child's whereabouts from her father and establish permanent residency in England.<sup>68</sup> Nevertheless, the father was able to locate the child and brought her back to Arizona. The mother, who claimed that she resided in England, filed an action under the Convention in an Arizona court for the return of her daughter. The mother's petition was denied upon the court's finding that the child's place of habitual residence was and is Arizona and not England.<sup>69</sup>

## DEFENSES TO RIGHT OF RETURN<sup>12</sup>

There are several defenses under the Hague Convention that can be used to overcome the Convention's requirement that a child be returned to their state of habitual residence to have the custody case adjudicated. These defenses are contained in Articles 12, 13 and 20 of the Convention. It must be noted that these defenses only permit a court to exercise its discretion to decide not to return the child to the habitual residence, and are not mandatory.

Under the following narrowly defined circumstances, a foreign country may not order the return of the child. If one of these exceptions applies, the court of the country to which the child was taken may exercise its discretion not to order the return of the child. These exceptions include situations in which:

- More than one year has passed since the abduction and the filing of the application for return of the child, and the child is settled in the foreign country;
- The parent seeking the return was not exercising custody rights, or has consented or acquiesced to the removal or retention of the child;
- There is a risk that if the child were to be returned, the child would be exposed to harm, either physical or psychological, or an intolerable situation
- A child who is of an age to maturely express his/her desires objects to the return<sup>13</sup>
- The return violates the protection of human rights and fundamental freedoms of the foreign nation from whom return is requested. Furthermore, member countries may choose not to cooperate if there is a pending criminal trial against the removing parent.

### 1. Article 13(a): Exercising Custody Rights and Consent and Acquiescence

Under Article 13(a), a court can deny return if the petitioner was not "actually exercising" custody rights at the time of removal, or if she consented to the removal or retention. This is merely a corollary to the definition of a "wrongful removal" in Article 3.

The second part of Article 13(a) provides that, if a parent consents or subsequently acquiesces to the removal, the child does not necessarily have to be returned. There is conflicting case law interpreting what constitutes "acquiescence," but the general trend is for courts to limit the interpretation.<sup>70</sup> The abductor typically has the burden of proof of the consent defense and must show by a preponderance of the evidence that the petitioner consented to, or subsequently acquiesced to, the children either moving or staying with the respondent.<sup>71</sup> Parents who negotiate custody arrangements after the abduction and who later bring actions under the Convention are sometimes faced with this defense.

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<sup>68</sup> See *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991).

<sup>69</sup> *Id.*

<sup>70</sup> Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 149 (1997).

<sup>71</sup> See *Friedrich II*, 78 F.3d at 1067 (citing Hague Convention, Oct. 25, 1980, art. 13(a), T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html> and 42 U.S.C. §11603(e)(20)(B)).

Courts in the United States, England, and France have found acquiescence to be a subjective test.<sup>72</sup> The English House of Lords has held, “Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world’s perception of his intentions.”<sup>73</sup> In the French case of *Horlander v. Horlander*, the court held that the actions of a father who negotiated to create an overall settlement of custody and property should not be construed as acquiescence, overturning other decisions from France’s lower courts that accepted broad interpretations of acquiescence to avoid returning children.<sup>74</sup> The high court found that acquiescence is subjective, and refused to find acquiescence where the petitioner’s intention to acquiesce was not “unequivocal.”<sup>75</sup>

A number of courts have interpreted the defense quite narrowly. The court in *Friedrich II* held that “acquiescence under the convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written enunciation of rights; or a consistent attitude of acquiescence over a significant period of time.”<sup>76</sup> The court also said “subsequent acquiescence requires more than an isolated statement to a third party. Each of the words and actions of a parent during the separation are not to be scrutinized for a possible waiver of custody rights.”<sup>77</sup> The First Circuit found there was no acquiescence in a case in which the petitioner had failed to institute formal custody proceedings and had hand-written a note in which he purportedly acknowledged that the respondent could relocate with their child to the United States as long as the child flew back to Mexico for a few holidays each year. The Court found that this note, on its face, did not constitute a waiver of custody rights by the petitioner.<sup>78</sup>

## 2. Article 13(b): Grave Risk of Harm and Intolerable Situation

This is the most litigated exception. It provides that, if the return of the child would create a “grave risk of psychological harm or otherwise place the child in an intolerable situation,” the court can deny the return. The terms “grave risk” and “intolerable situation” are not defined anywhere in the Convention, but have been interpreted narrowly. Courts have applied the defense sparingly, keeping in mind that it has the potential to turn the court’s decision into one based on the merits of custody, or a “best interest” analysis.<sup>79</sup> For instance, the implementing legislation in the United States, the International Child Abduction Remedies Act (ICARA)<sup>80</sup>, requires this defense to be proven by clear and convincing evidence.<sup>81</sup> Drafters intended this defense to apply to not just a serious, but only to a grave risk, such as physical or sexual abuse of the child.<sup>82</sup>

This may be the best defense under the Convention for victims of domestic violence who flee with their child to another country, but a U.S. or foreign court will not necessarily accept it. When the Convention was drafted, the idea that the abductor may be a victim of domestic violence who flees to another country to escape her abuser was not discussed. The Convention was created to discourage abductions by parents who either lost, or would lose, custody. It was not considered that the abductor would be the primary caretaker.<sup>83</sup> More recently, courts have had to make decisions in cases that involve primary caretakers abducting their children to escape abuse. This has led to an uneven body of U.S. and foreign case law analyzing the Article 13(b) defense in relation to domestic violence.<sup>84</sup>

<sup>72</sup> *Pesin*, 77 F. Supp. 2d at 1288.

<sup>73</sup> *Re H and Others*, 2 W.L.R. 563, 573B (1997) (citing *Friedrich II*, 78 F.3d at 1060; *Wanninger v. Wanninger*, 850 F. Supp. 78 (D. Mass. 1994); *Horlander v. Horlander*, 1992 Bull. Civ. I, No. 91-18.177).

<sup>74</sup> See *Horlander v. Horlander*, 1992 Bull. Civ. I, No. 91-18177.

<sup>75</sup> See *id.*

<sup>76</sup> See *Friedrich II*, 78 F.3d at 1070.

<sup>77</sup> See *id.* (citing *Wanninger*, 850 F. Supp. at 81-82).

<sup>78</sup> *Whallon v. Lynn*, 230 F.3d 450, 461 (1st Cir. 2000).

<sup>79</sup> See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 27 (1994).

<sup>80</sup> International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. 11601-11610).

<sup>81</sup> 42 U.S.C. 11603(e)(2)(A).

<sup>82</sup> Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One*, 20 HOUS. J. INT’L L. 141, 151 (1997) (citing the Hague Convention, 51 Fed. Reg. at 10, 510).

<sup>83</sup> See Merle Weiner, *Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RIGHTS L. REV. 275, 278 (2002).

<sup>84</sup> See *id.* at 277-80. Weiner states that between July 2000 and January 2001, seven of the nine cases decided by the U.S. Courts of Appeals involved an abductor who alleged she was a victim of domestic violence. Weiner believes that in some of

Although it is rare, in some cases the courts in the United States have denied the left-behind parent's petition to return the child. The return may be denied due to a pattern of violence or an extreme situation that clearly threatens the child. The First Circuit in *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000), reversed and remanded the district court's decision to grant the petitioner's request for return of the child, based upon the father's pattern of violence. This included extensive abuse towards his wife, as well as fights and threats against other people, including a fight with his son and a threat to kill a young neighbor.<sup>85</sup> The First Circuit found that the district court erroneously had required a showing of an "immediate, serious threat" to the children under Article 13(b). The Court said that the "Convention does not require that the risk be 'immediate,' only that it be grave."<sup>86</sup>

The First Circuit also discussed the potential use of the "undertakings approach" that has been adopted by a number of jurisdictions. "Undertakings" are steps that can be taken by the petitioner or country of habitual residence to ensure the child's safety and well-being should he or she be returned to that country under the Convention for a custody determination. Examples of undertakings include financial assistance, a place to stay that the alleged abuser cannot enter, and an alternate temporary caretaker.<sup>87</sup> The court in *Walsh* stated "a potential risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings."<sup>88</sup> In this case, however, it was decided that there was no way, even with undertakings, to return the children without exposing them to grave risk of physical and psychological harm.<sup>89</sup> It should be noted that this was an extreme set of facts that included a severe and extensive pattern of spousal abuse by the father. It included beating his wife while she was six months pregnant, as well as abuse towards others.<sup>90</sup> A doctor in the United States diagnosed the daughter as having post-traumatic stress disorder when she was brought to the United States, which later went into remission. He believed that she would have a relapse if she returned to Ireland, where she had previously lived with her family.<sup>91</sup>

The court in *Walsh* considered the affect of spousal abuse on children and said that the district court had "inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse."<sup>92</sup> The court cited the fact that credible literature established that serial spousal abusers are also likely to be child abusers, and that both state and federal law have recognized that the children are at increased risk of physical and psychological injury when they are in contact with a spousal abuser.<sup>93</sup>

The First Circuit, in *Danaipour v. McLarey*, has also held that sexual abuse of a child satisfies both prongs of the Article 13(b) defense: intolerable situation and grave risk.<sup>94</sup> The court found that the district court had

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these decisions, the courts have adopted novel interpretations in an effort to avoid applying the Convention to these abductors. Weiner argues that while the courts may have reached the correct result, their departure from precedent (including foreign cases) and their rejection of uniformity are mistakes that could potentially affect the strength of the Convention as a whole.

<sup>85</sup> See *Walsh*, 221 F.3d at 220.

<sup>86</sup> See *id.* at 218.

<sup>87</sup> See *C v. C*, 2 All E.R. 465 (Eng. C.A. 1989). See also, *Korowin v. Korowin*, Dist. Ct. Horgen (1992) (observing that Convention would require return of mother in these specific circumstances although Court did not order it and noted that husband was willing to provide housing and costs while custody proceedings were pending in Michigan); *PF v. MF*, (1992) 2 Ir. S.C. 390 (noting Court might go further in an appropriate situation and require father to prove he had made necessary arrangements for care of family).

<sup>88</sup> See *Walsh*, 221 F.3d at 218. Note that not every jurisdiction has concluded that undertakings can be a sufficient reason to return a child after finding that there is a grave risk of harm. The Third Circuit, in remanding a case to the district court for a determination of whether the mother could establish an Article 13(b) defense, held that if the court ordered the return of the child, but also determined that an unqualified return order would be detrimental to the child, the court should investigate the adequacy of the undertakings by the petitioner to ensure that the child does not suffer short-term harm. *Feder*, 63 F.3d at 226.

<sup>89</sup> See *Walsh*, 221 F.3d at 219.

<sup>90</sup> See *id.* at 209.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> The court in *Tsarbopoulos*, holding that the Article 13(b) defense applied, cited the First Circuit in *Walsh* for having ruled, *inter alia*, that the exposure of the children to a spousal abuser would expose the children to the risk of abuse. 176 F. Supp. 2d at 1059. The court in this case stated that spousal abuse "is a factor to be considered in the determination of whether or not the Article 13(b) exception applies because of the potential that the abuser will abuse the child." *Id.*

<sup>94</sup> See *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002).

erred in determining that the Convention did not require it to determine the issue of sexual abuse in ordering a mother to return to Sweden with her children for a forensic evaluation. The appeals court remanded the case for the district court to determine if there was any sexual abuse by the father towards his children while living in Sweden. The First Circuit relied on the United States State Department's legal analysis of Article 13(b) which states that "[a]n example of an 'intolerable situation' is one in which a custodial parent sexually abuses a child."<sup>95</sup> The court in *Danaipour* stated that the district court had incorrectly relied on the assumption that it could impose undertakings that would keep the children from being exposed to any grave risk of harm or an intolerable situation.<sup>96</sup> The court cautioned that the use of undertakings should be limited in scope, and noted that the concept is a judicial construct, based neither in the Convention, nor in the implementing legislation of any nation.<sup>97</sup> The Court cited *Walsh* and admitted that undertakings can be "an important tool for courts to comply with the Convention's strong presumption of a safe and speedy return of the wrongfully removed child."<sup>98</sup> But it also stated that there are limits to the court's ability to use undertakings to avoid an Article 13(b) defense, and that the court entertaining the petition "must recognize the limits on its authority and must focus on the particular situation of the child in question in order to determine if the undertakings will suffice to protect the child."<sup>99</sup>

The Second Circuit also limited the use of undertakings as it expanded the Article 13(b) defense in *Blondin v. Dubois*.<sup>100</sup> While the court recognized that returning the children to the father would expose them to a "grave risk of harm" based upon the abuse that had occurred, it did remand the case back to the district court for a more "complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they...were wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody."<sup>101</sup> The Second Circuit found on its second hearing that France, the country of habitual residence, could not do anything to provide the children with the necessary protection from a grave risk of harm.<sup>102</sup> There had been a serious history of abuse, and in the course of seven years, the father had repeatedly beaten and threatened to kill both his wife and his daughter.<sup>103</sup> The district court had examined all social services that could be offered to the children in France, as well as the husband's financial assistance, his agreement not to make contact, and the French government's agreement not to prosecute Dubois for abduction or forgery of the children's passports. The Second Circuit accepted the district court's decision that any arrangements would fail to mitigate the grave risk of harm to the children, because returning to France under any circumstances would cause them psychological harm.<sup>104</sup>

The Supreme Court of Connecticut followed the Second Circuit's lead and remanded the case of *Turner v. Frowein* for a more complete examination of possible undertakings.<sup>105</sup> The court then reversed the trial court's decision denying the return of a child after its finding that his father had sexually abused the child. The Connecticut Supreme Court held that the trial court's finding on the sexual abuse was proper, but that the court had failed to examine whether the child could be returned with certain undertakings provided. The court stated that, "the trial court offered no explanation for why the child should not be returned to Holland in the temporary custody of some appropriate and suitable party, other than the defendant, with adequate guarantees of child protection."<sup>106</sup>

The Second Circuit's interpretation of the Article 13(b) defense is not followed by all jurisdictions. The Eighth Circuit specifically rejected the idea that the Article 13(b) exception applies only if the government

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<sup>95</sup> *Id.* at 37 (citing *Blondin v. Dubois*, 238 F.3d 153, 162 n.10 (2nd Cir. 2001) [hereinafter *Blondin III*]).

<sup>96</sup> *Id.* at 53.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 55.

<sup>99</sup> *Id.*

<sup>100</sup> *Blondin III*, 238 F.3d 153 (2nd Cir. 2001).

<sup>101</sup> *Blondin v. Dubois*, 78 F. Supp. 2d 283, 284 (S.D.N.Y. 2000) [hereinafter *Blondin II*] (citing *Blondin v. Dubois*, 189 F.3d 240, 242 (2nd Cir. 1999) [hereinafter *Blondin I*]).

<sup>102</sup> *Blondin III*, 238 F.3d at 162.

<sup>103</sup> *Blondin II*, 78 F. Supp. 2d at 283.

<sup>104</sup> *Blondin III*, 238 F.3d 153 at 152. Although the Second Circuit denied the petition for return, the court did use a strict standard for proving the Article 13(b) defense, applying the standard in *Friedrich* to determine whether there was a grave risk to the children. *Id.* at 162-63.

<sup>105</sup> *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

<sup>106</sup> *Id.*

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agencies and courts of the habitual residence are unable to protect the child if he is returned to that country.<sup>107</sup> The court said that, “[i]t is clear that Article 13(b) 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. If that were all that were required, the drafters of the Convention could have found a clear, more direct way of saying so.”<sup>108</sup>

Courts in the United States have generally ordered the return of the child when the Article 13(b) defense is argued. While the courts do not want to enter into a best interests analysis, it is unclear what the exact standard for examining the defense should be. In *Tahan v. Duquette*, the court, in holding that the child must be returned to his country of habitual residence, held that psychological profiles and evaluations of parental fitness were inappropriate on a return petition, and that the “Article 13(b) inquiry was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding.”<sup>109</sup> The court did acknowledge, however, that the trial court’s holding that the proper scope of inquiry precludes any focus on the people involved is too narrow and mechanical, and that the court should focus on the child’s well-being and analyze “the surroundings to which the child is to be sent, and the basic personal qualities of those located there.”<sup>110</sup>

When applying this defense to victims of domestic violence, it is more likely that courts will only choose not to order return when the abuse or violence directly affects the child. Courts generally rely on the courts in the place of the child’s habitual residence to sort out the claims of violence or abuse, and to take the necessary measures.<sup>111</sup> The First Circuit in *Whallon v. Lynn* applied the language regarding “grave harm” from *Walsh*, and used the extreme conduct cited there as a bar that must be reached for there to be “grave risk of harm.”<sup>112</sup> The court found that the abuse with which the petitioner was accused did not rise to the level of the conduct of the petitioner-father in *Walsh*.<sup>113</sup> While the mother had been abused verbally and physically, and the petitioner’s stepdaughter had been abused verbally, there were no allegations that the petitioner had abused his five-year-old daughter.<sup>114</sup> The First Circuit also found that the district court had correctly considered the alleged psychological harm to the young child in question, and had concluded correctly that any such harm did not rise to the level required to sustain the Article 13(b) defense.<sup>115</sup> The court also noted that, while a separation of the child from the mother would undoubtedly be difficult, that type of harm was not “*per se* the type of psychological harm contemplated by the narrow exception under Article 13(b).”<sup>116</sup>

In *Tabacchi v. Harrison*, a woman’s husband extensively physically abused her. She eventually left Italy where they were living and took their child to the United States.<sup>117</sup> When she raised the Article 13(b) defense, citing her husband’s domestic violence, the court rejected her argument. The court said that the “primary risk of physical harm is to Harrison [the mother], not to [the child],” and noted that the child had not been hurt during any of the altercations.<sup>118</sup>

Although some foreign courts have made decisions denying the return, they have also generally refused to accept the defense.<sup>119</sup> One Canadian example of a decision to return is the case of the Canadian decision in *Pollastro v. Pollastro*.<sup>120</sup> In that case, the court denied the return of the child based upon the father’s physical abuse of the mother, despite the fact that there was no evidence that the son had ever been abused. The judge

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<sup>107</sup> *Nunez-Escudero*, 58 F.3d at 377.

<sup>108</sup> *Id.* (citing *Tahan v. Duquette*, 613 A.2d 486, 489 (N.J. Super. A.D. 1992)).

<sup>109</sup> *Tahan*, 613 A.2d at 489.

<sup>110</sup> *Id.*

<sup>111</sup> See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 657-58 (2000).

<sup>112</sup> *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000).

<sup>113</sup> *Id.* at 460.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Tabacchi v. Harrison*, NO. 99-C4130, 2000 WL 190576, 13 (N.D. Ill. Feb. 109, 2000).

<sup>118</sup> *Id.*

<sup>119</sup> See e.g., *Re S*, 3 FCR 43 (Eng. C.A. 2002) (finding that the child’s return to Israel, while creating “very real and worrying problems which will confront the mother and daughter,” did not produce a situation that is intolerable); *Re B*, 2 FCR 531 (C.A. 2001).

<sup>120</sup> *Pollastro v. Pollastro*, [1999] D.L.R. (4th) 32 (Ont. Ct. App.).

determined that returning a child to a violent environment placed him in an intolerable situation, as well as exposed him to a serious risk of psychological and physical harm.<sup>121</sup> Although the father had never abused his son in the past, the court found that the father's ongoing hostility, irresponsibility, and irrational behavior put him at serious risk of personal harm.<sup>122</sup> The court also took account of the fact that the mother was the only capable parent, creating a situation in which the child's interests were "inextricably tied to her psychological and physical security."<sup>123</sup>

The same Canadian court came to the opposite conclusion in *Finizio v. Scoppio-Finizio*, constructing some boundaries in its "grave risk" analysis.<sup>124</sup> In this case, there had only been one violent incident towards the mother by the father, and no evidence that the children had ever been hurt. Although the court acknowledged that it is possible for a physical attack on the mother to cause psychological harm to her children, the court stated that this situation was, "far from the terrifying situation chronicled...in Pollastro."<sup>125</sup>

The narrowest interpretation of the Article 13(b) defense is the 6th Circuit's decision in *Friedrich v. Friedrich (Friedrich II)*.<sup>126</sup> The court stated that a grave risk of harm could exist in only two situations. The first is when return of the child puts the child in "imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine or disease." The second is in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.<sup>127</sup> In *Friedrich II*, the respondent argued that the child would be subjected to grave psychological harm if he returned to Germany, as the child had grown attached to family and friends in Ohio.<sup>128</sup> The respondent also hired an expert psychologist who testified that returning the child to Germany would be traumatic and difficult for him, since he was currently happy and healthy in America with his mother. There was no allegation of abuse, or anything in the record to indicate that life in Germany would be particularly difficult or harmful for the child.<sup>129</sup> The Court made it clear that the return of the child did not depend upon which place would be a better home for the child to grow up. It stated that the "exception for grave harm to the child is not license for a court of the abducted-to country to speculate on where the child would be happiest."<sup>130</sup> The court also noted that if the child were to be returned to a country that was considered dangerous or a bad place to grow up, the court would expect the court of that country to respond accordingly and award custody to the parent in the other country. The Sixth Circuit also stated that international precedent, as well as the U.S. State Department's interpretation, supported their restrictive reading of the grave harm exception.<sup>131</sup>

Several courts have considered the potential separation of a child from a parent to whom he or she is attached as harm that generally does not rise to the level of the Article 13(b) defense. The Eight Circuit in *Nunez-Escudero v. Tice-Menley* found that the district court had incorrectly factored in the possible separation of the infant from his mother in assessing whether the return would constitute a grave risk of physical or

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<sup>121</sup> *Id.* at 26.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Finizio v. Scoppio-Finizio*, [1999] 46 O.R. (3d) 226 (Ont. Ct. App.).

<sup>125</sup> *Id.*

<sup>126</sup> *Friedrich II*, 78 F.3d 1060.

<sup>127</sup> *Id.* at 1069. The decision in *Friedrich II* has recently been followed in *March v. Levine*, 249 F.3d 462 (6th Cir. 2001). The court held that, despite a default judgment obtained against the father after the disappearance of their daughter, there was no grave risk of returning the children to their father. The Sixth Circuit held that the inference that could be drawn from that judgment (that the father might hurt his children) "did not rise to the level of an imminent risk of grave harm." *Id.* at 472. The court also noted that the respondents had not shown that Mexico, the country of habitual residence, was incapable or unwilling to protect the children. *Id.*

<sup>128</sup> *Id.* at 1067.

<sup>129</sup> *Id.* at 1068.

<sup>130</sup> *Id.* at 1068.

<sup>131</sup> The Sixth Circuit cited the international cases of *Thomson v. Thomson*, 119 D.R.L. (4th) 253 (Can. 1994) (finding exception applies only to harm "that also amounts to an intolerable situation." *Id.* at 286); *In re A.*, 1 F.L.R. 365, 372 (Eng. C.A. 1988) (finding harm required is "something greater than would normally be expected from taking a child away from one parent and passing him to another"). The State Department's analysis included the statement that the phrase "intolerable situation" was "not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494,10510 (March 26, 1986).



psychological harm, or place him in an intolerable situation.<sup>132</sup> The Court based its reasoning on a narrow interpretation of the 13(b) clause from a Canadian court. The Canadian court had found that, although the word ‘grave’ modifies ‘risk’ and not ‘harm,’ it must be read in conjunction with the clause, “or otherwise place the child in an intolerable situation.” The use of the word ‘otherwise,’ then leads to the conclusion that the physical or psychological harm must be harm that also amounts to an “intolerable situation.”<sup>133</sup> The Eighth Circuit remanded the case to give the respondent another opportunity to present evidence that the return of the child would subject him to a grave risk of harm or otherwise place him in an intolerable situation. The court instructed the district court not to consider evidence relevant to custody or the best interests of the child.<sup>134</sup> The Fifth Circuit came to the same conclusion in *England v. England*, holding that the separation of a child from her parent should not be considered in the grave risk analysis.<sup>135</sup>

There are exceptions to the concept that the potential harm of a child’s separation from a parent should not be considered in a grave risk analysis. A district court in Arizona held that the child in question should not be returned to his father, the petitioner, because he faced a graver risk of psychological harm if he was removed from his mother for any period longer than a few weeks.<sup>136</sup> The court acknowledged that the respondent would not be able to make the requisite showing under the Sixth Circuit’s analysis in *Friedrich*, but the court cited in support of its holding an Eighth Circuit case in which the court suggested the possibility of evidence of potential harm to a child as a result of separation from a primary caregiver, as well as a German case where the court held that a grave risk existed if the child was returned because of an intensive bond between the mother and child.<sup>137</sup>

In the United Kingdom it is not uncommon for respondents to take one step further and argue that a parent who is unhappy because of the return would also make an unsuitable parent, creating an intolerable situation or grave risk for the child under her care.<sup>138</sup> In *P v. P*, the mother (respondent) argued that because she would be forced to return to New Jersey from England with the child, she would become isolated and depressed, as compared to staying in England where she was surrounded by her family and friends.<sup>139</sup> She argued that her children were still of the age that they were acutely sensitive to their mother’s feelings and would suffer psychological harm if forced to return with the mother to New Jersey. The United Kingdom court held that the argument that an “unhappy mother means unhappy children” was not valid in a Hague Convention hearing, and belonged in the custody dispute in the country of habitual residence. The judge stated that this type of argument is “beside the point,” because the Convention assumes that the courts in all of its signatories are capable of handling such concerns and when they adjudicate custody cases on their substantive merits.

The English Court of Appeal in *In Re C* came to the same conclusion in a case where the mother attributed her children’s risk of harm to the uncertainties and anxiety that would come from splitting up her family.<sup>140</sup> The mother would be forced to return with the children to the United States while leaving behind the children’s stepfather, who was unable to enter the United States because of immigration problems. The lower court judge had found that the mother would be “significantly handicapped from performing the functions expected of a mother of children of this age,” due in part due to the stress of leaving her husband and the risk that the mother would be prosecuted in California for the removal of the children.<sup>141</sup> The Court of Appeals overturned the lower court’s decision to deny the return, finding that the lower court had given undue weight to the slight evidence of a risk of psychological harm to the children. Moreover, as the potential splitting up of the family and the possible criminal prosecution of the mother were situations created by the mother, the

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<sup>132</sup> *Nunez-Escudero*, 58 F.3d at 377.

<sup>133</sup> *Id.* at 374 (citing *Thomson v. Thomson*, 119 D.L.R.4th 253, 286 (Can. 1994)).

<sup>134</sup> *Id.* at 379. The Court in *Dalmasso v. Dalmasso*, 9 P.3d 551 (Kan. 2000), following the Eighth Circuit’s reasoning concerning the level of potential harm to the child, granted the return of the child. The court found that two incidents of spousal abuse by the petitioner towards his wife, and his wife’s testimony that the petitioner had hit their children with a belt during meals, was not enough to demonstrate an Article 13(b) defense. The court did note that there was evidence that the mother had also used corporal punishment on her children. *Id.* at 763.

<sup>135</sup> *England v. England*, 234 F.3d 268-69 (5th Cir. 2000).

<sup>136</sup> *Steffen F. v. Severina P.*, 966 F. Supp. 922 (D. Ariz. 1997).

<sup>137</sup> *Id.* at 928.

<sup>138</sup> The judge in *P. v. P.* stated that, “[a]rguments of that kind are commonly raised within this jurisdiction” but are really “beside the point.” 1 F.L.R. 155 (1992) (High Ct. Fam. Div.).

<sup>139</sup> *Id.*

<sup>140</sup> *Re C* (Abduction: Grave Risk of Psychological Harm), 1 Fam. L. Rep. 1145 (Eng. C.A. 1999).

<sup>141</sup> *Id.*

court concluded that it would be wrong to allow her to rely upon adverse conditions that she herself had created. While the lower court had found evidence that the father had hit the children in the past, the judge concluded that there was no grave risk of physical harm if the children were returned, as any future contact with the father was to be supervised by the U.S. court. The English Court of Appeal stated their intervention cannot also reduce the risk of psychological harm.

Article 13(b) also allows for a court to refuse returning a child if the child has “attained an age and degree of maturity at which it is appropriate to take account of its views” and objects to being returned. Nevertheless, this defense has been construed narrowly. A California court ruled that a twelve-year-old girl was not of sufficient age and maturity for the court to take her views into account.<sup>142</sup> In *Tahan v. Duquette*, the court, after reviewing the evidence from a psychologist who had interviewed the nine-year-old girl in question, held that “this standard simply does not apply to a nine-year-old child.”<sup>143</sup> The Fifth Circuit in *England v. England* found that a thirteen-year old girl was not mature enough for the court appropriately to consider her views under the Convention, and stated that, like the grave risk exception, the “age and maturity” exception is to be applied narrowly.<sup>144</sup> The court also pointed out that it is the party opposing the child’s return who has the burden of establishing the child’s maturity by a preponderance of the evidence, and not that of the petitioner to show that the child is too immature to have his or her views considered.<sup>145</sup> In determining the child’s maturity in this case, the court considered the fact that she had had four mothers in twelve years, had been diagnosed with Attention Deficit Disorder, had learning disabilities, took Ritalin regularly, and was scared and confused by the circumstances producing the litigation.<sup>146</sup>

A Swiss court reversed a lower court that had denied a return based upon the objections of two children who were aged twelve and fourteen. The court held that the circumstances of the children and the reasons for their objections needed to be more closely evaluated.<sup>147</sup> The English court in *P. v. P.*, had said that the Convention assumes that courts of the requesting state are “equally capable of ensuring a fair hearing,” and having the child’s wishes about custody considered there.<sup>148</sup> The Court held that it was a matter of the judge’s discretion, and not in the respondent’s right, to have the child’s objections heard by the court. The court declined to hear the eight-year-old girl’s objections based upon the fact that there was no advantage to be gained and valuable time would be lost. Some courts have also refused to recognize certain types of objections, such as the child’s desire simply to stay with the abductor, or a desire that may have been influenced by the abductor.<sup>149</sup>

### 3. Article 20: Fundamental Principles Relating to Human Rights and Fundamental Freedoms

This defense appears broad, but has been interpreted narrowly. Few courts, if any, have accepted a defense invoking Article 20.<sup>150</sup> According to the State Department, the provision was meant to be “restrictively interpreted and applied...on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.”<sup>151</sup> It is not meant to pertain to international agreements dealing

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<sup>142</sup> See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 30 (1994) (citing *Bickerton v. Bickerton* (Super. Ct. Contra Costa Cty, July 17, 1991)).

<sup>143</sup> *Tahan*, 613 A.2d at 490.

<sup>144</sup> *England*, 234 F.3d at 272.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 273.

<sup>147</sup> *Id.* (citing *Rajaratnam v. Rajaratnam-Hertig*, Higher Ct. (Zurick, Switz.) (July 18, 1988)).

<sup>148</sup> *P. v. P.* 1 F.L.R. 155 (1992) (High Ct. Fam. Div.).

<sup>149</sup> See e.g., *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (N.Y. Sup. 1989) (finding that nine-year-old child had not attained age and degree of maturity to warrant court to take account of his view. Although the child said he wanted to stay in the U.S., the court found that “this appeared to be very much the result of his being wooed by this father during the visitation.”); *In Re S*, 2 All E.R. 683, 690 (C.A. 1992).

<sup>150</sup> As of 1997 the Article 20 defense had successfully been invoked only twice in internationally cases where the constitutionality of the Convention itself was challenged—and not at all in the United States. *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 614 n.36 (E.D. Va. 2002) (citing *Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (17-21 March 1997), Permanent Bureau of the Hague Conference on Private International Law, 78 (1997)).

<sup>151</sup> Department of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, Pub Notice 957, 51 Fed Reg. 10,494,10,510 (1986).

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with human rights and fundamental freedoms, but to the forum state's internal laws.<sup>152</sup> In a recent case, the respondent argued that he had been denied due process in the Colombian courts when the Family Court there had decreed the custody arrangements between him and his former wife, and later ordered increases in support payments without notice. While noting that the facts disclosed no violations of due process rights of either of the parents, the court held that Article 20 does not require the courts to compare the due process safeguards in the petitioner's country, with those in the respondent's country or with some ideal notion of due process.<sup>153</sup> Victims of domestic violence will probably not be able to use this defense successfully due to its limited interpretation, as well as the fact that most countries do not incorporate freedom from domestic violence into a fundamental principle of human rights.<sup>154</sup>

### Application of the Convention

#### A. MECHANICS

The child must be below the age of sixteen for the Convention to apply.<sup>155</sup> Also, if the petition is not brought within one year from the date of the wrongful removal or retention, the court has discretion not to order the return of the child if he or she is "now settled in its new environment."<sup>156</sup> A parent does not have to have a custody order in place to use the Convention.

#### B. INTERNATIONAL CHILD ABDUCTION REMEDY ACT (ICARA)<sup>157</sup>

The International Child Abduction Remedies Act (ICARA) is a federal implementing mechanism that allows parents to seek relief under the Hague Convention. It does not convey any substantive rights itself.<sup>158</sup> There is also no requirement under the Convention or ICARA that discovery be allowed, or that an evidentiary hearing be conducted, and the court is given the authority to resolve these cases without resorting to a plenary evidentiary hearing or a full trial on the merits.<sup>159</sup> Therefore, if there is a dispute over the evidence to be used for or against a Hague petition, the court may resolve this dispute without holding a hearing to consider the parties' arguments.

#### C. CRIMINAL CHARGES

There is no provision under the Convention for criminal charges. The United States implemented the International Parental Kidnapping Crime Act of 1993 (IPKCA) to make it a criminal offense to remove or retain a child who has been in the United States outside the U.S. borders.<sup>160</sup> The left-behind parent must have had "parental rights" which, for purposes of the Act, means physical custody that can arise by "operation of

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<sup>152</sup> Elisa Perez-Vera, Explanatory Report, in Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426, 462 (1982) [hereinafter Perez-Vera Report]. The *Perez-Vera* Report states, "[t]his particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently...it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles." *Id.* Ms. Perez-Vera is the official Conference reporter for the Hague Convention. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986).

<sup>153</sup> *Escaf*, 200 F. Supp. 2d at 614.

<sup>154</sup> See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 665-66 (2000). Weiner contends that victims of domestic violence will have difficulty making a successful argument under Article 20 since domestic violence has only begun to be discussed as a violation of international law. A victim from the United States will have trouble making the argument as well, since there is no provision in the Constitution that people have a right to be free from private violence or its effects.

<sup>155</sup> Hague Convention, Oct. 25, 1980, art. 4, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

<sup>156</sup> *Id.* at art. 12

<sup>157</sup> International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. 11601-11610).

<sup>158</sup> *Mohsen v. Mohsen*, 715 F. Supp. 1063, 1064 (D. Wyo. 1989)

<sup>159</sup> ALR citing ICARA, § 2(a)(4), 6, 42 U.S.C.A §11601(a)(4), 11605; International Child Abduction Convention, Arts. 2, 11, 14, 18, 1988 WL 411501; *March v. Levine*, 249 F.3d 462 (6th Cir. 2001).

<sup>160</sup> 18 U.S.C § 1204(a).

law, court order, or legally binding agreement of the parties.”<sup>161</sup> The Act also includes an affirmative defense for a defendant fleeing an incidence or pattern of domestic violence.<sup>162</sup>

It is possible to bring criminal charges against the abductor outside of the Hague Convention. In considering whether to exercise this option in the case of an international abduction, a number of factors should be considered. It is possible that the threat of criminal charges will prompt the parent to return the child, but it is also possible that it will drive the parent into hiding.

The U.S. State Department advises parents to consider that, while the parent may have some degree of control over an ongoing civil procedure, they may not be able to affect the course of criminal action once the charges are filed.<sup>163</sup> While law enforcement authorities in the U.S. and some foreign countries may be valuable sources of information and assistance, they also may be generally unfamiliar with international child abduction. Also, neither extradition nor prosecution guarantees the return of the child, and, in some cases, may complicate, delay, or jeopardize return of the child. The primary job of the prosecutors is not to obtain return of the child, and there may be conflicting interests once a criminal prosecution begins. The parent should consider the potential reaction of the abductor to the threat of criminal prosecution, and whether it might cause the abductor to go into hiding. If a parent brings criminal charges, she must also consider whether she is prepared to participate in the prosecution if the abductor is ultimately brought to trial, including testifying against him, and possibly having her child’s father be incarcerated.

### D. CRIMINAL CHARGES: STEPS THAT CAN BE TAKEN

The U.S. State Department describes the following possible options for bringing criminal charges against the abductor.<sup>164</sup>

#### 1. State Arrest Warrant

A parent can contact her local prosecutor or law enforcement authorities to request that the abducting parent be criminally prosecuted and an arrest warrant issued, if state law provides for this. In some states, child abduction or custodial interference is a misdemeanor, but in many states it may be a felony depending on the circumstances of the removal.<sup>165</sup> If the parent is able to obtain a state warrant, the local prosecutor can contact the FBI or the United States Attorney to request the issuance of a federal Unlawful Flight to Avoid Prosecution (UFAP) warrant for the arrest of the abductor.<sup>166</sup> The Federal Parental Kidnapping Prevention Act of 1980 provides for the issuance of the warrant.<sup>167</sup>

#### 2. Federal Warrant/Investigation

The abduction could also be a federal offense under the International Parental Kidnapping Crime Act (IPKCA).<sup>168</sup> An unlawful retention after 1993 could violate the statute, even though the actual removal of the child may have occurred before the date of enactment. The FBI is responsible for investigating the abduction.

If the abductor is a U.S. citizen and the subject of a federal arrest warrant, the FBI or the United States Attorney’s office can ask the Department of State’s Passport Office to revoke the person’s United States

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<sup>161</sup> 18 U.S.C. §1204(a)(2)(B).

<sup>162</sup> 18 U.S.C. § 1204(c).

<sup>163</sup> <http://travel.state.gov/int'lchildabduction.html>.

<sup>164</sup> *Id.*

<sup>165</sup> See Breaking Barriers, *Custodial Interference Chapter*

<sup>166</sup> For more information, see Department of Justice, “United States Attorneys’ Manual,” Title 9: Criminal Resource Manual, 1962 Unlawful Flight to Avoid Prosecution (October 1997) at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01962.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01962.htm).

<sup>167</sup> Federal Parental Kidnapping Prevention Act, 28 USC § 1738A (2004).

<sup>168</sup> International Parental Kidnapping Crime Act of 1993, 103 P.L. 173; 107 Stat. 1998 (1993).

passport.<sup>169</sup> If the parent only has U.S. citizenship, when his passport is revoked by the Department of State, he becomes an undocumented alien in a foreign country. Some countries may deport an undocumented alien or make it difficult for them to remain in the country. This option can be useful, but it also might make a parent choose to flee with the child instead of communicating with the left-behind parent.

If the abductor is not a U.S. citizen, the existence of a federal warrant can still be helpful. It may encourage the parent to return the child voluntarily, so that the outstanding warrant will not interfere with his ability to travel to the United States. This is particularly true for abducting parents who need to travel to the United States for business or other related reasons. The warrant also serves to inform the foreign government that the abduction of the child is a violation of U.S. law and the abductor is a federal fugitive. A warrant is also needed if the parent wishes to have authorities seek extradition of the abductor from a foreign country.

### **3. Accomplices/Agents of Abductor**

It is also possible, under some state laws, to take legal action against agents or accomplices to abduction. A parent should consider whether this might be helpful in locating or bringing about the return of her child.

### **4. Extradition**

The State Department warns that extradition is rarely a viable approach in international child abduction cases. The United States Justice Department is responsible for pursuing extradition of wanted persons, and national law enforcement in other countries regularly cooperates in locating and apprehending international fugitives. Extradition is used only in cases that prosecutors believe can be successfully prosecuted due to the sufficiency of the evidence. Also, extradition only applies to the abductor, not to the abducted child. There is no guarantee the child will be returned if the alleged abductor is extradited. There is also a risk that the parent may hide the child with a friend or relative in the foreign country.

The offenses of parental child abduction or custodial interference are covered in only a few of the extradition treaties now in force between the United States and more than 100 foreign countries. Most of these treaties list all covered offenses, and were negotiated before international child abduction became widely recognized. Therefore, there is no valid argument under the same older treaties, that parental child abduction is a covered offense.<sup>170</sup> Newer treaties negotiated by the United States often contain a “dual criminality” provision, which means that, if an offense is a felony in both countries, it is covered in the treaty. If the underlying conduct involved in parental child abduction or custodial interference is a felony in both countries, then that conduct is an extraditable offense under an extradition treaty with a dual criminality approach.

Another problem is that most civil law countries<sup>171</sup> refuse to extradite their own nationals. Nearly all the nations of Latin America and Europe are civil law countries. Also, foreign governments are generally reluctant or unwilling to extradite anyone for parental child abduction.

### **5. Prosecution of an Abductor in a Foreign Country**

In many countries (but not in the United States), nationals of a country can be prosecuted for acts committed abroad if the same conduct would constitute a criminal offense under local law. U. S. law enforcement authorities can request such prosecution by forwarding evidence that would have been used in a U.S. prosecution to the foreign country. U.S. witnesses may have to appear to testify in the foreign proceeding.

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<sup>169</sup> For the passport to be revoked, the FBI or United States Attorney must send a request for such action and a copy of the federal warrant to the Department of State's Office of Passport Policy and Advisory Services. The regulatory basis for revocation of passports is found in the Code of Federal Regulations (22 C.F.R. § 51.70, et seq. (2004)).

<sup>170</sup> Even if the language used in the list of offenses appears broad, such as “abduction” or “kidnapping,” it cannot be argued that parental child abduction was included in the treaties when they were written.

<sup>171</sup> Civil law (as opposed to common law) is a legal tradition that developed from Roman law and is the basis of law in many countries, especially in continental Europe and Latin America. In many countries with systems based on civil law, such as France, case law still plays a considerable role.

See Merriam-Webster's Dictionary of Law ©1996, available at

<http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=1c/1c6f7dd27572e05c6139b702a5d3787>.

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The State Department also warns that this approach may be counter-productive and will not necessarily result in the return of the child.

### Non-Hague Remedies<sup>172</sup>

Even if the country to which the child is removed upholds the Convention, the parent seeking the child's return should also attempt to pursue non-Hague remedies. Pursuing alternative remedies, in addition to implementing the international child kidnapping prevention strategies discussed above is important because in many instances it is difficult to achieve the return of children through Hague. For example, in 2003 the U.S. has determined that Mexico was "non-compliant" under the Hague Convention because Mexico lacked implementing legislation, resources, and familiarity among the judiciary of the duties and responsibilities of the Convention. Since more children are abducted from the United States and taken to Mexico than any other country, these findings are particularly problematic. The best course of action in all cases for counsel and advocates representing battered women concerned about international abduction is to use all means necessary to prevent these abductions before they take place. Non-Hague remedies may include attempts to negotiate the return of children by friends and relatives of the abducting parent, or by law enforcement officials or prosecutors.

### A. CHILDREN'S PASSPORT ALERT PROGRAM<sup>173</sup>

As of July 2, 2001, both parents are required to execute the passport application for a minor child under the age of fourteen.<sup>174</sup> Information regarding the issuance of a passport is available to either parent, regardless of custody rights, as long as the requesting parent's rights have not been terminated. As a result, it is possible for a parent to obtain passport records of their children through the State Department. For this reason, the State Department advises that if a parent believes that her child, whether or not a minor, may be abducted internationally, she should immediately contact the Office of Children's Issues and inform appropriate law enforcement officials.

The Children's Passport Issuance Alert Program (CPIAP) is a service provided by the U.S. Department of State for parents and legal guardians of minor children. Through CPIAP, the State Department's Office of Children's Issues is able to notify a parent or court-ordered legal guardian before issuing a U.S. passport for his or her child. The State Department's Passport Namecheck Clearance System, which generally remains in effect until the child turns eighteen, is the system used to alert a parent when an application for a U.S. passport has been made. While the system can be used to inform a parent or court when an application for a U.S. passport is executed on behalf of a child, the CPIAP does not track or control the use of the passport once it is issued. There are no exit controls for American citizens leaving the United States.

To benefit from CPIAP, a parent, legal guardian, legal representative, or a court of competent jurisdiction must file a written request for entry of a child's name into the CPIAP program with the Office of Children's Issues. In order for the Office of Children's Issues to notify an objecting parent, the parent must have filed, in addition to the parent's written request, a copy of a document that shows the relationship between the child and the objecting parent, such as a birth certificate or court order of guardianship. In utilizing this program, it

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<sup>172</sup> For a detailed listing of resources, including references, laws and reading list, visit the U.S. Department of State, Children & Family, International Child Abduction, Child Abduction Resources, *available at* [http://travel.state.gov/family/abduction\\_resources\\_04.html](http://travel.state.gov/family/abduction_resources_04.html).

<sup>173</sup> Portions of this excerpt were taken from the U.S. Department of State home page, Passport Issuance and Denial to Minors Involved in Custody Disputes—Children's Passport Issuance Alert Program, *at* [http://travel.state.gov/family/abduction\\_resources\\_05.html](http://travel.state.gov/family/abduction_resources_05.html).

<sup>174</sup> Pub. L. No. 106-113, Div B, § 1000(a)(7), 113 Stat. 1536 (enacting into law § 236 of Subtitle A of Title II of Division A of H.R. 3427 (113 Stat. 1501A-430), as introduced on Nov. 17, 1999), provides that before a child under the age of 14 years is issued a passport, the following requirements shall apply:

"(A) Both parents, or the child's legal guardian, must execute the application and provide documentary evidence demonstrating that they are the parents or guardian; or

"(B) the person executing the application must provide documentary evidence that such person—

"(i) has sole custody of the child;

"(ii) has the consent of the other parent to the issuance of the passport; or

"(iii) is in loco parentis and has the consent of both parents, of a parent with sole custody over the child, or of the child's legal guardian, to the issuance of the passport."

is very important to keep the Office of Children's Issues informed in writing of any changes to contact information and legal representation. Failure to update such information could result in a passport issuance for the child without the objecting party's consent.

The CPIAP can also be used to notify a court, in addition to a parent, that the child's other parent has sought passports for the children. In domestic violence cases where there is risk of international child abduction, the court can order that it be notified if the abuser seeks issuance of passports for the children. Such order can be issued as part of a protection order or other family court order in a custody or divorce case, including temporary orders in family court cases. The protection order or other family court order should also include provisions requiring that the abuser not leave the jurisdiction or the country with the children, and that he turn over to the victim (through the court) the children's passports. With such orders in place, the court and the child's non-abusive parent will be notified when the abuser files a passport application. Counsel for the abused parent can then go to court to enforce the court order and have the abuser held in contempt. In doing so, the abused parent might effectively prevent the abduction.

Many children, although born in the U.S. or born abroad to a U.S. citizen parent, are dual citizens of both the U.S. and another country.<sup>175</sup> If a child were a dual citizen, the child's participation in CPIAP would not automatically deter the child from obtaining and traveling on a foreign passport. Each foreign country has its own entry requirements concerning citizenship, passports and visas. Consequently, there is no requirement that foreign embassies adhere to U.S. regulations regarding issuance and denial of their passports to U.S. citizen minors if they have dual nationality. Thus, if a parent suspects that the child may have another nationality; she should contact that country's embassy or consulate directly to inquire about denial of that country's passport to the child.

#### B. THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT<sup>176</sup> (ICARA) & THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT<sup>177</sup> (UCCJEA)<sup>178</sup>

Under the UCCJEA, there is a procedure to ensure a child's safety and presence in the jurisdiction when notice of an enforcement proceeding might cause the recipient to harm or flee with the child. On a finding that a "child is imminently likely to suffer serious physical harm or be removed from the State," section 311 of the UCCJEA authorizes a court to issue a warrant directing law enforcement officers to take immediate physical custody of the child. Warrants to take physical custody of a child (a "pickup" order) are obtained under the UCCJEA in conjunction with an enforcement action. The remedy may be helpful in preventing international abductions. Patricia Hoff, writing for the U.S. Justice Department, points out that, "ICARA contemplates that courts hearing Hague Convention cases may take measures under the State and Federal law to protect the well-being of the child or prevent a further removal or concealment before the final disposition of the petition. Section 311 of the UCCJEA provides the authority to do so."<sup>179</sup>

#### C. OTHER RESOURCES

In addition to programs such as CPIAP, described above, other resources include the Vanished Children's Alliance (VCA),<sup>180</sup> U.S. State Missing Children Clearinghouses, and various state district attorneys' offices. The VCA is a non-profit organization based in San Jose, California, that has assisted left-behind parents of abducted children for more than two decades. Once a case is registered with the VCA, parents receive certain services free of charge, including a toll-free number that is available to receive reports of sightings of

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<sup>175</sup> This may occur in a variety of situations, such as through the child's birth abroad, a parent who was born outside the U.S., or a parent who has acquired a second nationality through naturalization in another country.

<sup>176</sup> Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. 11601-11610 (2000)).

<sup>177</sup> Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9(1A) U.L.A. 649 (1999 & Supp. 2003), *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uccjea97.htm> and [www.nccusl.org](http://www.nccusl.org).

<sup>178</sup> See Breaking Barriers, *Protection Orders* Chapter (discussing how protection orders can be used to deter foreign embassies from issuing visas and passports to children).

<sup>179</sup> PATRICIA HOFF, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN, THE UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (Dec. 2001).

<sup>180</sup> For more information, visit the VCA website at <http://www.vca.org> or email [gen\\_info@vca.org](mailto:gen_info@vca.org). To report a missing or abducted website, fill out their online form, *available at* <http://www.vca.org/pages/On-line%20notification.htm>.

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abducted children and requests for help. VCA coordinates closely with law enforcement agencies to help find abducted children.

All fifty U.S. states and the District of Columbia have missing children clearinghouses<sup>181</sup>, although some states do not have the adequate funding or resources for their offices to be effective. Nevertheless, some state clearinghouses, such as the New York State Missing and Exploited Children Clearinghouse have good track records and assist in many cases of international abduction each year.<sup>182</sup> A number of states have also given their district attorneys and investigators the legal tools to locate and return parentally abducted children. This can include a special unit to deal with international and interstate child abduction, and statewide meetings of criminal justice professionals. California has an innovative approach to custodial interference and abduction cases, and many of their District Attorney's Offices are specially equipped to handle such cases.<sup>183</sup>

Other resources include:

- International Police Organization “INTERPOL”
  - Local law enforcement officials will request that a search by the local police department be conducted for the abducted child in the country where the parent believes the child was taken.
  - Contact them by telephone at (202) 616-9000 or visit the U. S. National Central Bureau of Interpol website at [www.usdoj.gov/usncb](http://www.usdoj.gov/usncb).
- Department of Homeland Security (DHS)
  - If the abducted child is under the age of 21, unmarried and has been taken to a non-Hague country, the USCIS can deny a visa or admission into the U.S. to the removing parent if that parent is not a U.S. citizen. The U.S. will deny that parent from entering the country until the child is returned.
  - Visit their website at <http://uscis.gov/graphics/>.
- US Embassy
  - The Embassy can supply passports, assist in obtaining exit permits and can help to arrange for loans that will pay for the child's return trip to the U.S.
- Child Find of America, Inc.
  - Child Find America is an organization that helps to negotiate a safe return of the child through mediation.
  - Contact them at 1-800-A-Way-Out.
- National Crime Information Center (NCIC)
  - NCIC is a computerized index of criminal justice information (i.e.- criminal record history information, fugitives, stolen properties, missing persons). The database, which is available to Federal, state, and local law enforcement and other criminal justice agencies, can assist authorized agencies in locating missing persons.
  - National Crime Information Center  
Criminal Justice Information Services (CJIS) Division  
1000 Custer Hollow Road  
Clarksburg, West Virginia 26306  
Hours of Service: 9:00 a.m. - 5:00 p.m.  
Telephone: (304) 625-2000
  - Their website is <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm>.

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<sup>181</sup> For contact information of U.S. State Missing Children Clearinghouses, visit <http://www.clamb.org/statecle.htm> or <http://www.klaaskids.org/pg-mc-stmisschildclearing.htm>.

<sup>182</sup> Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Dept. of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUVENILE JUSTICE BULLETIN (Dec. 2001) at 397, 409.

<sup>183</sup> *Id.* at 408-09.



#### D. INTERNATIONAL ABDUCTION TO NON-SIGNATORY COUNTRIES

When a child is abducted to a non-signatory country, the Hague Convention does not apply in any way. It is much more difficult to have a child returned if he or she is abducted to one of these countries, and the number of parental abductions to non-signatory countries has actually increased, in recent years, while the number has decreased to contracting states.<sup>184</sup> Most countries in the Middle East, Africa, and East Asia are not covered by the Convention. These countries often have very different custody laws than those in the United States which makes it difficult to have children returned.

When a child is taken to a country in which the Hague Convention does not apply, the law of that country governs custody determinations. The court will often consider the child's best interests in determining custody, but each country has a different definition of this term. Foreign countries often ignore requests for a child's return, and the country from which the child has been taken has little power to aid the left-behind parent.<sup>185</sup>

There are a number of alternatives that the left-behind parent can try. However, none of them has proven particularly successful. One option is to initiate *habeas corpus* proceedings, which can provide relief by compelling return of the child to the legally entitled party.<sup>186</sup> Writs of *habeas corpus* are authorized under the UUCJA as a means of enforcing out-of-state custody decrees<sup>187</sup> and may prove useful in challenging the validity of a custody determination.<sup>188</sup> If successful, a writ of *habeas corpus* may secure an order demanding a child's return, so that the habitual state of residence can make the custody determinations.<sup>189</sup> Nonetheless, even if a *habeas corpus* order is issued, it is difficult to enforce, particularly if the parent is in another country and outside the issuing court's jurisdiction.<sup>190</sup> *Habeas corpus* proceedings are governed in all jurisdictions by statutory provisions, so counsel must conform the writ to the jurisdiction's individual requirements.

Another alternative is to try to enforce a custody decree in the foreign country. Often, U.S. custody orders are not binding in the foreign state. It is possible the foreign country will consider the decree when making its custody decision. Nevertheless, even if the foreign country considers the U.S. custody order, it will apply its own custody laws when making the determination, which often favors its own nationals.<sup>191</sup> If a parent does not have a custody order at the time of the abduction, a court in their state may still have jurisdiction to issue an order despite the child's absence. A custody order made after an abduction is sometimes called a "chasing order." Although it may not be enforceable abroad, once a child is returned to the United States, that order governs custody and visitation rights until modified.<sup>192</sup> Parents may also try to criminally prosecute the abductor under U.S. laws or under the laws of the foreign state.

When a child is abducted from a non-signatory nation and is brought to the United States, it is also difficult to predict what will happen when the left behind parent tries to secure a return. U.S. case law is inconsistent and there is no set standard.<sup>193</sup> It is possible to apply the Uniform Child Custody Jurisdiction Act

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<sup>184</sup> Lisa Nakdai, Note, *It's 10PM, Do You Know Where Your Children are: The Hague Convention on the Civil Aspects of International Child Abduction*, 40 FAMILY CT. REV. 251 (2002).

<sup>185</sup> Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 158 (1997).

<sup>186</sup> To obtain a writ of habeas corpus, the petitioner must prove: 1) that she is entitled to legal custody of the child; and 2) that the child is being unlawfully detained by the abducting parent in the jurisdiction in which the writ is sought. For example, a writ of habeas corpus would be suitable in a case where the abuser has kidnapped children who are in the victim's legal custody and he remains in the jurisdiction. If the order is granted, then the abducting parent will be ordered to bring the child to the court on a specific date and within specific period of time. ARNOLD H. RUTKIN, ED., 1-6 FAMILY LAW AND PRACTICE § 6.03 (vol. 35 2003).

<sup>187</sup> UCCJA § 15, Comment. See also *Application of Stone*, 481 P.2d 280 (1971).

<sup>188</sup> See, e.g., *Smart v. Cantor*, 574 P.2d 27 (Ariz. 1977).

<sup>189</sup> Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 160 (1997).

<sup>190</sup> *Id.* at 161 (citing *Ruppen v. Ruppen*, 614 N.E.2d 577, 580 (Ind. App. 1993)).

<sup>191</sup> *Id.*

<sup>192</sup> U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 433 (2002).

<sup>193</sup> Lara Cardin, *Comment: The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Nonsignatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 169 (1997).

(UCCJA)<sup>194</sup> when a child is wrongfully taken to the United States, but there are questions as to whether it actually applies to the actions of foreign state courts. Section 23 of the UCCJA applies the Act to international disputes<sup>195</sup> but there is conflicting case law as to whether the term “state” includes a foreign nation. Many states have adopted the UCCJA with their own adjustments to various sections. Some states have not adopted Section 23 as part of the state’s UCCJA and have held that the legislature did not intend the word “state” to include a foreign country.<sup>196</sup> States that have adopted Section 23 have taken different approaches as to whether the word “state” includes a foreign country. Some states have found that the foreign country is a “state” under the UCCJA.<sup>197</sup> Other states that have adopted Section 23 but that do not include foreign countries in the definition of “state,” have deferred to the laws of other nations based upon whether the child custody laws in the foreign country are similar to the UCCJA.<sup>198</sup> In many of these decisions, the courts state that they recognize that they could defer to the foreign court, but are not required to under the UCCJA.

### What to Do Under Hague If a Child Is Abducted

A parent has three options to start a return action under the Hague Convention. She can: 1) submit an application to the U.S. Central Authority. U.S.CA will forward the application to the foreign central authority; 2) submit a return application directly to the central authority of the foreign country in which the child is located, bypassing the U.S.CA; or 3) file a lawsuit directly with the foreign court in which she can request her child’s return pursuant to the Hague Convention, bypassing both the U.S.CA and the foreign central authority.

#### A. CENTRAL AUTHORITY<sup>199</sup>

Each country that is a party to the Convention has designated its own “central authority” to carry out special duties. Under the Hague Convention, the Central Authority in the requested country has the primary responsibility for processing applications under the Convention. Nevertheless, while a parent can submit their application directly to the central authority or foreign court of the country where the child is believed to be, the State Department advises parents to submit it to the U.S. Central Authority for the best assistance. The Central Authority for the United States (U.S.CA) is the Department of State’s Office of Children’s Issues.<sup>200</sup> By contractual agreement, the National Center for Missing and Exploited Children (NCMEC)<sup>201</sup> acts on behalf of the U.S.CA with regard to incoming Hague cases, by assisting in negotiating the safe and prompt return of children who have been abducted to the United States. NCMEC also provides assistance in outgoing Hague cases (i.e. when the children are abducted and taken outside of the United States), including

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<sup>194</sup> 9 Uniform Laws Annotated, Uniform Child Custody Jurisdiction Act.

<sup>195</sup> “The general policies of this article extend to the international area. The provisions of this article relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.” UCCJA sect 23 at 326.

<sup>196</sup> See *Minton v. Mcmanus*, 458 N.E.2d 1292 (Ohio App. 1983); State ex rel. *Rashid v. Drumm*, 824 S.W.2d 497 (Mo. App. E.D. 1992).

<sup>197</sup> *In Re Marriage of Arnold & Cully*, 222 Cal. App. 3d 499 (Cal. App. 1990) (finding Canada a state because UCCJA has international application); *Ivaldi v. Ivaldi*, 685 A.2d 1319, 1323 (N.J. 1996) (finding that “the term ‘state’ includes foreign countries and...the jurisdiction provisions of the [UCCJA] apply to international custody disputes”).

<sup>198</sup> See *Lotte U. V. Leo U.*, 491 N.Y.S.2d 581 (N.Y. Fam. Ct. 1985) (finding Jurisdiction of Switzerland not recognized because based solely on domicile of father); *Amin v. Bakhaty*, 812 So.2d 12, 39 (La. App. 2001) (stating court’s reluctance “to defer to an Egyptian court, because Egypt’s child custody laws are at the opposite end of the spectrum to Louisiana’s child custody laws”); *McDaniel v. McDaniel*, 262 A.D.2d 1066, 1067 (N.Y.A.D. 1999) (finding “New York should defer only to those foreign nations whose ‘legal institutions [are] similar in nature’ to our own...and whose regard for the rule of law and due process parallels that of American courts”); *Suarez Ortega v. Pujals de Suarez*, 465 So.2d 607, 609 (Fla. App. 1985) (holding Mexico would exercise jurisdiction in accord with principles embodied in UCCJA).

<sup>199</sup> Hague Convention, Oct. 25, 1980, art. 6, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, available at <http://hcch.net/e/conventions/text28e.html>.

<sup>200</sup> Parents may contact the State Department by calling 1-888-407-4747 or by writing to the Office of Children’s Issues at: SA-29; 2201 C Street, NW; U.S. Department of State; Washington, D.C. 20520. Information is also available on their website at [http://travel.state.gov/children's\\_issues.html](http://travel.state.gov/children's_issues.html).

<sup>201</sup> Parents may contact the National Center for Missing and Exploited Children (NCMEC) by calling their 24 hour help-line (1-800-THE-LOST) or by writing to NCMEC at the following address: Charles B. Wang International Children’s Building; 699 Prince Street; Alexandria, Virginia 22314-3175. Information is also available on their website at <http://www.missingkids.org>.

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completing the return application. According to the Department of State, the role of the Central Authority in the United States is that of an “active facilitator.”<sup>202</sup> As such, its mission is to promote cooperation among relevant parties and institutions by acting as a source of information about procedures under the Convention, as well as on the status and contents of applications.

The U.S.CA will review an application for the parent, forward it to the foreign central authority, and work with the foreign central authority until the case is resolved. The U.S.CA will facilitate communication, but this does not include translating documents, which is the parent’s responsibility. If the abductor does not voluntarily return the child, the left-behind parent may have to retain an attorney in the foreign country to present the case to the court. Some central authorities do provide or arrange for free or reduced-fee legal representation for applicant-parents. The U.S.CA can inquire on the parent’s behalf about this possibility.<sup>203</sup>

The United States Central Authority can also provide information on the central authority in the country in which the child is believed to be located, and assist the parent in understanding the application process. They can also help a parent obtain, either directly or through the NCMEC, information concerning the wrongfulness of the removal or retention under the laws of the country in which the child has resided. At a parent’s request, the U.S.C.A will request a status report six weeks after court action commences in the other country if the court has not yet issued a ruling on the return petition. The Hague process is supposed to be “expeditious,” but there are no penalties for delays or slow decision making.<sup>204</sup> The U.S.CA can also provide information about a particular country’s performance under the Hague Convention so that a parent can assess whether the Convention could effectively work in her case. To obtain this information, the parent may have to make a formal request. If the country has a poor track record under the Hague Convention, the parent may want to consider other lawful means to effect the child’s return. When a parent fears international abduction, this information should help the parent consider whether stronger prevention measures are appropriate.<sup>205</sup>

There are a couple of reasons why it is strongly recommended, particularly in family violence cases, that a parent act quickly in invoking the Hague Convention.<sup>206</sup> In addition to the dangers to the child of being in an abusers control, one reason for acting quickly is that the courts are only required to order a return of a child if less than a year has passed since the wrongful removal. The second is that, once a return application is filed (or a court is put on notice of the abduction), courts and other authorities are not allowed to make substantive custody decisions about the child. This may prevent an abductor from getting a custody order in the foreign country.

If the parent who is filing the petition has a custody order, she should attach a certified copy of the custody order to the application. For battered immigrants, the swiftest way to obtain a pre-abduction custody order is as part of a civil protection order. Obtaining protection orders as soon as possible is highly recommended in the case of immigrant victims, particularly when there are concerns about abduction. In circumstances where there is no custody order at the time of the abduction (a pre-decree abduction), the searching parent may strengthen a future Hague Convention case by obtaining an order from a court in this country that states that the taking or retention of the child is wrongful within the meaning of Article 3 of the Hague Convention. This too could be done as part of a protection order, a temporary protection order, or other family court proceeding. The foreign court may, pursuant to Article 15, request that the applicant parent obtain such a determination after an abduction. In the absence of a judicial request, the parent should consider how quickly and at what cost such an order could be obtained.<sup>207</sup>

If the Hague Convention petition for return is denied, a parent must remember that it is not a decision on the merits of custody. The custody adjudication on the substantive merits of the case will need to take place in

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<sup>202</sup> International Parental Child Abduction, Department of State Publication 10862, Bureau of Consular Affairs (Revised July 2001), available at <http://travel.state.gov/int'lchildabduction.html> at Part VII.

<sup>203</sup> U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING, Chapter 4, 428 (2002) [hereinafter FAMILY RESOURCE].

<sup>204</sup> *Id.* at 430.

<sup>205</sup> *Id.* at 427.

<sup>206</sup> *Id.* at 428.

<sup>207</sup> *Id.* at 425.

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the foreign country. Nevertheless, the Hague Convention petition denial should not be used against her in those and other legal proceedings.<sup>208</sup>

### B. IMMIGRATION

The Convention does not confer any immigration benefits. If persons who are not U.S. citizens are ordered by the court to return to the United States, they must fulfill the appropriate entry requirements. This applies to children and parents involved in any child abduction case, including a Hague Convention case.<sup>209</sup> When the abducting parent is ineligible to enter the United States under U.S. immigration laws, the parent may be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole<sup>210</sup> in order to participate in custody or other related proceedings in a United States court. There is also the possibility of a waiver of visa ineligibility for an undocumented alien pursuant to section 212(d)(3)(A) of the Immigration and Nationality Act. A waiver requires the recommendation of a consular officer or the Department of State (Bureau of Consular Affairs/Visa Office), and the approval of the Department of Homeland Security.<sup>211</sup>

### C. FOREIGN COUNTRY JURISDICTION

It is possible a parent will have to litigate custody or visitation in the courts of a foreign country. This can happen if: 1) a parent loses her Hague petition for return; 2) a foreign court refuses a parent's request to enforce a U.S. custody or visitation order; 3) a parent does not have a custody order to enforce; or 4) a parent is advised to seek custody in the foreign courts. Parents are often at a disadvantage because many foreign courts favor a parent who has returned home to his or her native country with a child.<sup>212</sup> Some countries also have a cultural bias in favor of the mother or father, or religious laws that preclude one parent from being awarded custody. It is also possible to be awarded custody, but to have travel restrictions that interfere with the exercise of those custody rights.<sup>213</sup>

Even if a foreign country grants a parent custody or visitation, there may not be a legal mechanism to enforce the order. If a parent loses custody, a foreign court will not necessarily award the losing parent visitation. If visitation is awarded, the child may not be allowed to come to the United States, and the parent may have to travel to the foreign country to see their child. It is also possible that these visits will be restricted or supervised.

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<sup>208</sup> *Id.* at 431.

<sup>209</sup> <http://travel.state.gov/int'lchildabduction.html> at 12.

<sup>210</sup> See INA 212(d)(5)(A).

<sup>211</sup> U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 430 (2002). 212(d)(3)(A) provides:

an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

<sup>212</sup> U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 433 (2002). Family Resource, *supra* note 158,68 at 433

<sup>213</sup> One example given is that of a non-Muslim mother who cannot take her children from an Islamic country without the permission of her Muslim husband, despite that she and their children are U.S. citizens. Even if the wife is awarded custody, she may still need the father's permission to leave the country. See U.S. Department of State, Children & Family Issues, International Child Abduction, Country-Specific Abduction Flyers, at [http://www.travel.state.gov/family/abduction\\_country.html](http://www.travel.state.gov/family/abduction_country.html). The NCMEC has a publication entitled *Family Guide to Surviving Abduction to the Islamic World* (for information on how to proceeding in a particular country). U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, FAMILY RESOURCE, Chapter 4, 434 (2002). Family Resource, *supra* note 158,68 at 434.

Litigating custody can be difficult and foreign country systems may not offer the same kinds of due process protection available in U.S. courts.<sup>214</sup> Common law countries will most likely provide a fair custody hearing. Civil law countries do not provide the same kind of due process protections or evidentiary rules that are basic to the U.S. system. Most countries of continental Europe and Central and South America have civil systems. Notice and opportunity to be heard are not necessarily fundamental rights in civil law countries and a parent may not be given adequate notice of custody proceedings or be able to obtain the abductor's foreign address to serve notice of U.S. legal proceedings. Also, because precedent does not bind civil law courts, case outcomes are less predictable than in common law countries.

While litigating in a foreign court can be costly for the U.S. parent, the abductor may be funded fully or in part by the foreign government. If the litigation is lengthy, the amount of time the child lives with the abductor will be prolonged. The longer the child stays with the abductor, the less likely it is that a foreign court will disrupt the relationship by ordering return.<sup>215</sup> Moreover, a parent in the United States who pursues custody in foreign countries runs the risk that the foreign parent will then argue to a U.S. court that the parent has waived U.S. jurisdiction by participating in the foreign proceedings. To avoid this, a parent can seek an order from her home state court stating that her participation in foreign proceedings is completely without prejudice to her rights under U.S. law, and to the validity of any U.S. custody orders she has obtained.<sup>216</sup>

### Conclusion

Obtaining return of children abducted from the United States can be difficult, and expensive. Often this involves prolonged litigation with counsel in both countries and success can be elusive. For this reason, advocates and attorneys working with immigrant victims of domestic violence should carefully review the lists of risk factors for abduction discussed at the beginning of this chapter and take all steps possible to prevent international child abduction. It is particularly helpful to obtain a protection order awarding custody to the battered immigrant victim as soon as possible. It is also important to have the court order an abuser who has the children's passports to turn over the passports to the victim as part of a protection order. If the children are dual nationals the protection order should also include a recommendation that the embassy of the abusive parent's country not issue a passport to the children absent court order. It is recommended that children of all immigrant women be registered in the Children's Passport Alert Program. The following chart summarizes steps that can be taken to prevent international parental kidnapping and to attempt to secure return of children who have been abducted.

### Checklist

#### PREVENTION:

- Be aware of risk factors that may pose a risk for abduction
- Keep a record of important information about the other parent
- Maintain current photos and keep a detailed written description of the child
- Obtain custody decree with specific provisions that attempt to safeguard child against abduction

#### IF THE CHILD IS ABDUCTED, HOW TO SEARCH FOR A CHILD ABROAD:

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<sup>214</sup> For more information on civil law versus common law jurisdictions, see U.S. Department of State's Bureau of International Information Programs (USIS), *Issues of Democracy*, September 1999 – US Courts, at <http://usinfo.state.gov/journals/itdhr/0999/ijde/messitte.htm>.

<sup>215</sup> U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, *FAMILY RESOURCE*, Chapter 4, 435 (2002).

<sup>216</sup> *Family Resource*, *supra* note 1568, *id.* at 435. Parents should consult an attorney in the U.S. and abroad to decide on the best approach to promote their interests.

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- File a missing person's report with local law enforcement officials
- Enter the child's name in the National Crime Information Center [NCIC]
- Attempt negotiating a return of the child through such organizations as NCMEC and Child Find America, Inc.
- Contact the Office of Children's Issues at the Department of State to file an application for the prompt and safe return of the abducted child
- Communicate with the Central Authority of the country to which the child has been abducted (typically the Office of Children's Issues will assist in this communication.)
- Retain legal counsel in the other country to assist in litigating the return of the child
- Consider both Hague and non-Hague remedies

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