Federal Judicial Center
International Litigation Guide

The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges

2012

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Executive Summary

The 1980 Hague Convention on the Civil Aspects of International Child Abduction is a treaty that governs proceedings for the prompt return of children who have been wrongfully taken or kept away from their "habitual residence." The most typical situation that will trigger the operation of the Convention occurs when one parent relocates with a child across an international border without the consent of the left-behind parent or without a court order permitting that relocation. Proceedings under the Convention are not criminal.[1] The Convention is the only internationally recognized remedy that compels the actual return of the wrongfully abducted child. The 1980 Convention serves two primary purposes: first, to deter future child abductions; and second, to provide a prompt and efficient process for the return of the child to the status quo that existed before the abduction.

A Hague Convention case is not a child custody case.[2] Rather, a Hague Convention case is more akin to a provisional remedy—to determine if the child was wrongfully removed or kept away from his or her habitual residence, and if so, then to order the child returned to that nation. The merits of the child custody case—what a parent's custody and visitation rights should be—are questions that are reserved for the courts of the habitual residence. In the event that a parent has commenced a child custody proceeding in a U.S. state court,

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1. In 1993, Congress enacted the International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204 (1993). This act provides felony criminal penalties for the removal or retention of a child from the United States with the intent to obstruct the lawful exercise of parental rights. Because the 1980 Hague Convention is only applicable when the treaty is in force between the two countries involved, IPKCA fills a void in the law regarding child abductions from the United States to a country where the 1980 Convention is not in force with the United States.

2. 42 U.S.C. § 11601(b)(4) reads, in part:

> In enacting this chapter the Congress recognizes –
> * * * * *
> The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

that proceeding must be stayed pending outcome of the Hague petition for return of the child. See *infra* page 6.

The substantive law and fundamental elements of a cause of action for return of a child are found in the text of the Convention. The Convention is set forth in Appendix A on page 141. The procedural aspects of handling these cases are governed by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11610. A copy of ICARA can be found in Appendix B, *infra* at page 157.

Courts may only entertain petitions for return of a child if the Hague Convention is in force between the two countries involved. This is a fundamental jurisdictional requirement. The 1980 Convention went into effect in the United States on July 1, 1988, and it is currently in force between the U.S. and 68 other countries. A list of those countries can be found in Appendix D, *infra* at page 169. Additionally, the wrongful removal or retention of the child must have occurred after the date the treaty became effective in both countries. See discussion *infra* at page 2.

A quick checklist of key issues that arise in Hague cases is provided in Appendix C, *infra* at page 167, for use as a guide to issues that may arise.

Unique Concepts

Hague Convention cases have several unique aspects that distinguish them from other forms of litigation:

- *Expeditious handling.* The expected time frame for handling a Hague Convention case is six weeks. To meet the goal of promptly deciding the case, the Convention urges trial and appellate courts to use the most expeditious procedures that are available to hear and issue a ruling on the case. Courts have uniformly regarded the expeditious handling of these cases as essential. (See *infra* page 115.) In one reported case, the time from the

filing of the initial petition in district court to a published affirmance in the circuit court occurred within 95 days.[3]

- *Role of the executive branch.* Each country that is a signatory to the 1980 Convention must designate a "Central Authority" to assist in the administration of the Convention. In the United States, the Central Authority is the U.S. State Department. Within the State Department, the Office of Children's Issues is responsible for handling child abduction cases—both abductions to the United States (incoming cases) and abductions from the United States (outgoing cases). The role of the Central Authority includes locating children, securing the voluntary return of the child if possible, and cooperating with counterpart authorities in other countries. The Central Authority typically informs courts of the filing of a petition for a child's return, and it acts as a conduit for official inquiries by a U.S. or foreign court as to the status of foreign law. In this capacity, the State Department may request, pursuant to Article 11 of the Convention, reasons for the delay of a case beyond six weeks in order to provide status reports to the Central Authorities of foreign states. This action does not constitute disregard for the doctrine of separation of powers—rather, the State Department is fulfilling its role as the Central Authority for the United States. See discussion *infra* at page 10.
- *Administrative return.* The 1980 Convention provides for an administrative alternative to court proceedings. A parent seeking the return of a child may make a formal request through the Central Authority of either the country of the child's habitual residence or the Central Authority where the child is located. The Central Authority will make contact with the parent who has physical custody of the child and will attempt to negotiate a voluntary return of the child. The Central Authorities have no power to compel the return of the child. If efforts at voluntary return fail, the only remaining alternative under the Convention

3. Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010).

is to commence legal proceedings by filing a petition for the return of the child in the country where the child is physically present. See discussion *infra* at page 19.

- *Reliance on foreign precedent*. It is clear that courts may appropriately consider foreign precedent for the purpose of interpreting the Convention. In the only case under the Convention to be decided by the Supreme Court, *Abbott v. Abbott*,[4] the Court recognized that the opinions of foreign courts interpreting the treaty were entitled to "considerable weight." See discussion of the *Abbott* case *infra* at pages 12 and 39. For the benefit of the countries that are signatory to the Convention, the Hague Permanent Bureau maintains a website with a searchable database of significant foreign decisions concerning the interpretation of the Hague Convention. See *infra* page 15.

Elements of the Case for Return

A case begins with the filing of a petition for the return of a child. State courts and federal district courts have original concurrent jurisdiction to hear Hague Convention cases. Because of this parallel jurisdiction, issues of abstention or removal may arise. See discussion *infra* at page 118.

A person or parent petitioning for the return of a child must show by a preponderance of the evidence that:

- a child under the age of 16
- has been wrongfully removed or retained
- from his or her habitual residence
- in violation of the custody rights of the left-behind parent.

If the parent petitioning for return of the child has proved the elements above, the court must order the return of the child, unless one of the defenses to return is established.

4. Abbott v. Abbott, 560 U.S. ____, 130 S. Ct. 1983 (2010).

Some of the elements of the cause of action for return require definition:

- *Wrongfulness.* The removal to—or retention in—a foreign country is considered "wrongful" under the Convention if it amounts to a breach of the custody rights of the left-behind parent[5] according to the law of the country that is the child's habitual residence. "Wrongfulness" also requires some preliminary evidence that the parent seeking the child's return must have been actually exercising his or her rights of custody. See discussion *infra* at page 21.
- *Custody rights.* Custody rights are to be determined according to the law of the child's habitual residence. The Convention sets out three methods of determining custody rights: by a showing that they arise (1) by operation of law, or (2) by judicial or administrative decision, or (3) by an agreement of the parties. The term *custody rights* means more than mere visitation rights or access[6] rights. Custody rights include rights relating to the care of the child and, in particular, the right to determine the child's place of residence. In *Abbott*, the Supreme Court held that custody rights existed under the Convention where the left-behind parent had only visitation rights, but the taking parent violated a restraining order that prohibited the removal of a child across an international border. See discussion *infra* at page 27.
- *Habitual residence.* The term *habitual residence* is not defined by the Convention. In substance, the term refers to that place where a child has lived for a sufficient period of time for the child to become settled. The term differs from the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) concept of "home state," which requires a six-month residence for a state to

5. Institutions may have rights of custody if that institution has the responsibility for the care and support of the child.

6. The term "access rights" is used in the 1980 Convention, but it is not a term commonly used in the United States. The term is synonymous with "visitation rights." 42 U.S.C. § 11602(7) (1988).

acquire jurisdiction over child custody issues. The concept of habitual residence differs from domicile, in that domicile includes elements of future intent, citizenship, and nationality. See discussion *infra* at page 41.

There is a split among the circuit courts concerning the factors to look to in determining a child's habitual residence and, in particular, the role that the intent of the parents plays in the acquisition of a new habitual residence. An apparent majority of the circuits follow the rationale of the Ninth Circuit opinion in *Mozes v. Mozes*.[7] That decision focuses on the question whether a child's habitual residence has changed based on whether the parents have demonstrated a shared intention to abandon the former habitual residence and, if so, whether there has been a change in the child's geographic location for a period of time that is sufficient for the child to become settled or acclimatized. Other circuits, such as the Sixth and Eighth Circuits, place the primary focus of determining habitual residence on the degree that the child has become settled in his or her new environment. See discussion *infra* at page 44.

Defenses to Return

The Convention sets forth five defenses to petitions for return:

- delay of over one year in bringing the petition for return (*infra* page 68);
- consent or acquiescence to removal or retention of the child (*infra* page 74);
- failure to exercise custody rights (*infra* page 76);
- return would expose the child to a grave risk of harm (*infra* page 78); and
- return would violate fundamental principles of human rights (*infra* page 85).

7. Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).

Although not technically set forth as a defense, the Convention vests courts with discretion to refuse to return a child if that child objects to being returned. Courts must consider both the age of the child and the extent of the child's level of maturity in assessing the child's objections to return. See discussion *infra* at page 87.

Two of the defenses—grave risk to the child, and violation of fundamental principles of human rights—must be established by clear and convincing evidence. The remainder of the defenses are subject to proof by a preponderance of the evidence.

The defenses to return are subject to a narrow interpretation. Underscoring this concept of narrow interpretation, the Convention gives courts the discretion to order a child returned to his or her habitual residence despite a defense having been proven. See *infra* page 65.

One of the most frequently raised defenses is the "grave risk" defense. The Convention provides that a court may refuse the return of a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." This broad language encompasses situations involving child abuse, domestic violence, return to a war zone, or circumstances where there is an unacceptable risk to the child's safety. This defense is not meant to trigger an examination of issues relating to the custody of the child, i.e., whether the welfare of the child would be better served in the custody of the left-behind parent or the abducting parent. Neither does the grave risk defense envision that a court will simply compare the benefits of the living conditions of a child in one country versus another. See discussion *infra* at page 81.

Managing the Case

Hague Convention cases require active case management. See discussion *infra* at page 133. Because these cases are to be handled in an expeditious manner, it is recommended that a Rule 16[8] conference should be promptly scheduled so that a trial date may be set and or-

8. Federal Rule of Civil Procedure 16.

ders made for the completion of discovery. Topics that are likely to be covered at the case-management conference include the following:

- the child's current situation, including whether there is a risk of re-abduction or concealment;
- a plan for discovery;
- the substantive issues likely to be raised at trial;
- the manner of taking evidence (e.g., by telephone, declaration or affidavits, or live testimony); and
- estimates of the length of trial.

Legal Representation

There are no provisions for paying for court-appointed counsel in Hague Convention cases. For applicants who are seeking the return of children, the U.S. State Department will assist with identifying counsel who may be able to provide representation on a pro bono or reduced-fee basis. See *infra* page 137.

Making Return Orders

A unique feature of the 1980 Hague Convention is the remedy—the actual physical return of the child to his or her habitual residence. If a court orders a child returned, that order may call for the enforcement of the order by the U.S. Marshals Service or any other relevant law enforcement organization. As such, return orders may be very specific as to the details of the child's return. See discussion *infra* at page 107.

Undertakings, Mirror-Image Orders, and Safe Harbor Orders

In the context of a Hague Convention case, an "undertaking" is an official promise or concession by a party to do a thing, or refrain from doing something. Undertakings may consist of offers for temporary support or housing for the child and parent upon return to the habitual residence; agreements not to seek a custody modification in the courts of the habitual residence for a certain period of time; or offers

to pay the costs of transportation for the child's return. There is disagreement among U.S. courts as to whether undertakings should be accepted as a condition of ordering a child's return. See discussion *infra* at page 98.

Some courts may consider using "mirror-image" or "safe harbor" orders as a condition of a child's return. These orders may provide measures for the child's protection in transit and upon return to the habitual residence. These orders typically contain provisions for counterpart orders to be entered in the child's habitual residence so that the conditions of the child's return may be enforced by the courts of that nation. See discussion *infra* at page 108.

Direct Judicial Communication

There is an emerging acceptance of judges directly communicating with their counterparts in foreign nations. Direct judicial communication may be helpful to resolve logistic issues concerning the return of a child. Forty-five countries have designated one or more "International Hague Network Judges" to assist judges who wish to contact a foreign judge. These contacts usually deal with the details of foreign law, or the availability of resources to assist in the transition of a child back to the habitual residence. See *infra* page 126.

The number of return cases filed worldwide is increasing, as modern methods of communication and transportation contribute to the expanding ease of international travel and settlement.[9] The United States enjoys a bourgeoning body of federal and state case law that deals with the 1980 Convention, as well as a number of issues subject to disagreement among the circuits. As additional nations become treaty partners, the number of legal systems that impact this area of the law will expand accordingly. For these reasons, handling cases under the 1980 Convention promises to be both interesting and challenging.

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9. Nigel Lowe, Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law 2011.

Introduction

This guide provides an overview of the 1980 Hague Convention on the Civil Aspects of International Child Abduction,[10] focusing on the legal and procedural issues judges are likely to encounter during litigation under this treaty. As the statistics below indicate, the number of applications for return represents a significant number of cases over a period of time. The actual number of litigated Hague Convention cases, however, is smaller in comparison to other civil and criminal cases, so it is difficult to become proficient with handling Hague cases from experience alone. This publication will discuss the purposes served by the Convention, describe its provisions, review relevant statutory and case law, and offer practical suggestions for managing Hague cases.

Figure 1. Total Applications for Return Received Through U.S. State Department, 2008–2011

Source: U.S. State Department, Office of Children's Issues

The Convention was signed by the United States in 1981 and ratified by Congress in 1986, and implementing legislation was passed in

10. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501 [hereinafter "Convention"].

1988. The treaty entered into force with other signatory nations on July 1, 1988.[11] As of April 2012, eighty-seven nations have ratified or acceded to the treaty. It is in force between the United States and sixty-eight of those countries.[12]

The Convention sets out an expeditious process for the return of a child when that child has been wrongfully removed or retained from his or her habitual residence in violation of the custody rights of the left-behind parent. The remedy provided by the Convention—the physical return of the child—seeks to restore the child's status quo that existed before the abduction.

Congress granted concurrent, original jurisdiction over Convention cases for both federal and state courts. Although this guide will focus primarily on federal case law, state court decisions will be discussed when helpful.[13] Because the Convention is an international instrument, decisions from courts of other contracting nations will be noted if relevant.[14]

This guide is structured sequentially, addressing topics in the order that judges are likely to encounter them. It commences with an

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11. Hague Convention on International Child Abduction Enters Into Force on July 1, 1988, 53 Fed. Reg. 23,843-01 (June 24, 1988).

12. The Convention automatically enters into force between countries that ratify the treaty and which were members of the Hague Conference on Private International Law at the time of approval by the member states on October 25, 1980. The accession of all other nations must be specifically accepted by a nation in order for the treaty to enter into force between those two nations. For a more complete description of the process involved, see "Whether Both Countries Are Bound by the Treaty," *infra* at page 15. Appendix D, *infra* at page 169, lists the countries where the treaty is currently in force with the United States.

13. Reference to unreported dispositions is occasionally made to highlight how courts have approached certain issues. Restrictions may apply to the citation of these cases for precedential value, based on local circuit rules in existence prior to 2007. Cases arising after January 1, 2007, may be cited pursuant to Federal Rule of Appellate Procedure 32.1.

14. *See generally* Abbott v. Abbott, 560 U.S. ____, 130 S. Ct. 1983, 1993 (2010) (quoting Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338 (1985) ("In interpreting any treaty, '[t]he "opinions of our sister signatories" . . . are "entitled to considerable weight."'" El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999)).

overview of the Convention, summary of its provisions, and guide to interpretation. The next sections deal with the essential elements that make up a case for the return of a child, along with the defenses to return. Subsequent sections address orders of return, procedural issues that may arise, and a discussion of practical matters relating to case management. Appendices include the text of the Convention, the implementing legislation for the United States—the International Child Abduction Remedies Act[15] (ICARA)—a list of countries where the treaty has entered into force with the United States, and a checklist that may be used as a quick reference guide.

As a final introductory note, courts should bear in mind that "a Hague Convention case is not a child custody case."[16] On the contrary, all relevant authorities caution courts not to become mired in the question of which parent is the "better" parent.[17] A foundational premise of the Convention is that the courts of the child's habitual residence is best at determining questions regarding the child's custody.[18] The Convention addresses a far more limited issue: whether the child should be returned to his or her habitual residence, enabling the courts of that nation to assess issues relating to custody and best interests of the child. In this sense, proceedings under the Convention may be viewed as akin to a "provisional remedy."[19]

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15. 42 U.S.C. §§ 11601–11610 (1988).

16. William M. Hilton, Esq. (1934–2009). Bill Hilton appeared as counsel in Hague Convention cases throughout the United States. As counsel for parents seeking the return of a child, Hilton would invariably begin his case by stating to the court "A Hague Convention case is not a child custody case." He compiled a vast amount of information relating to the Convention and made it available on the Internet for use by courts and counsel alike. *See, e.g.,* Baran v. Beaty, 526 F.3d 1340, 1350 (11th Cir. 2008); Simcox v. Simcox, 511 F.3d 594, 607 (6th Cir. 2007).

17. *See* 42 U.S.C. § 11601(b)(4) (1988); *see also* Jenkins v. Jenkins, 569 F.3d 549, 555 (6th Cir. 2009).

18. *See* Explanatory Report by Elisa Pérez-Vera ¶ 19 (1982) [hereinafter *Pérez-Vera Report*].

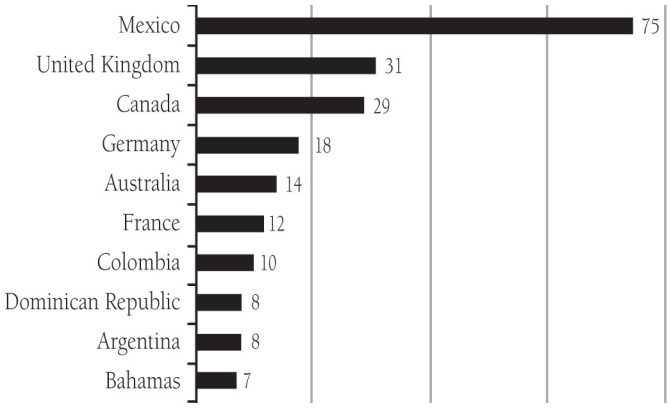
19. *See Jenkins*, 569 F.3d at 555 (citing Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005)); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005).

I. The 1980 Convention

A. Overview of the Convention

The Convention provides an expeditious remedy for the physical return of children who have been wrongfully removed or retained from their habitual residence, in violation of the custody rights of the left-behind parent. The treaty envisions that courts will promptly hear and decide the limited issues relating to whether the child was wrongfully removed to, or retained in, a foreign country. If the elements of the case for return have been met, the Convention requires that the child be expeditiously returned to his or her habitual residence (Appendix A sets forth the full text of the Convention). The framers of the Convention anticipated that most cases should be decided within six weeks (see *infra* page 12).

Figure 2. Highest Incidence of Reported Abductions to the U.S. in FY 2009



Source: 2010 U.S. State Department Compliance Report to Congress

The structure for hearing return cases is set forth at 42 U.S.C. §§ 11601–11610, the International Child Abduction Remedies Act (ICARA). Pursuant to ICARA, both state and federal courts have orig-

inal concurrent jurisdiction to hear cases arising under the Convention.[20] ICARA also sets forth burdens of proof applicable to the case for return and defenses,[21] relaxed rules for admissibility of documents,[22] and establishes guidelines for the award of fees and costs.[23] ICARA is set forth in Appendix B, *infra* at page 157.

Pendency of a Hague Convention petition for return in any U.S. court requires that state court custody proceedings be stayed. One of the purposes of the Convention is to return a child to his or her habitual residence—the place where custody proceedings should be maintained. Accordingly, the Hague case must be resolved before it can be determined if the custody case has been brought in the appropriate jurisdiction. If a court conducting a custody proceeding receives notice that there is a claim that the child has been wrongfully removed or retained in violation of the Convention (it need not be an actual petition for return), the court must stay that proceeding until either the Hague claim has been resolved or it has not been pursued within a reasonable time.[24] A federal court may vacate a state court custody determination that was entered in violation of the stay provisions of Article 16. [25]

B. Purposes for Adoption of the Convention

The Convention was adopted (1) to deter international abductions of children and (2) to provide a prompt remedy[26] for the return of abducted children.[27] It aims to restore the child to the "*status quo ante*"

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20. 42 U.S.C. § 11603(a) (1988).
21. *Id.* § 11603(e).
22. *Id.* § 11605.
23. *Id.* § 11607(b).
24. *See* Convention, *supra* note 10, Article 16; *see also* Yang v. Tsui, 416 F.3d 199, 203 (3d Cir. 2005).
25. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067, 1085 n.55 (9th Cir. 2001).
26. *See, e.g.*, Kijowska v. Haines, 463 F.3d 583 (7th Cir. 2006).
27. "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt

and discourage parents from crossing international frontiers in search of friendlier fora to validate their custody claims.[28]

The Convention is not a jurisdictional statute such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[29] The Convention's purview does not include the entry, modification, or enforcement of foreign or domestic child custody orders.

C. Basic Elements of the Case for Return

The substantive law of the Convention is not complicated. The prima facie case for return must show that a child has been wrongfully removed to, or retained in, any contracting state in violation of the rights of custody of any person, institution, or other body.[30] The Convention defines a "wrongful removal or retention" as (1) a breach of the rights of custody according to the law of the country where the child was habitually resident, (2) where these "rights of custody" were actually being exercised, or would have been exercised but for the wrongful removal or retention.[31]

The determination of "custody rights" is to be made according to the law of the state where the child was habitually resident immediately before the wrongful removal or retention.[32] Children are defined as persons under sixteen years of age.[33]

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return to the State of their habitual residence as well as to secure protection for rights of access." Convention, *supra* note 10, Preamble.

28. *See, e.g.*, Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995).

29. Uniform Child Custody Jurisdiction and Enforcement Act, §§ 101–405 (1997). The UCCJEA is a model act that was approved for adoption in 1997 by the National Conference of Commissioners on Uniform State Laws. It has been enacted in 49 states, the District of Columbia, Guam, and the U.S. Virgin Islands. Legislation is pending in Massachusetts and Puerto Rico for adoption in those jurisdictions.

30. *See* Convention, *supra* note 10, Articles 1, 3.

31. *See id.*, Article 3(b).

32. *See id.*, Article 3(a).

33. *See id.*

D. Basic Elements of the Defenses to Return

There are five narrowly defined defenses to an action for return of a child:[34]

1. the person making the request for return of the child has delayed for more than one year since the wrongful removal or retention, and the child has become settled in the new environment;[35]
2. the person, institution, or other body having the care of the child was not actually exercising custody rights at the time of removal or retention;[36]
3. the person, institution, or other body having the care of the child consented to or subsequently acquiesced in the removal or retention;[37]
4. the return of the child would expose the child to a grave risk of "physical or psychological harm or otherwise place the child in an intolerable situation";[38] or
5. the return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[39]

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34. The Convention limits the defenses to those stated. However, a handful of U.S. cases have established procedural defenses to actions for return of a child. *See, e.g.,* Prevot v. Prevot, 59 F.3d 556 (6th Cir. 1995); March v. Levine, 249 F.3d 462 (6th Cir. 2001); Pesin v. Rodriguez, 244 F.3d 1250, 1253 (11th Cir. 2001) (holding that fugitive disentitlement doctrine precluded consideration of mother's appeal); Journe v. Journe, 911 F. Supp. 43, 47 (D.P.R. 1995) (holding that remedy under Convention was waived by voluntary dismissal of previous French action); *cf.* Karpenko v. Leendertz, 619 F.3d 259 (3d Cir. 2010) (refusing to apply the doctrine of "unclean hands").

35. Convention, *supra* note 10, Article 12.

36. *Id.*, Article 13(a).

37. *Id.*

38. *Id.*, Article 13(b).

39. *Id.*, Article 20.

A court also may refuse a petition for return of a child if the child objects to return, and, based upon the age and maturity of the child, the court determines it is appropriate to consider the child's views.[40]

However, even if the evidence establishes one of these defenses, the court retains some discretion to order the child returned.[41]

E. Legal Framework

The Convention was proposed for adoption by the Hague Conference on Private International Law, an intergovernmental organization that develops international instruments on topics ranging from recognition and enforcement of judgments to banking and commercial transactions.[42]

Member states of the Hague Conference—including the United States—approved the Child Abduction Convention for adoption in 1980, and it entered into force on December 1, 1983, when it was ratified by three nations (France, Canada, and Portugal). Currently, eighty-seven nations have signed that Convention, representing countries with legal systems based on common law, civil law, Islamic law,[43] and various combinations thereof.

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40. *Id.*, Article 13.

41. *See, e.g.*, Antunez-Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800, 814–15 (N.D. Iowa 2003); Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995); Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996) (citing to the U.S. State Department Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986)). *See infra* page 65.

42. The Hague Conference operates in a manner similar to the process used by the National Conference of Commissioners on Uniform State Laws when it proposes model acts, such as the Uniform Commercial Code or the Uniform Child Custody Jurisdiction and Enforcement Act. The Hague Conference also monitors, supports, and reviews the operation of conventions that provide for cross-border judicial and administrative cooperation, through quadrennial "special commissions" and regional conferences.

43. Morocco, which acceded to the Convention effective June 1, 2010, is the first country with an Islamic law system to become bound by the Convention.

1. Text of the 1980 Convention

A copy of the Convention is included as Appendix A. The text of the Convention is also available on the website of the Hague Conference on Private International Law.[44] The U.S. Department of State maintains a website with links to the official text of the Convention as well as other resources for attorneys and judges.[45]

2. International Child Abduction Remedies Act

The International Child Abduction Remedies Act[46] (ICARA) implemented the Convention in the United States. Congress passed ICARA in 1988, contemporaneous with the Convention, entering the Convention into force between the United States and other nations.[47] The substantive law of the individual states of the United States does not impact the application of the Convention except in one area: courts (state or federal) may not peremptorily remove a child from a parent having physical control of that child unless provisions of state law are satisfied.[48]

3. Concurrent Jurisdiction

Both U.S. district courts and state courts have original and concurrent jurisdiction to hear cases for return of a child under the Convention.[49] This gives rise to potential issues relating to removal,[50] parallel actions,[51] and abstention.[52]

4. Role of the Central Authority

The Convention creates not only the legal structure for litigation of return cases as described above, but it also provides for administrative

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44. *See* http://www.hcch.net/index_en.php?act=conventions.text&cid=24.
45. *See* http://travel.state.gov/abduction/attorneysjudges/attorneysjudges_4306.html.
46. 42 U.S.C. §§ 11601–11610 (1988).
47. *See supra* page 2, note 11.
48. 42 U.S.C. § 11604(b) (1988). See discussion *infra* at page 134.
49. *See* 42 U.S.C. § 11603(a) (1988).
50. *See* 28 U.S.C. § 1441 (2002).
51. *See* Lops v. Lops, 140 F.3d 927 (11th Cir. 1998).
52. *See* Holder v. Holder (*Holder I*), 305 F.3d 854 (9th Cir. 2002).

tasks that are performed by a "Central Authority" designated by each member nation. In the United States, the Central Authority is the U.S. State Department.[53]

The Central Authority's role is to cooperate with counterpart authorities of sister states and to take an active role in facilitating the return of children wrongfully removed or retained in the United States. This mandate includes:

- locating children who have been wrongfully removed;
- securing the voluntary return of the child, if possible;
- exchanging information relating to the social background of the child;
- providing general information concerning the law of the contracting state;
- facilitating proceedings before the courts or administrative authorities to obtain the return of the child; and
- informing interested states as to the progress of individual cases.[54]

The U.S. State Department typically informs state and federal courts of the filing of a petition for return of a child and includes information concerning available resources that may be of assistance to the court. At the request of a U.S. court, the U.S. State Department may act as a conduit for inquiries concerning whether the removal or retention of a child was wrongful under the law of the country from which the child was removed. The State Department will forward the request for information through diplomatic channels to the Central Authority of the foreign country. When an answer has been provided by the foreign court or by the Central Authority for that country, it will be transmitted through the State Department back to the initiating court. Such an inquiry may be made under Article 15 of the Convention.[55]

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53. *See* Exec. Order No. 12648: Relating to the Implementation of the Convention on the Civil Aspects of International Child Abduction, 53 Fed. Reg. 30,637 (Aug. 11, 1988).

54. *See* Convention, *supra* note 10, Articles 7, 11.

55. *See infra* page 28.

Most Hague Convention cases should be resolved in six weeks. Pursuant to Article 11 of the Convention, the U.S. State Department may request reasons for the delay of a case beyond six weeks so as to keep applicants or sister Central Authorities informed of the progress of a case.[56]

F. Treaty Interpretation

In *Abbott v. Abbott*,[57] the Supreme Court set forth four sources for interpreting parental custody rights: (1) the Convention text, (2) the Convention's purposes, (3) the view of the U.S. State Department, and (4) decisions of sister signatory states to the Convention.

1. *Abbott* Guidelines

Abbott addressed the issue of whether a *ne exeat*[58] clause, coupled with rights of visitation, constituted sufficient "custody rights" under the Convention.

a. Interpretation of the Convention Text. Citing to its decision in *Medellin v. Texas*,[59] the Supreme Court noted "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."[60] When defining some terms, such as "custody rights," the law of the habitual residence must be consulted to determine how domestic law treats the question,[61] but that right must inevitably be determined by following the text and structure of the Convention.

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56. Convention, *supra* note 10, Article 11.

57. 560 U.S. ____, 130 S. Ct. 1983 (2010). *Abbott* is the only U.S. Supreme Court case to date that deals with the Convention.

58. A *ne exeat* clause is "An equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction. A *ne exeat* is often issued to prohibit a person from removing a child or property from the jurisdiction. . . ." Black's Law Dictionary (8th ed. 2004). In the United States these orders are routinely referred to as "restraining orders," which prohibit removal of a child from a state or local jurisdiction.

59. 552 U.S. 491 (2008).

60. *Abbott*, 130 S. Ct. at 1990.

61. *See* Convention, *supra* note 10, Article 3(a).

For example, a foreign nation may label as "custody rights" a set of rights that amount only to access or visitation rights in most other nations. While U.S. courts should consider that label, and the extent of the rights that it includes, courts should ultimately decide whether the particular label is consistent with the purposes, text, and interpretations given to the Convention by sister states and other relevant authorities. The *Abbott* court specifically noted that Congress recognized the need for "uniform international interpretation of the Convention" in its findings and declarations preamble to ICARA.[62]

b. Deference to Convention Purposes. The ultimate question in *Abbott* involved an issue integral to one of the Convention's fundamental purposes—deterring parental abductions motivated by seeking a friendlier forum.[63] When a court wrestles with interpreting a particular provision of the Convention, deference should be given to the purposes of the Convention. A court's interpretation should be consistent with the treaty's objectives.

c. Executive Interpretation of Treaties. The opinions of the executive branch concerning interpretation of the Convention are entitled great weight.[64] In *Abbott*, the Court gave deference to the opinions of the Office of Children's Issues of the U.S. State Department.[65]

d. Sister State Decisions. The decision in *Abbott* emphasizes the importance of consistency with the judgments of sister state signatories

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62. 42 U.S.C. § 11601(b)(3)(B) (1988).

63. See the discussion on custody rights *infra* beginning at page 39.

64. *See Abbott*, 130 S. Ct. at 1993 (citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184–85 n.10 (1982)).

65. The *Text & Legal Analysis*, drafted by the U.S. State Department at the time the Convention was newly adopted, also carries interpretative weight. U.S. State Department Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986) [hereinafter *Text & Legal Analysis*]. *See, e.g.*, Viteri v. Pflucker, 550 F. Supp. 2d 829, 834 (N.D. Ill. 2008); Castillo v. Castillo, 597 F. Supp. 2d 432, 438 (D. Del. 2009); Aldinger v. Segler, 263 F. Supp. 2d 284 (D.P.R. 2003).

to the Convention.[66] This is especially true now that eighty-seven countries are signatories to the Convention. Uniform interpretation can be undermined by undue reliance on local domestic practices, legal concepts, and value-laden presumptions. Recognizing this challenge, the Supreme Court utilized the text of the Convention as a means to promote uniformity of interpretation among signatories. The Court observed that interpreting the Convention using a uniform text-based approach ensures international consistency in interpreting the Convention, foreclosing courts from relying on local usage to undermine recognition of custodial arrangements in other countries and under other legal traditions.[67]

The Court found that its view was supported by the weight of authority in other nations, with scholars noting "an emerging international consensus on the matter."[68]

2. Pérez-Vera Report

The *Pérez-Vera Report* is the product of the official reporter of the 1980 sessions of the Hague Conference that led to the approval of the Convention.[69] The report is recognized as the official history and commentary to the Hague Convention and is a "source of the background on the meaning of the provisions of the Convention."[70] U.S.

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66. *See* Linda Silberman, *Interpreting the Hague Convention Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005).

67. *Abbott*, 130 S. Ct. at 1991.

68. *Id.*

69. *Pérez-Vera Report*, *supra* note 18. The *Pérez-Vera Report* may be accessed and downloaded at the website of the Hague Conference on Private International Law, at http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2779&dtid=3.

70. *See, e.g.*, Simcox v. Simcox, 511 F.3d 594, 605 n.3 (6th Cir. 2007); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). But note *Abbott*'s reservation as to the weight to be given to the *Pérez-Vera Report*: "We need not decide whether this Report should be given greater weight than a scholarly commentary." *Abbott*, 130 S. Ct. at 1995. *Compare Text & Legal Analysis*, *supra* note 65, at 10,503–06 (identifying the *Pérez-Vera Report* as the "official history" of the Convention and "a source of background on the meaning of the provisions of the Convention") and *Pérez-Vera Report* ¶ 8 (1981) ("[the Report] has not been approved by the Conference, and it is possible that, de-

courts routinely cite to this report for guidance on interpreting the treaty.[71]

3. U.S. State Department Text & Legal Analysis

The *Text & Legal Analysis*[72] is a document that was prepared by the U.S. State Department for the U.S. Senate as part of the ratification process for the Convention. It is valuable as an interpretative tool and is frequently cited.[73]

4. INCADAT

The Permanent Bureau of the Hague Conference on Private International Law has compiled a searchable database of decisions of other signatory nations called INCADAT (The International Child Abduction Database).[74] It is available in English, French, and Spanish. The database has links to the full text of many leading decisions of courts throughout the world, including U.S. courts.

G. Whether Both Countries Are Bound by the Treaty[75]

Two elements must be established in order to pursue an action for the return of a child: (1) the Convention must have "entered into force" between the two countries involved prior to the filing of the applica-

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spite the Rapporter's [sic] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective").

71. *See, e.g.*, Barzilay v. Barzilay (*Barzilay II*), 600 F.3d 912, 916–17 (8th Cir. 2010); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009).

72. *Text & Legal Analysis*, *supra* note 65.

73. *See, e.g.*, Nicolson v. Pappalardo, 605 F.3d 100, 105 (1st Cir. 2010); Baran v. Beaty, 526 F.3d 1340, 1345 (11th Cir. 2008); Karkkainen v. Kovalchuk, 445 F.3d 280, 288 (3d Cir. 2006).

74. This database can be found at http://www.incadat.com/index.cfm?act=text.text&lng=1.

75. The U.S. State Department maintains a list of countries with whom the Convention has entered into force with the United States. This can be accessed at the State Department's website at http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html.

tion for return;[76] and (2) the wrongful removal or retention of the child must have occurred after the date the treaty became effective in both countries.[77]

The issue of whether the Convention is "in force" between states can be complex, depending in some cases on whether the countries involved are "member states" or "party states." "Member states" are those nations that were members of the Hague Conference at the time of the Fourteenth Session in 1980. A member state becomes bound to the Convention by ratifying it. Party states are countries that did not belong to the Hague Conference on Private International Law at the time of approval of the Convention for adoption in 1980—party states become bound by the Convention by acceding to the Convention.

The legal significance of ratification versus accession is important. Between member states, the ratification by one member state causes the Convention to automatically enter into force between that member state and all other previously ratifying member states.[78] For example, the 1999 ratification by Belgium, a member state, caused the Convention to come into force between Belgium and all other member states that had previously ratified, including the United States. However, when a Member State X ratifies the Convention, the Convention does not automatically enter into force between Member State X and a party state that has acceded to the Convention. Member State X must expressly accept the accession by the party state. For example, El Salvador (a party state) acceded to the Convention in 2001. However, this accession was not accepted by Belgium until 2007. As such, the Con-

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76. *See* Convention, *supra* note 10, Article 38.

77. *See id.*, Article 35. In *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007), father brought suit against his former spouse to compel the return of the parties' two children to Dominican Republic. The U.S. had not accepted the Dominican Republic's accession to the Hague Convention, so the treaty was not in force between them. Father instead relied on the Alien Tort Statute (ATS) (28 U.S.C. § 1350). The circuit court affirmed the district court's denial of relief to father, finding that mother's fraudulent entry into the U.S. did not confer jurisdiction under the ATS.

78. Japan is the only remaining nation having original "member state" status that has not ratified the Convention. If and when Japan ratifies the Convention, it will immediately enter into force with the remaining member states.

vention had not "entered into force" between the two nations until Belgium accepted El Salvador's accession.

The same applies to the accession of one party state vis-à-vis another acceding state. That is, the accession must be specifically accepted by the previously acceding state. In the case of party state accession by Belarus, the act of Belarus agreeing to be bound by the Convention would not bind the United States, or any other member or party state, until these states affirmatively accept Belarus' accession. Until such formal acceptance is made, the Convention has not entered into force between these two nations.

If one country involved in a Hague Convention dispute only recently has acceded to the Convention, it may be complicated to determine whether both countries are reciprocally bound by the treaty. Addressing this issue, the court in *Viteri v. Pflucker*[79] concluded that the Convention will apply if it is *in force* between each country—that is, each country has either ratified or acceded to the Convention on the date of the wrongful removal.

In *Viteri v. Pflucker*, mother took the parties' child to the United States in September 2005. She failed to return to Peru when her visa expired in October 2005. Peru acceded to the Convention in 2001, and the United States ratified the Convention in 1988. In October 2005 (the date of wrongful retention), the Convention was *in force* in each country, but had not entered into force between them. The United States accepted Peru's accession in 2007, and the treaty entered into force between the two countries on June 1, 2007. Father petitioned for the return of the child in February 2008 and mother moved for dismissal for lack of jurisdiction.

The court ruled that a wrongful removal occurs as a fixed date: in the instant case, before the United States accepted Peru's accession to the Convention. Therefore, the court ruled the Convention did not apply because the Convention was not in force *between* the United States and Peru on the date of the wrongful removal. The United States' acceptance of Peru's accession in 2007 does not grant jurisdic-

79. 550 F. Supp. 2d 829 (N.D. Ill. 2008).

tion for a wrongful removal that occurred in 2005. The Convention must be in force between two countries; the Convention cannot simply be in force in each respective country.[80]

80. Practical reasons support this requirement. Petitions typically are transferred between countries through their Central Authorities. To the extent that a country acceding to the Convention fails to designate a Central Authority—or, having done so, the Central Authority lacks the capacity to perform its required tasks, such as locating children or communicating effectively with counterparts in other nations—the operation of the Convention is rendered a nullity.

II. The Case-in-Chief for the Return of a Child

A. Summary

The Convention provides two methods for requesting the return of a child: (1) administrative requests and (2) court proceedings. The administrative procedure begins with the filing of an application for return directly with the Central Authority of either the country where the child is located or the country of the left-behind parent. If the proceeding is started in the latter, the Central Authority will forward the request to the counterpart Central Authority where the child is located. The Central Authority will usually attempt to negotiate a return of the child directly with the parents involved. Central Authorities have no independent powers to compel the child's return; if a Central Authority's negotiations fail, the left-behind parent must make an application to a court where the child is located and secure a court order for the child's return.

The U.S. State Department attempts to track each case filed in U.S. courts where return of a child is sought. Occasionally, however, a petitioner may file a case without any prior involvement or notice to the U.S. Central Authority, and the case will not come to its attention. Although notice to the U.S. State Department is not a prerequisite to filing an action, should the need later arise to utilize the resources of the Central Authority, delays may occur that could have been obviated by petitioner's earlier notice.[81]

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81. For example, there may be a delay in Article 15 requests for information from the habitual residence whether the removal or retention of a child was unlawful under that nation's laws. The State Department also provides other services that may prove valuable to the court, such as assistance in locating counsel for petitioners; providing translation services for documents; assisting in securing passports and visas; facilitating contacts with the Central Authority of the child's habitual residence; and providing assistance with the return of children to their habitual residences.

In the United States, a petition for the return of a child may be filed in either state or federal court. The elements to the prima facie cause of action for return are:

- the child was wrongfully removed or retained;
- the child was removed from his or her habitual residence;
- there was a breach of the rights of custody under the law of the child's habitual residence;
- the left-behind parent was exercising those custody rights; and
- the child is under the age of sixteen.

When such an action is filed, a state court entertaining the merits of a custody case must stay any pending custody matters pursuant to Article 16 of the Convention.

No particular form of action is required to begin a case for return.[82] Because custody matters are not within the jurisdiction of federal courts, it is commonplace to commence a federal action by filing a petition for the return of the child, pursuant to 42 U.S.C. § 11603(b).[83] A petition for return is sometimes accompanied by a request for a warrant in lieu of habeas corpus.[84] In state courts, however, the matter has been raised in a number of legal avenues.[85]

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82. *See Text & Legal Analysis*, *supra* note 65, at 10,507.

83. 42 U.S.C. § 11603(b) (1988) states: "Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."

84. A warrant in lieu of a writ of habeas corpus is an order directed to law enforcement officers commanding them to physically secure the child and bring the child before the court. *See, e.g.*, *In re* Kim, 404 F. Supp. 2d 495 (S.D.N.Y. 2005); Aldinger v. Segler, 338 F. Supp. 2d 296 (D.P.R. 2004); *In re* Leslie, 377 F. Supp. 2d 1232 (S.D. Fla. 2005); *see also* Grieve v. Tamerin, 269 F.3d 149 (2d Cir. 2001) (raising return of child issue in writ of habeas corpus); Wanninger v. Wanninger, 850 F. Supp. 78 (D. Mass. 1994) (raising return of child issue in petition for warrant in lieu of writ of habeas corpus).

85. *See, e.g.*, Harsacky v. Harsacky, 930 S.W.2d 410 (Ky. Ct. App. 1996) (raising return of child issue during domestic violence action); Brennan v. Cibault, 643

B. Burdens of Proof

ICARA sets forth the burdens of proof for the case in chief for return and for the defenses to return.[86] For the case in chief (i.e., proof of the child being under sixteen, that there was a wrongful removal from the child's habitual residence, and the removal was in violation of the custody rights of the left-behind parent), the burden upon the petitioner is a preponderance of the evidence.[87]

In the case in chief, the petitioner must prove that the person with custody rights was actually exercising those rights. There are two provisions in the Convention that deal with the exercise of rights of custody: (1) Article 3(b) requires a showing in the petitioner's case in chief, and (2) Article 13 refers to non-exercise of custody rights as an affirmative defense. In the former case, the Convention presumes that only preliminary evidence will be needed to establish that custody rights were being exercised.[88] In the case of the Article 13 defense,

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N.Y.S.2d 780, 227 A.D.2d 965 (App. Div. 1996) (addressing return of child issue during action to modify custody and access); Geiser v. Valentine, No. 80286/07, slip op. 52046(U), 17 Misc. 3d 1117(A), 851 N.Y.S.2d 65 (Sup. Ct. 2007)) (unpublished table decision) (raising return of child issue in action for writ of habeas corpus).

86. 42 U.S.C. § 11603(e) (1988), Burdens of Proof:

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence -
  (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
  (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing -
  (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
  (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

87. *See* 42 U.S.C. § 11603(e)(1)(A) (1988).

88. *See, e.g.*, Asvesta v. Petroutsas, 580 F.3d 1000, 1018 (9th Cir. 2009) ("We and other courts have held that a petitioner's burden under Article 3(b) is minimal."). The *Pérez-Vera Report* provides, in paragraph 73, that "This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child." *See also Text & Legal Analy-*

however, the person opposing the return of the child has the burden of proving by a preponderance of the evidence that custody rights were not being exercised.[89]

The Convention sets forth five narrowly defined defenses to an action for return of a child. Under ICARA, the defenses are subject to different burdens of proof. Three defenses may be proved by a preponderance of the evidence:

- The person making the request for return of the child has delayed for more than one year since the wrongful removal or retention, and the child has become settled in the new environment.
- The person, institution, or other body having the care of the child was not actually exercising custody rights at the time of removal or retention.
- The person, institution, or other body having the care of the child consented to, or subsequently acquiesced in, the removal or retention.

Two defenses must be established by clear and convincing evidence:

- The return of the child would expose the child to a grave risk of "physical or psychological harm or otherwise place the child in an intolerable situation."
- The return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

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sis, *supra* note 65, at 10,507 (noting "Very little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child.").

89. *See Pérez Vera Report*, *supra* note 18, ¶ 73: "Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (i.e., discharged by the 'abductor' if he wishes to prevent the return of the child)."

C. Wrongful Removal and Retention

Article 3 of the Convention defines wrongful removal or retention as follows:

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

The legal definition of the term "wrongful" usually implies some sort of *mens rea* or evil intent. In the context of the Convention, however, "wrongful" simply indicates that a person has engaged in the conduct described in the elements set forth in subsections (a) and (b) of Article 3 above.[90]

1. Distinguishing Between Wrongful Removal and Wrongful Retention

The Convention provides a one-year time period for a parent to commence proceedings for the return of the child after a wrongful removal or wrongful retention.[91] If an action is commenced after the one-year

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90. *See* Thomson v. Thomson, [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253, ¶ 53 (Can. S.C.C.) (holding that mother's knowledge of an order preventing child's removal from Scotland was not essential) ("Nothing in the nature of *mens rea* is required; the Convention is not aimed at attaching blame to the parties. It is simply intended to prevent the abduction of children from one country to another in the interests of children. If the removal of the child was wrongful in that sense, it does not matter what the appellant's view of the situation was.").

91. *See* Convention, *supra* note 10, Article 12. Despite this provision, even though more than one year has passed, Article 12 also provides that the child must still be returned unless it is shown that the child is settled in the new environment. *See* Child Settled in New Environment, *infra* page 68.

period, then the abducting parent may assert the Article 12 defense that the child has become settled and should not be returned to the petitioning parent.

A distinction should be drawn between the concepts of wrongful removal and wrongful retention. The difference between the two is significant because in the case of wrongful removal, the time begins to run from the date of the wrongful conduct. In most cases, the wrongful conduct in question is unequivocal, giving rise to a fair degree of certainty as to the date the one-year period commenced.[92] Typically, wrongful removal cases are characterized by parents unilaterally taking children from the habitual residence without the knowledge or permission of the left-behind parent.

Determining the commencement date of wrongful retention can be more complicated. Most cases dealing with wrongful retention involve a party leaving the child's habitual residence with the child by agreement with the other party. This frequently occurs when a parent leaves with a child for a visit or vacation in another country. When the traveling party refuses to return the child according to the previous agreement, this conduct may become a wrongful retention. In the case of a wrongful retention, the time begins to run either (1) from the date when the child remains with the abducting parent despite the clearly communicated desire of the left-behind parent to have the child returned,[93] or (2) when the acts of the abducting parent are so unequivocal that the left-behind parent knows, or should know, that the child will not be returned.[94]

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92. *See, e.g.*, Belay v. Getachew, 272 F. Supp. 2d 553 (D. Md. 2003).

93. *See, e.g.*, Karkkainen v. Kovalchuk, 445 F.3d 280, 290 (3d Cir. 2006) (citing Slagenweit v. Slagenweit, 841 F. Supp. 264, 270 (N.D. Iowa 1993)). *See also* Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627, 76 Ohio Misc. 2d 25 (1995) (determining that action taken in custody proceedings unequivocally asserted left-behind parent's rights to custody).

94. *See, e.g.*, Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010); Zuker v. Andrews, 2 F. Supp. 2d 134, 140 (D. Mass. 1998); *see also In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004) (ruling that after several missed dates for returning child, date of wrongful retention was the date when father learned that mother was never going to return the child to Argentina).

2. Anticipatory Violation and Wrongful Retention

One issue arising in this context is whether an anticipatory breach of an agreement to return a child constitutes a wrongful retention. In *Toren v. Toren*,[95] the parties entered into a custody agreement in Israel in 1996. The agreement provided that the children would live with their mother in Massachusetts for a period of years, but not beyond July 21, 2000. In 1997, mother filed an action in Massachusetts seeking to modify the Israeli decree and requested sole custody of the children. In 1998, father filed a petition for return of the children under the Hague Convention on the basis that mother's actions were in breach of their custody agreement and constituted an unlawful retention of the children. The First Circuit rejected father's claim and dismissed the petition:

> Even if the father had alleged facts sufficient to support his claim that the mother intended to retain the children in the United States after July 21, 2000, we do not believe that the Hague Convention or ICARA would enable us to exercise jurisdiction over such a claim. To the extent that the father's argument is based on the mother's future intent, the father is seeking a judicial remedy for an anticipatory violation of the Hague Convention. But the Hague Convention only provides a cause of action to petitioners who can establish actual retention. . . . Therefore, we do not see how a petitioner like the father, alleging only an anticipatory retention, can invoke the protections of the Hague Convention.[96]

Following *Toren*'s holding, the district court in *Falk v. Sinclair*[97] found that an unlawful retention did not commence until the actual date an American father was to return the child to mother in Germany. The question in *Falk* was whether mother had filed her petition for return of the child within one year of the commencement of the unlawful retention. Father maintained that mother filed her application more

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95. 191 F.3d 23 (1st Cir. 1999).

96. *Id.* at 28.

97. 692 F. Supp. 2d 147 (D. Me. 2010); *accord* Philippopoulos v. Philippopoulou, 461 F. Supp. 2d 1321, 1325 (N.D. Ga. 2006).

than one year after the retention, arguing that retention occurred when he unequivocally indicated to the child's mother that he was not going to return the child to Germany. Mother alleged that the unlawful retention began on the date that the child was to be returned, approximately 40 days after father gave "clear notice" that he was not returning the child. Citing to *Toren*, the *Falk* court held that an anticipatory breach of the parties' agreement was not sufficient to amount to a wrongful retention. Accordingly, the one-year period under Article 12 did not begin to run until father failed to return the child on the parties' agreed-on date.[98]

3. Retention by *Ne Exeat* Order

In one case, a party contended that the action of a state court forbidding the removal of a child from that state amounted to a wrongful retention of the child. In *Pielage v. McConnell*,[99] mother, a native of the Netherlands, was involved in a child custody case with the child's father, a U.S. citizen, in the state courts of Alabama. In the course of litigation, mother was given temporary physical custody of the child, but the state court also entered a *ne exeat* order that forbade mother from removing the child from Alabama's jurisdiction pending a full custody decision on the merits. Wishing to return to the Netherlands with the child, but unable to do so because she was restrained from removing the child from Alabama, mother filed in federal court a Hague Convention petition for return, claiming that the effect of the Alabama *ne exeat* order was to wrongfully retain the child in Alabama. Affirming the district court's dismissal of mother's action, the Eleventh Circuit ruled that the Convention was "meant to cover the situation where a child has been kept by *another* person away from the petition claiming rights under the Convention, not where the petitioner still retains the child but is prevented from removing him from the jurisdiction" (emphasis added).[100]

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98. *Falk*, 692 F. Supp. 2d at 162.
99. 516 F.3d 1282 (11th Cir. 2008).
100. *Id.* at 1289.

4. Custody Rights

To be wrongful, the removal or retention of the child must be in violation of the left-behind parent's custody rights.[101] Custody rights are more than mere visitation or "access" rights.[102] A person may not maintain an action for return of a child when that person is entitled to exercise only access or visitation rights.[103]

a. Holders of Custody Rights. Article 3(a) of the Convention provides that custody rights may be 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. . . ." The vast majority of cases involve parents or relatives claiming custody rights, but administrative agencies or other bodies also may claim custody rights.[104] Article 3 establishes that the law of the country in which the child was habitually resident determines custody rights.[105]

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101. *See* Convention, *supra* note 10, Article 3.

102. The Convention speaks in terms of "access rights"—a common term in other countries for what is usually described in the United States as "visitation rights." *See* 42 U.S.C. § 11602(7) (1988) (providing "the term 'rights of access' means visitation rights").

103. *See, e.g.*, Bromley v. Bromley, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998) (quoting Viragh v. Foldes, 612 N.E.2d 241, 415 Mass. 96 (1993)).

104. *See, e.g.*, *In re* S.J.O.B.G., 292 S.W.3d 764 (Tex. App. 2009) (custody rights claimed by the Child Welfare Services of Norwegian Municipality); L.H. v. Youth Welfare Office of Wiesbaden, 150 Misc. 2d 490, 568 N.Y.S.2d 852 (Fam. Ct. 1991) (holding that where a child is placed by the German Child Welfare Office, the child's biological mother's custody rights can be taken by the court declaring the child a ward of the German court); Brown v. Orange Cnty. Dep't of Soc. Servs., 91 F.3d 150, 1996 WL 366366 (9th Cir. 1996) (unpublished table decision) (alleging wrongful removal of child by child welfare agency).

105. Nevertheless, as the Supreme Court noted in *Abbott*, custody rights must be determined "by following the text and structure of the Convention." Abbott v. Abbott, 130 S. Ct. 1983, 1990 (2010).

A party's nationality or cultural affiliation does not alter this principle. For example, Native Americans and members of tribes are not exempt from the operation of the Convention.[106]

b. Article 15 Request. A removal or retention of a child is not deemed to be wrongful if the custody rights of the left-behind parent have not been violated. In order to determine whether a parent has custody rights, a court may require information about the law of the child's habitual residence. To assist in resolving the issue, a court may request a determination on the custody rights issue from the authorities of that contacting state. Article 15 of the Convention authorizes an inquiry to be made of the child's habitual residence to determine whether, under the law of that nation, the child's removal was wrongful.[107] Although this provision has not been widely noted in the case law, it appears that it has been used in some cases.[108] The procedure for obtaining information pursuant to Article 15 is cumbersome and may cause unnecessary delay.[109] Another option for the court is to make direct contact with a Hague network judge (see *infra* page 128) and request information concerning the law of custody rights in the foreign jurisdiction.

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106. *See, e.g.*, Diabo v. Delisle, 500 F. Supp. 2d 159, 163 (N.D.N.Y. 2007).

107. *See* Convention, Article 15. As a cautionary note, courts should anticipate that an Article 15 request typically proceeds back and forth through the diplomatic channels of the Central Authorities. As a result, this may add delay to the proceedings. For this reason, Article 15 requests should be addressed early in the proceedings.

108. *See, e.g.*, Armiliato v. Zaric-Armiliato, 169 F. Supp. 2d 230 (S.D.N.Y. 2001) (Article 15 declaration provided by petitioning father to court); Silverman v. Silverman (*Silverman II*), 338 F.3d 886 (8th Cir. 2003) (Israeli court provided Article 15 declaration for use in U.S. courts); Sorenson v. Sorenson, No. 07-4720 (MJD/AJB), 2008 WL 750531 (D. Minn. 2008) (unreported disposition) (father asserting that Australian Central Authority requested an Article 15 declaration).

109. The Conclusions and Recommendations of the Sixth Special Commission on the practical operation of the 1980 and 1996 Conventions, June 2011, page 8, acknowledges the reporting of problems and delays in connection with the use of Article 15.

c. "Chasing Orders." In some cases, a left-behind parent may seek a custody order from the courts of the child's habitual residence *after* the child has been removed. This does not constitute an Article 15 request. Rather, these orders are commonly referred to as "chasing orders," and they ordinarily have very little efficacy.[110]

Litigation may be complicated by the issuance of chasing orders giving the left-behind parent full custody. If the primary caretaker parent abducts the child, courts hearing the return case may be reluctant to order the child's return to the habitual residence, placing the child in the immediate custody of a parent who played a lesser role in the care of that child. The Convention presumes that a child will be returned to his or her habitual residence, effectively restoring the *status quo ante*. Depending on the circumstances of the case, the existence of a chasing order altering that status quo may result in the child being returned to a situation that the court feels is inappropriate.[111] Under such circumstances, the court may be motivated to craft its return order in such a manner that the return of the child does not pose a risk of physical or emotional harm. See the section on "Undertakings," *infra* at page 98.

d. Methods of Establishing Custody Rights. Custody rights under the Convention may be established by (1) operation of law, (2) judicial or administrative decision, or (3) agreement of the parties.[112] Courts are frequently requested to interpret foreign law questions, especially when analyzing the question whether a parent has "custody rights"

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110. *See, e.g.*, Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) (where father obtained chasing order ostensibly determining in his favor all issues that would be appropriate for the U.S. court to determine). In *Feder*, the U.S. court avoided any discussion of the Australian family court order in its analysis of the issue of custody rights and made its determination de novo. *See also* Hanley v. Roy, 485 F.3d 641 (11th Cir. 2007) (finding that removal of children from grandparents who were testamentary guardians was a wrongful removal).

111. These issues may arise in cases where there is a showing of previous domestic violence, child abuse or neglect, or circumstances that otherwise impact on the welfare of the child.

112. *See* Convention, *supra* note 10, Article 3.

under the Convention. Proof of foreign law may be established pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.[113] The Convention also envisions that proof of foreign law may be established by the use of "certificates or affidavits," Central Authority opinions, letters, and expert testimony.[114]

i. Custody Rights Established by Operation of Law. Courts frequently look to the establishment of custody rights by operation of law, particularly in cases involving unmarried parents or where married parties have not previously sought orders relating to the status of their marriage or the custody of their children. For example in *Tsai-Yi Yang v. Fu-Chiang Tsui*,[115] the court determined the custody rights of unmarried parents pursuant to the law of British Columbian, the child's habitual residence. Under British Columbia law, the parent with whom the child "usually resided" is entitled to custody of the child.[116] Similarly, in *Bader v. Kramer (Bader I)*,[117] the court applied the law of the child's habitual residence, in this case Germany. The parents' divorce agreement granted only visitation rights to father, with no underlying award of custody. Under German law, absent an order granting one parent sole custody of the child, both parents re-

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113. Fed. R. Civ. P. 44.1: "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

114. *See Pérez-Vera Report*, *supra* note 18, ¶ 101. *See also* Whallon v. Lynn, 230 F.3d 450, 458 (1st Cir. 2000) (establishing proof of foreign law by an affidavit of Mexican attorney); *accord* Shalit v. Coppe, 182 F.3d 1124, 1130 (9th Cir. 1999) (finding that father's filing of declaration of his Israeli attorney is not sufficient); Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1064 (6th Cir. 1996) (interpreting German civil code and noting that "We review the district court's findings of fact for clear error and review its conclusions about American, foreign, and international law *de novo*."); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004) (establishing foreign law via letters from Argentine Central Authority).

115. 499 F.3d 259 (3d Cir. 2007).

116. *Id.* at 277.

117. 445 F.3d 346 (4th Cir. 2006).

tain "parental responsibility" for the child. Hence, father had enforceable custody rights.[118]

(a) Choice of law: territorial law. *Yang* raised another point regarding choice of law. Many countries, including the United States, contain individual territories that have their own unique systems of law. These countries include Canada,[119] Mexico,[120] and Australia,[121] among others. Article 31 of the Convention provides that where there are two or more systems of law applicable to different territorial units within a country, the law of the habitual residence "shall be construed as referring to the law of the territorial unit in that State where the child habitually resides." Since the United States has no national system of family law, state laws are used to define parents' custody rights.[122]

(b) *Patria potestas*. Principally in civil-law jurisdictions, including Central and South America, the right of *patria potestas* may establish enforceable rights of custody under the Convention. *Patria potestas* is a legal concept derived from Roman Law that connotes "all the duties and rights of the parents in relationship to their children who have not reached majority, regarding the care, development and education of their children."[123] Some U.S. courts have held that the

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118. *Id.* at 351.

119. *See, e.g.*, Application of McCullough on Behalf of McCullough, 4 F. Supp. 2d 411 (W.D. Pa. 1998).

120. *See, e.g.*, Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (utilizing the law of the State of Baja California Sur); Perez v. Garcia, 198 P.3d 539, 148 Wash. App. 131 (Ct. App. 2009).

121. Feder v. Evans-Feder, 63 F.3d 217, 221–22 (3d Cir. 1995).

122. *Id.*; *see also Text & Legal Analysis*, *supra* note 65, at 10,506.

123. Altamiranda Vale v. Avila, 538 F.3d 581, 584 (7th Cir. 2008) (explaining the right of *patria potestas* as interpreted in Venezuela); *see* also *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M.D. Fla. 2002). In *Whallon v. Lynn*, 230 F.3d 450, 456 n.7 (1st Cir. 2000), the First Circuit explained the origin and transition of the doctrine:

> *Patria potestas* is a concept derived from Roman law and originally meant paternal power. It referred to a father's "near absolute right to his children, whom he viewed as chattel," a right with which courts were powerless to interfere. (citation omitted); *see also* Black's Law Dictionary 1188 (7th ed.

right of *patria potestas* does not overrule contrary provisions spelled out in a valid custody agreement.[124] Other cases, however, have incorporated the concept of *patria potestas* into agreements and orders.[125]

ii. Custody Rights Established by Judicial or Administrative[126] Decision. Decisions or custody determinations made before the child

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> 1999) (defining *patria potestas* as "[t]he authority held by the male head of a family over his children and further descendants in the male line, unless emancipated," initially including "the power of life and death"). In contrast, the Roman legal tradition did not provide wives with rights of parental authority. (citation omitted).
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> . . . Latin American countries with civil code traditions appear to recognize some form of *patria potestas* rights. Pesin v. Rodriguez, 77 F. Supp. 2d 1277, 1286 (S.D.Fla.1999) (noting, in Hague Convention case, that under Venezuela's code father and mother "'are vested with the parental authority until a judicial decision establishes otherwise'" and that "father and mother who exercise parental authority have custody of their children . . . shall elect by mutual consent their place of domicile, residence or domicile [sic]"; finding that mother's removal of child breached father's rights of custody under the Convention). This case highlights the difficulties in imposing Anglo-American definitions of custody on legal systems, like Mexico's, that have different origins and traditions. Baja California Sur's code suggests the continuing resilience of *patria potestas* rights (albeit in a diluted form) under Mexican law, despite the presumption that physical custody of children under age seven be awarded to the mother, at least in cases of divorce.

124. *See, e.g.*, Gonzales v. Gutierrez, 311 F.3d 942, 954 (9th Cir. 2002) (holding Mexico's doctrine of *patria potestas* "does not confer rights of custody upon the non-custodial parent where a competent Mexican court has already decided the rights and obligations of both parents"), *overruled on other grounds,* Abbott v. Abbott, 130 S. Ct. 1983, 1986 (2010); *see also* Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007) (holding "to the extent that Mexican law of *patria potestas* afforded plaintiff any right of custody of the child, plaintiff relinquished such rights in the agreed divorce decree").

125. *See, e.g.*, Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1123–24 (D. Colo. 2008) (finding the Mexican interpretation of *patria potestas* to be consistent with Convention's definition of custody); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004)) (commenting on the incorporation of *patria potestas* in Argentine agreement); *see also* Lalo v. Malca, 318 F. Supp. 2d 1152 (S.D. Fla. 2004) (showing Panamanian divorce decree that provided physical custody to the mother, visitation rights to father, and shared *patria potestas* rights).

has been removed from the habitual residence will typically define the nature of the custodial relationship, whether those judgments have been issued by a U.S. court or the court of a foreign nation.[127] A custody decree may be effective even if it is obtained ex parte.[128] Additionally, a temporary custody order granting custody rights will support a petition for return even though the court has not made a final ruling on the merits of the custody case. In *Kufner v. Kufner*,[129] a temporary court order awarding mother primary care of the children and granting father visitation rights did not terminate father's custody rights. Under German law, joint custody remained in effect until the death of a parent or a court order terminating joint custody. Mother's removal of the children in the face of a nonremoval order from the German court was sufficient to confer upon father "rights of custody" that supported his successful application for return of the children.[130]

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126. Although in most countries custody and visitation decisions are typically made only by courts, in some countries these decisions may be made by administrative bodies. *See* Viragh v. Foldes, 612 N.E.2d 241, 243, 415 Mass. 96, 98 (1993) ("In Hungary, custody issues are decided by the courts while specifics of visitation matters are determined by an administrative system, referred to as the Guardianship Authority."); *see also Text & Legal Analysis*, *supra* note 65, at 10,506–07 ("Custody rights [arise] by reason of judicial or administrative decision. Custody rights embodied in judicial or administrative decisions fall within the Convention's scope. While custody determinations in the United States are made by state courts, in some Contracting States, notably the Scandinavian countries, administrative bodies are empowered to decide matters relating to child custody including the allocation of custody and visitation rights.").

127. Note, however, that judgments of a foreign nation are not entitled to the protection of full faith and credit. *See* Diorinou v. Mezitis, 237 F.3d 133, 142 (2d Cir. 2001). Full faith and credit applies only to United States courts' orders and judgments regarding the Hague Convention. *See* Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828, 843 (S.D. Tex. 2006) ("As a general matter, judgments rendered in a foreign nation are not entitled to the protection of full faith and credit.").

128. *See, e.g.*, Van De Sande v. Van De Sande, 431 F.3d 567, 569 (7th Cir. 2005).

129. 519 F.3d 33 (1st Cir. 2008).

130. *Id.* at 39.

It is not required that orders conferring custody rights be issued by the courts of the child's habitual residence. In *Brooke v. Willis*,[131] where father was a resident of England and mother was detaining the child in the state of Virginia, the existence of a court order from California was held to govern the custodial rights of the parties. The California order granted each parent equal joint legal and physical custody of the child. The district court found that father had custody rights pursuant to the California order noting:

> Although the 1989 Stipulation and Order regarding custody . . . was made by a California court rather than a British court, the explanatory report accompanying the Convention provides that a judicial decision regarding custody may originate in a country other than the place of habitual residence (citations omitted). Furthermore, when custody rights are exercised in the place of habitual residence based on a foreign custody decree, it is not necessary for the state of habitual residence to formally recognize that decree. (citation omitted).[132]

If a parent is able to obtain a favorable custody decree from a nation that is not the child's habitual residence, the court may disregard that decree. Article 17 of the Convention provides the following:

> The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

In *Altamiranda Vale v. Avila*,[133] mother and father divorced in Venezuela. Mother obtained father's consent to travel with their children to Florida for five days on the pretense that she was going to a wedding. Mother left Venezuela, but instead flew to Illinois where she settled and married a man she had met on the Internet. Father peti-

131. 907 F. Supp. 57 (S.D.N.Y. 1995).
132. *Id.* at 62.
133. 538 F.3d 581 (7th Cir. 2008).

tioned for a return of the children. The parties agreed to a dismissal of father's petition based on their written agreement that the children would be in mother's custody but would spend every summer and lengthy holidays with father in Venezuela. The agreement provided that if mother failed to comply with its terms, father could refile his Hague Convention petition. The agreement further provided that the children's habitual residence was Illinois, and mother obtained an uncontested state judgment incorporating the terms of the agreement. When mother defaulted on her promise to allow the children to travel to visit with their father, father moved to set aside the judgment dismissing his Hague application and reinstate his request for the return of the children. Mother raised the Illinois judgment as a defense to his petition, contending that the children's habitual residence was no longer Venezuela pursuant to the Illinois decree, and argued that the Illinois decree was entitled to full faith and credit. She also contended that the reopening of father's Hague case was barred by the *Rooker-Feldman*[134] doctrine. The Seventh Circuit rejected each of mother's contentions and ordered the children returned to Venezuela, finding that Article 17 explicitly allowed courts to override a custody decree obtained by fraud.[135]

iii. Custody Rights Established by Agreement. Article 3 provides that custody rights may be established by "an agreement having legal effect" under the law of the child's habitual residence. Such agreements do not have to be reduced to a judgment or incorporated into custody orders in order to be binding.[136] For example, in *Carrascosa v.*

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134. The *Rooker-Feldman* doctrine bars federal courts from "exercising subject-matter jurisdiction over a proceeding in which a party losing in state court seeks what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Noel v. Hall, 341 F.3d 1148, 1156, 1158, 1163–64 (9th Cir. 2003). *See* Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). See discussion of the *Rooker-Feldman* doctrine *infra* at page 122.

135. *Altamiranda Vale*, 538 F.3d at 585.

136. The Legal Analysis of the Convention recites a brief but relevant history on this part of Article 3:

McGuire,[137] the court found that the parties signed a valid, binding "Parenting Agreement" to resolve their custody issues without seeking "any court's imprimatur."

However, a custody agreement must be sufficiently definite to be accorded legal significance. *In re Application of Adan*[138] involved an informal agreement made by the parents that addressed the parenting of the child. During Hague litigation, the parties failed to provide the court with an English version of the document and were vague on precisely what the parenting agreement provided. The court noted:

> Indeed, [father] conceded in his testimony before the District Court that he did not consider the agreement binding because it "was not ratified in front of a judge," and that the agreement "didn't last long really." The parties have not cited, and the District Court did not mention, any provisions of Argentine law related to the creation, terms, or enforceability of such agreements, and we therefore have insufficient information to conclude whether the agreement had "legal effect under the law of [Argentina]," as required by Article 3 of the Convention.[139]

> Comments of the United States with respect to language contained in an earlier draft of the Convention (i.e., that the agreement 'have the force of law') shed some light on the meaning of the expression 'an agreement having legal effect.' In the U.S. view, the provision should be interpreted expansively to cover any legally enforceable agreement even though the agreements may not have been incorporated or referred to in a formal custody judgment. Actes et documents de la Quatorzieme Session, (1980) Volume III. Child Abduction, Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision: As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities. Pérez-Vera Report, paragraph 70 at 447.

Text & Legal Analysis, *supra* note 65, at 10,507.

137. 520 F.3d 249, 256 (3d Cir. 2008).

138. 437 F.3d 381 (3d Cir. 2006).

139. *Id.* at 393.

iv. Agreements Establishing Habitual Residence. Parents may not arbitrarily fix a child's habitual residence by an agreement between them. In *Barzilay v. Barzilay (Barzilay II)*,[140] mother took the parties' three children to Israel to visit with their father. While in Israel, father commenced a custody action, ultimately resulting in the parties reaching an agreement that was approved by an Israeli court. The agreement, reduced to a formal judgment, provided that mother and the children would repatriate to Israel by August 2009 and mother's failure to do so would amount to an abduction under the Hague Convention. The judgment also designated the Israeli courts as the only proper jurisdiction for handling custody issues between the parents. Soon after mother and children returned to the United States, father filed a Hague Convention action in federal district court.[141] The district court found that the children's habitual residence was in Missouri. Father argued that the Israeli judgment was res judicata and entitled to recognition in U.S. courts. He also argued that the parties' agreement in the judgment was a binding contract establishing the children's habitual residence in Israel.

The court found both of father's arguments to be unpersuasive. As a factual matter, the Israeli judgment conceded that the children's habitual residence was in Missouri. The district court found, however, that a recitation in a custody order fixing the children's habitual residence by consent was ineffectual:

> We have held that "[h]abitual residence may only be altered by a change in geography and passage of time." *Silverman,* 338 F.3d at 898. It follows that it may not be altered by simple parental fiat. In other words, "[w]hile the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone." *Mozes,* 239 F.3d at

140. 600 F.3d 912 (8th Cir. 2010).

141. The district court abstained on the basis that the Missouri state court had adjudicated that Hague petition, but on appeal the matter was remanded with instructions to hear the merits of the petition. Barzilay v. Barzilay (*Barzilay I*), 536 F.3d 844 (8th Cir. 2008).

> 1078. The notion that parents can contractually determine their children's habitual residence without regard to the actual circumstances of the children is thus entirely incompatible with our precedent. Indeed, [father] has not cited a decision by any court anywhere in the world embracing such a proposition.[142]

5. Rights of Custody Versus Rights of Access

Rights of custody support a Hague petition for the return of a child; rights of access alone do not. For this reason, it is important to determine if a petitioning party possesses rights of custody or rights of access. Article 5 of the Convention defines these distinct rights as follows:

> For the purposes of this Convention—
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

In *Jenkins v. Jenkins*,[143] the parties, both Israeli citizens, moved to the United States for the purpose of seeking better employment. They lived in Ohio for almost three years and became established there. When their marriage deteriorated, mother wanted to go back to Israel with their child, but father refused to allow the child to leave the United States. Mother, who still resided in the United States, commenced an action for return of the child to Israel. The court denied mother's application, finding that there was no breach of her rights of custody. The court noted, "In refusing to let [mother] take [the child] to Israel, [father] may arguably have committed a breach of [mother's] 'rights of access' to [the child], (footnote omitted) but he did not commit a 'breach of rights of custody . . . under the law of the State in which the

142. *Barzilay II*, 600 F.3d at 920.
143. 569 F.3d 549 (6th Cir. 2009).

child was habitually resident immediately before the [alleged] removal or retention'."[144]

6. *Ne Exeat* Orders—*Abbott v. Abbott*

Abbott[145] addressed an issue that generated conflicting rulings in the courts of appeals: can a parent with only access rights acquire custody rights if a *ne exeat* clause accompanies the access rights? In a six-to-three opinion, the Supreme Court held that a *ne exeat*[146] order confers a right of custody to a left-behind parent, entitling that parent to maintain an action under the Convention.

This decision reversed the Fifth Circuit opinion[147] that followed the Second Circuit judgment in *Croll v. Croll*.[148] *Croll* held that a parent with visitation rights and a *ne exeat* clause possessed only part of the "bundle of rights" that encompass "rights of custody." *Croll* reasoned that such limited rights are insufficient to compel a return remedy under the Convention. The Fourth and Ninth Circuits had also adopted *Croll*'s reasoning.[149] However, in *Furnes v. Reeves*,[150] the Eleventh Circuit refused to follow the holdings of the Fourth and Ninth Circuits, holding that a *ne exeat* provision conferred a right that would

144. *Id.* at 555.

145. 560 U.S. ____, 130 S. Ct. 1983 (2010).

146. As in *Abbott*, a *ne exeat* order typically restrains a parent, or both parents, from removing a child from the jurisdiction of the court, or from moving a child across an international frontier without the permission of the other parent or a court. Usually this right is not absolute, and if permission to remove the child is unreasonably withheld, or a court determines that good cause for continued restraint no longer exists, a court of competent jurisdiction may vacate the *ne exeat* order.

147. Abbott v. Abbott, 542 F.3d 1081 (5th Cir. 2008).

148. 229 F.3d 133 (2d Cir. 2000), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010).

149. *See* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003); Gonzales v. Gutierrez, 311 F.3d 942 (9th Cir. 2002). State courts that have considered the issue appear to have accepted *Croll*'s reasoning regarding the lack of efficacy of a *ne exeat* order. *See* Ish-Shalom v. Wittman, 797 N.Y.S.2d 111, 19 A.D.3d 493 (App. Div. 2005); Welsh v. Lewis, 292 A.D.2d 536, 740 N.Y.S.2d 355 (App. Div. 2002).

150. 362 F.3d 702 (11th Cir. 2004).

satisfy the Convention's definition of "custody rights," thus creating a split among the circuits.

In *Abbott*, mother, father, and child lived in Chile since the child was an infant. The Chilean court granted mother the daily care and control of the child, and father was granted "direct and regular" visitation. According to Chilean statute, once a parent is granted visitation rights, a *ne exeat* right is conferred, requiring the custodial parent's permission before the child may be removed from the country.[151] An additional *ne exeat* was ordered at mother's request when she became concerned that the child's father might remove the child. In 2005, while custody proceedings were still pending before the Chilean courts, mother took the child to Texas in violation of the order of the Chilean court and Chilean statute. Father commenced a Hague application in Texas.

The U.S. Supreme Court held that father's statutory *ne exeat* clause gave him both the right to determine the child's place of residence and a joint right relating to the care of the child. The court acknowledged that a *ne exeat* clause did not fit within "traditional notions of physical custody," but reasoned that the Convention established its own concept of custody rights consistent with increasingly broad definitions in use within the United States.[152]

Mother argued that the *ne exeat* order imposed by the Chilean court did not have a provision that granted father a right to consent to the child's removal. She argued that the provision could not confer custody rights upon father, but rather was merely a provision that protected the Chilean court's continuing jurisdiction. The court declined to rule on the legal significance of a *ne exeat* clause, which did not include a provision granting a parent the right to consent to the removal of a child. In dictum, however, the court noted, "Even a *ne exeat* order issued to protect a court's jurisdiction pending issuance of

151. *See, e.g.*, Law No. 16,618, Julio 22, 1966, Diario Oficial [D.O.] (Chile).

152. Abbott v. Abbott, 560 U.S. ____, 130 S. Ct. 1983, 1991 (2010).

further decrees is consistent with allowing a parent to object to the child's removal from the country."[153]

D. Habitual Residence

The determination of a child's habitual residence is significant because wrongful removal can occur only if the child has been taken from his or her habitual residence.[154] Courts must look to the law of the habitual residence in order to determine whether the parent seeking return of the child has custody rights.

"Habitual residence" is not defined by the Convention. According to the *Pérez-Vera Report*, "We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference that regards it as a question of pure fact, differing in that respect from domicile."[155]

Before a substantial body of U.S. case law developed, courts adopted the definition of habitual residence set forth in a case from the United Kingdom, *In re Bates*:[156]

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

153. *Id.* at 1992.

154. In order for the Convention to apply, the child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights." Convention, Article 4. "In practical terms, the Convention may be invoked only where the child was habitually resident in a Contracting State and taken to or retained in another Contracting State." *Text & Legal Analysis*, *supra* note 65, at 10,504.

155. *Pérez-Vera Report, supra* note 18, ¶ 66.

156. [1989] EWHC (Fam) CA 122/89 (Eng.).

> a sufficient degree of continuity to be properly described as settled.[157]

The "settled purpose" language of *Bates* has continued to be one of the hallmarks of the habitual residence inquiry. However, some U.S. federal courts have begun to focus on "parental intent." See discussion on the role of parental intent *infra* beginning at page 44.

The question of whether a particular place is a child's habitual residence is a fact-driven issue.[158] Courts have considered a number of factors, including language issues,[159] how well the child has acclimated to his or her environment, the intentions of the child's parents, the time that the child was physically located in a particular place,[160] and personal issues, such as medical care, schooling,[161] social life,[162] extended family, friends, and age.[163]

The concept of habitual residence must be distinguished from "domicile." The differences between the two are noted in the *Pérez-Vera Report* and by most courts.[164] Domicile embodies elements of

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157. *Id.* at 10.

158. *See, e.g.*, Holder v. Holder (*Holder II*), 392 F.3d 1009, 1016 (9th Cir. 2004) (opining that cases involving military families do not "generate a typical fact pattern and, in all Convention cases, emphasis is on the details of the case at hand").

159. *See, e.g.*, McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. 2007) (unreported disposition).

160. *See, e.g.*, Miller v. Miller, 240 F.3d 392, 400 (4th Cir. 2001); Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995).

161. *See, e.g.*, Ruiz v. Tenorio, 392 F.3d 1247, 1255 (11th Cir. 2004); Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 898–99 (8th Cir. 2003).

162. *See, e.g.*, *Holder II*, 392 F.3d at 1020.

163. *See, e.g.*, *id.* at 1019.

164. *See Pérez-Vera Report, supra* note 18, ¶ 66. *See, e.g.*, Kijowska v. Haines, 463 F.3d 583, 587 (7th Cir. 2006) ("[E]quating habitual residence to domicile would reraise the spectre of forum shopping by encouraging a parent to remove the child to a jurisdiction having a view of domicile more favorable to that parent's case. So, consistent with Congress's recognition of 'the need for uniform international interpretation of the Convention,' 42 U.S.C. § 11601(b)(3)(B), 'habitual residence' should bear a uniform meaning, independent of any jurisdiction's notion of domicile. Koch v. Koch, . . . 450 F.3d at 712."). *See also* Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401–02 (6th Cir. 1993) ("[H]abitual residence must not be confused with domicile.

future intent, citizenship, and nationality—concepts that the Convention does not consider determinative of a child's habitual residence.[165] Nationality and citizenship have no bearing on a determination of a child's habitual residence. It is not unusual for a court to be presented with a situation where both parents and children are of the same nationality and citizenship, yet the child's habitual residence is deemed to be another country.[166]

1. Appellate Standard of Review

The appellate standard of review for factual determinations is whether the district court's factual findings are subject to "clear error."[167] The standard of review for mixed questions of fact and law are subject to a de novo review. A de novo review applies to findings of habitual residence.[168] The de novo standard also applies to:

- whether a grave risk of harm exists under Article 13(b);[169]

To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.").

165. *E.g.*, Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (dismissing consideration of the children's status as registered residents of Sweden on the basis that their official resident status had nothing to do with their habitual residence).

166. *E.g.*, Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995) (ordering child returned to Australia where both parents and child were American citizens living in Australia).

167. *See, e.g.*, Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010).

168. *See* Barzilay v. Barzilay (*Barzilay II*), 600 F.3d 912 (8th Cir. 2010); Sorenson v. Sorenson, 559 F.3d 871 (8th Cir. 2009); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Whallon v. Lynn, 230 F.3d 450, 454 (1st Cir. 2000); Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010); *but cf.* Silverman v. Silverman, 312 F.3d 914, 916–17 (8th Cir. 2002) (analyzing the question of habitual residence, the court noted that "We are not persuaded that in this circumstance the Silverman children's habitual residence inquiry raises mixed questions of law and fact. Resolution of this case is largely fact-based, as are most cases arising under the Hague Convention. . . . We conclude that the determination of . . . habitual residence is a factual finding, and hold that the district court's findings are not clearly erroneous.").

169. *See, e.g.*, Baran v. Beaty, 526 F.3d 1340, 1345 (11th Cir. 2008) (citing Simcox v. Simcox, 511 F.3d 594, 601 (6th Cir. 2007), and *Silverman II*, 338 F.3d at 896).

- whether a child is settled within the meaning of Article 12;[170]
- the application of domestic, foreign, and international law;[171] and
- whether equitable tolling may be applied to Article 12's time limitation of one year.[172]

2. The Role of Parental Intent

a. Division in the Circuits. In *Nicolson v. Pappalardo*,[173] the court noted that a majority of the circuits approach the question of habitual residence beginning "with the parents' shared intent or settled purpose regarding their child's residence."[174] Circuit courts are divided, however, on the extent that parental intent should factor into the acquisition of a habitual residence. The First, Second, Fourth, and Seventh Circuits[175] place the primary focus upon parental intent, following the Ninth Circuit decision in *Mozes v. Mozes*.[176] Under this approach the first inquiry when deciding whether a new habitual residence has been acquired is: Did the parents demonstrate a shared intention to aban-

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170. *See, e.g.*, Blondin v. Dubois (*Blondin II*), 238 F.3d 153 (2d Cir. 2001); *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009).

171. *See, e.g.*, Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001); Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007).

172. *See, e.g.*, *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009).

173. 605 F.3d 100 (1st Cir. 2010).

174. *Id.* at 104.

175. *See* Zuker v. Andrews, 1999 WL 525936 (1st Cir. 1999) (unreported opinion); Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005); *Maxwell*, 588 F.3d 245; Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). Note, however, that some courts apply some of the *Mozes* criteria, but deviate from it in other ways. *See* Whiting v. Krassner, 391 F.3d 540, 550 (3d Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding an intent to abandon the U.S. as a prior habitual residence for an infant, who was to spend a two-year period in Canada, and then return to the U.S.). See also *Norinder v. Fuentes*, 657 F.3d 526 (7th Cir. 2011), where the court acknowledged that in *Koch*, *supra*, 450 F.3d at 715, that the Seventh Circuit adopted a "version" of the *Mozes* analysis by considering "the shared actions and intent of the parents coupled with the passage of time."

176. 239 F.3d 1067 (9th Cir. 2001).

don the former habitual residence?[177] The second question in the *Mozes* analysis is whether there has been a change in geography for an "appreciable period of time"[178] that is "sufficient for acclimatization."[179]

Other circuits have declined to make the issue of parental intent dispositive and have focused instead upon the degree of the child's settlement in determining the issue of habitual residence. In *Stern v. Stern*,[180] the Eighth Circuit cited to its previous decision in *Barzilay v. Barzilay (Barzilay II)*[181] and noted that the issue of the child's settlement must be viewed from the child's perspective and that parental intent is not dispositive (under the Eighth Circuit's decisions). Citing to decisions in the Third[182] and Sixth[183] Circuits, and rejecting the *Mozes* approach, the court noted that "[t]he child's perspective should be paramount in construing this convention whose very purpose is to 'protect children' (citation omitted) by preventing their removal from 'the family and social environment in which [their lives have] developed'."[184]

Similarly, the Sixth Circuit, in the seminal case *Friedrich I*,[185] adopted a five-factor test for determining habitual residence. Under this test,

1. courts should look to the facts and circumstances of each case as opposed to concepts of legal residence or domicile;
2. courts should consider only the child's experiences;
3. courts should focus exclusively on the child's past experience, and not future plans of the parents;

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177. *Id.* at 1075.

178. *Id.* at 1078 (citing C v. S (Minor: Abduction: Illegitimate Child), [1990] 2 All E.R. 961, 965 (Eng.)).

179. *Id.* at 1067 (citing Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995)).

180. 639 F.3d 449 (8th Cir. 2011).

181. 600 F.3d 912 (8th Cir. 2010).

182. Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006).

183. Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

184. *Stern*, 639 F.3d at 452 (citing to the *Pérez-Vera Report* (1981)).

185. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396 (6th Cir. 1993).

4. a child may only have one habitual residence;[186] and
5. habitual residence is not determined by the nationality of the child's primary caregiver.[187]

Under this approach, courts should focus on factors 2 and 3 above—the "past experiences of the child, not the intentions of the parents."[188]

In *Robert v. Tesson*,[189] the Sixth Circuit adhered to its previous test set out in *Friedrich I*, but also incorporated a major part of the Third Circuit's holding in *Feder v. Evans-Feder* and held that "a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization," and where this presence has a "degree of settled purpose from the child's perspective."[190] The *Robert* court declared that the *Feder* language was consistent with its holding in *Friedrich I*, that the proper inquiry must "focus on the child, not the parents, and examine past experience, not future intentions."[191]

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186. There is somewhat of a question whether a child may acquire more than one habitual residence. *See* Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) (implying the possibility of dual habitual residences). In *Johnson v. Johnson*, 493 S.E.2d 668, 26 Va. App. 135 (Ct. App. 1997), father and mother entered into a custody agreement that provided that their daughter would spend alternating school years in Sweden and the United States. Understandably, this situation led to substantial litigation, including multiple Hague Convention cases. While it could be argued that had the agreement been followed, the child indeed had more than one habitual residence, it is doubtful that the drafters of the Convention contemplated that this type of arrangement would fall within the purview of the Convention. *See also* Quinn v. Settel, 682 So. 2d 617 (Fla. Dist. Ct. App. 1996) (implying the concept of concurrent habitual residences where a child was the subject of a shared custody agreement between the parents, spending equal amounts of time in the United States and France). *But cf.* Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010) (holding that a child may only have one habitual residence); *accord In re* Morris, 55 F. Supp. 2d 1156 (D. Colo. 1999).

187. *Robert*, 507 F.3d at 989.

188. *Id.*

189. 507 F.3d 981 (6th Cir. 2007).

190. *Id.* at 989.

191. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993).

b. Parental Intent. Under *Mozes*, cases raising issues regarding parental intent fall into three general categories. The first category deals with cases where there was a mutual settled intent to change habitual residence, even though one party may have given a "grumbling acceptance." In this situation, courts are likely to find that the child's habitual residence has changed.[192] See *infra* page 48.

The second category described in *Mozes* consists of those cases where both parents intend the relocation to be temporary. Courts will not find a change in habitual residence if one parent decides to resettle permanently in the temporary location.[193] See *infra* page 49.

The third category cited by *Mozes* involves situations where parents agree to allow a relocation, but for an ambiguous or uncertain period of time. In these cases, the result seems to center around whether the stay was intended to be indefinite or whether there was a conflict in the parental intent. Where the intent points to an indefinite stay, courts have tended to find an abandonment of the prior habitual residence.[194] Where, however, there is a lack of consensus between the parents whether the stay was indefinite or simply left for future negotiation, *Mozes* then finds that there is no mutual intent of abandonment of the prior habitual residence.[195] See *infra* page 51.

Mozes cautions that parental intent cannot effect a change in the habitual residence "by wishful thinking alone," but that it must be accompanied by an actual "change in geography"[196] plus an "appreciable period of time."[197] Finally, *Mozes* recognizes that despite a lack of

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192. Mozes v. Mozes, 239 F.3d 1067, 1076–77 (9th Cir. 2001).

193. *Id.* at 1077.

194. *Id.*

195. *Id.* at 1077–78.

196. *Friedrich I*, 983 F.2d at 1402.

197. *Mozes*, 239 F.3d at 1079. But it has been suggested that the time necessary to establish a habitual residence may be as short as one day. *See* Brooke v. Willis, 907 F. Supp. 57, 61 (S.D.N.Y. 1995) (finding a time period was one summer and stating, "Place of habitual residence is determined more by a state of mind than by any specific period of time; technically, habitual residence can be established after only one day as long as there is some evidence that the child has become settled into the location in question."). In *Bates*, a period of three months was found sufficient to have constitut-

uniform parental intent, a relocation to a different country for a longer period of time may result in such a degree of acclimatization that the child acquires a new habitual residence. In this latter situation, however, the court cautions that "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."[198]

i. Mutual Intent. Where parties have exhibited a mutual intention to relocate to another place, courts have found that the relocation amounts to a change in the child's habitual residence.[199] In *Feder v. Evans-Feder*,[200] mother and father moved to Australia so that father could accept employment there. Father moved in advance, and the mother and child followed. Mother expressed an initial reluctance to relocate to Australia, but acquiesced in the move, joining in the plans to establish a life in that country. After several months in Australia, mother surreptitiously removed the child back to the United States. Granting father's petition for return of the child to Australia, the court relied upon the analysis in *Friedrich I*, adding to the definition of habitual residence:

> . . . [W]e believe that a child's habitual residence is the 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. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place *and*

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ed the child's habitual residence. *In re* Bates, [1989] EWHC (Fam.) CA 122/89 (Eng.). Other cases have found habitual residence on periods of time as short as eight weeks.

198. *Mozes*, 239 F.3d at 1078–79.

199. *See* Harsacky v. Harsacky, 930 S.W.2d 410, 415 (Ky. App. 1996) (finding that where it was the intention of the parties to relocate to the U.S. for an indefinite period of time, ". . . we fully agree with the trial court that a determination of habitual residence 'must focus on the child, not the parents, and examine past experience, not future intentions.' Friedrich v. Friedrich, 983 F.2d at 1401. Mrs. Harsacky's unrealized future intention cannot change the specific intention demonstrated by the conduct of both parties.").

200. 63 F.3d 217 (3d Cir. 1995).

> *the parents' present, shared intentions regarding their child's presence there.*[201] (emphasis added)

ii. Relocations for a Finite Period of Time. The second *Mozes* category includes relocations that are intended for a specific and limited period of time. Where that time is relatively short, courts have refused to find a change in habitual residence. For example, in *In re Morris*,[202] father was offered a teaching position in Switzerland for ten months, resulting in the relocation of the mother and child to that country. Though the parents jointly intended to move back to Colorado after the teaching assignment ended, mother changed her mind during the ten months, wishing to stay in Europe. Father clandestinely returned to Colorado with the child, and mother filed a Hague Convention petition in district court. The court found that the child's habitual residence was in Colorado, noting:

> In determining the habitual residence of a child, the duration of the residence in the contracting state is a factor for consideration. See Mozes v. Mozes, 19 F. Supp. 2d 1108, 1115 (C.D. Ca. 1998). Where the duration of a stay in a foreign country is intended to be indefinite, the habitual residence of a child is usually in that foreign country. See Falls v. Downie, 871 F.Supp. 100, 102 (D.Mass.1994); Levesque v. Levesque, 816 F.Supp. 662, 666 (D.Kan.1993). However, where the stay is intended for a limited, distinct period of time, especially for less than one year, courts have been reluctant to find that a new habitual residence has been established. See *In re* S (Minors), F.L.R. 70 (UK 1994).[203]

Under some circumstances, a child's habitual residence may shift with his or her parents' change in residence, even though the stays in each place were relatively brief. In *Zuker v. Andrews*,[204] mother and father, an unmarried couple, alternated residences between the United States, mother's country of origin, and Argentina, father's country.

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201. *Id.* at 224.
202. 55 F. Supp. 2d 1156 (D. Colo. 1999).
203. *Id.* at 1161.
204. 2 F. Supp. 2d 134 (D. Mass. 1998).

Father was involved in the recording industry in Argentina and consented to mother's periodic return to the United States with the child. The child alternated between the United States and Argentina seven times between 1993 and 1996, never spending more than ten months in one location. The court found that the child's habitual residence shifted with the moves stating, "[For the periods noted] [the child] was a habitual resident of the country in which he was actually situated. This is certainly true from the point of view of [the child]. It is also true from the point of view of the shared intentions of the parents."[205]

Even though parents may agree that a relocation is for a finite period of time after which return to the original home is contemplated, where the period of time is sufficiently long for the child to become acclimatized to the new environment, courts may find that a change of habitual residence has occurred. For example in *Whiting v. Krassner*,[206] the parents agreed to allow their infant child to be relocated to Canada for two years, then to be relocated back to the United States upon the occurrence of certain conditions. In finding that the child's habitual residence shifted to Canada, the court stated:

> [T]he fact that the agreed-upon stay was of a limited duration in no way hinders the finding of a change in habitual residence. Rather, as we stated in *Feder,* the parties' settled purpose in moving may be for a limited period of time. *See Feder,* 63 F.3d at 223. Logic does not prevent us from finding that the shared intent of parents' to move their eighteen-month old daughter to Canada for two years could result in the abandonment of the daughter's prior place of habitual residence. Put more succinctly, in our view, the intent to abandon need not be forever; rather, intent to abandon a former place of residency of a one-year-old child for at least two years certainly can effectuate an abandonment of that former habitual residence.[207]

205. *Id.* at 138.
206. 391 F.3d 540, 548–50 (3d Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005).
207. *Id.* at 550.

In *Shalit v. Coppe*,[208] a twelve-year-old boy relocated with his father to Israel so that his mother could attend law school in the United States. The duration of the relocation was agreed to be three years. At the end of the second year, the child traveled to Alaska to visit with his mother. She unilaterally decided not to return the boy, and father sought relief under the Hague Convention. Finding that the child had become settled in Israel, the court ruled that the child's habitual residence had changed to Israel.[209]

iii. Lack of Mutual Intent. The third *Mozes* category includes cases where the left-behind parent allowed the child to be relocated for a period of uncertain or ambiguous duration. These cases tend to be fact-specific.

In *Harkness v. Harkness*,[210] the court found that the intention of the parties was not controlling where the parties had not resolved where they would settle after the father was discharged from the U.S. military. Despite the parties' previous three-year stay in the United States, the last lengthy period of residence was in Germany, where the U.S. military assigned the father. The court of appeals affirmed the

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208. 182 F.3d 1124 (9th Cir. 1999).

209. Despite the finding that the child's habitual residence had changed from Alaska to Israel, the court did not order the child returned, principally upon the basis that father failed to prove that mother's retention of the child was in violation of his custody rights. *Id.* at 1131. In *Toren v. Toren*, 191 F.3d 23 (1st Cir. 1999), the First Circuit declined to return two children to Israel, finding that the question whether the habitual residence had changed was premature. The parties' amended divorce agreement provided that the children would reside with the mother in the United States for a period of approximately four years, after which time they would return to Israel to go to school. At the end of the first year mother commenced an action to modify the custody arrangement requiring her to return the children to Israel. In denying father's petition for return, the court reasoned that by the very terms of the Israeli judgment of divorce, mother was not wrongfully retaining the children since the children did not have to be returned to Israel for three more years. Until that time it was contemplated that mother would retain the children in the United States. The court further held that mother's maintaining a custody modification action in Massachusetts courts did not amount to a violation of the Israeli judgment since the Massachusetts courts had yet to attempt to modify the judgment.

210. 577 N.W.2d 116, 227 Mich. App. 581 (Ct. App. 1998).

trial court's holding that Germany was the children's habitual residence, concluding that there was a lack of mutual intent to abandon Germany as the habitual residence.[211] Noting that the case differed from *Feder* because the parties' intentions to settle in one place were never solidified, the court observed:

> While we agree that "habitual residence" should not simply be equated with the last place that the child lived, the [trial] court's opinion does not indicate that this was its only consideration. As noted in *Feder*, *supra* at 224, a determination of habitual residence must take into account whether the child has been physically present in a country for an amount of time "sufficient for acclimatization."[212]

In *Levesque v. Levesque*,[213] an indefinite but substantially shorter period of relocation was found to constitute a change in the child's habitual residence. Upon mother and father's separation, mother returned with the child to Germany for an undetermined period of time with father's consent. Approximately three months later, father went to Germany and abducted the child back to the United States. The court found that parents mutually agreed that both mother and child would return to Germany for "some" period of time, and this was sufficient to demonstrate an intention to alter the child's habitual residence.[214]

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211. *Id.* at 123, 227 Mich. App. at 596.

212. *Id.*

213. 816 F. Supp. 662 (D. Kan. 1993).

214. *Cf.* Cohen v. Cohen, 602 N.Y.S.2d 994, 158 Misc. 2d 1018 (Sup. Ct. 1993). In *Cohen*, two children, both raised in Ohio and New York, were taken by their father to Israel. At the time he took the children, father had separated from the children's mother, who had been their primary caretaker. The court found, based upon conflicting evidence, that it was never the intention of the family to move to Israel, certainly not mother's intention, and that the children were allowed to accompany the father for the purpose of meeting their paternal grandparents. "Since this court determines that it was not the mutual intent of the parties to move the children to Israel and, in fact, the intent of one of the parties was merely to permit a visit to that country, the habitual residence of the children was not changed from the United States of America." *Id.* at 999, 158 Misc. 2d at 1026.

iv. Coercion and Physical Abuse. The habitual residence of a child may not be changed if that child is forced or compelled to remain in the new location owing to the coercion of, or threats to, a caretaker parent. Coercion cannot be deemed "voluntary conduct" necessary to the establishment of a new habitual residence.[215]

In the case *In re Application of Ponath*,[216] the district court found that a child's continued presence in Germany was the product of husband's abuse of the mother. The child was born in the United States. When the child was sixteen weeks old, the family went to Germany for what was to be a three-month visit with father's parents. Despite mother's desire to return to the United States, she and child were prevented from doing so by father's physical, emotional, and verbal abuse. "The concept of habitual residence must, in the court's opinion, entail some element of voluntariness and purposeful design. Indeed, this notion has been characterized in other cases in terms of 'settled purpose'. . . . In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention."[217]

In *Koch v. Koch*,[218] father did not deny a history of spousal abuse, but argued that the issue was irrelevant to a determination of the habitual residence of the child. The Seventh Circuit disagreed in dicta,

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215. *See* Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 900 (8th Cir. 2003) (finding an absence of evidence that the change of residence was the result of abuse or coercion).

216. 829 F. Supp. 363 (D. Utah 1993).

217. *Id.* at 367. But see *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), where mother claimed that her husband and father-in-law held her a virtual prisoner after the birth of her child in Mexico. She removed the child to the United States when the child was six weeks old. The court declined to follow the reasoning of *Ponath* on the basis that in *Ponath*, the child was born in the United States, presumably the child's habitual residence, and was forced to remain in Germany only because of the father's abuse. In *Nunez-Escudero*, the child was born in Mexico and knew no other residence until mother unilaterally relocated to the United States. The court rejected the contention that habitual residence of an infant moves with the mother. Nevertheless, the court remanded the matter to the district court to determine whether Mexico was the child's habitual residence and whether an Article 13(b) defense existed. *Nunez-Escudero*, 58 F.3d at 379.

218. 450 F.3d 703 (7th Cir. 2006).

stating that physical attacks "have some relevance in some situations to determine habitual residence issues."[219]

In *Maxwell v. Maxwell*,[220] mother and father had quadruplets. The family lived in Massachusetts until father moved back to Australia. Mother moved to North Carolina and secured a permanent order awarding her custody of the children; father was granted visitation. The parties reconciled, and mother made arrangements to move to Australia. Suspecting that father had ulterior motives for the reconciliation, mother purchased round-trip tickets for herself and the children and obtained three-month visas. Shortly after her arrival in Australia, the marriage broke down, and father blocked mother's efforts to leave the continent. With the assistance of the U.S. Embassy, mother secured new passports for herself and the children and returned with them to the United States. Father filed a Hague petition in North Carolina for return of the children to Australia. In reviewing the issue of the children's habitual residence, the court followed the approach adopted in *Mozes*, finding that mother never intended to abandon residence in the United States and the children had not become acclimatized to Australia. Father's petition was denied.

A court order preventing removal of a child may not constitute nonconsensual presence and support a claim of a coerced habitual residence. In *Janakakis-Kostun v. Janakakis*,[221] during the course of a bitter separation and divorce action in Greece, a court order prohibited mother, a U.S. citizen, from removing child from Greece. In violation of the order, mother abducted the child to the United States, where the child and her mother had visited frequently during previous years. Mother claimed, inter alia, that the child could not have acquired a habitual residence in Greece because she, the mother, was

219. *Id.* at 719. See also *Tsarbopoulos v. Tsarbopoulos*, where the court considered the emotional and physical abuse of the spouse and children to be a factor in determining whether there was a sufficient degree of acclimatization and shared intent (citing to *Ponath*) to establish a new habitual residence. 176 F. Supp. 2d 1045 (E.D. Wash. 2001).

220. 588 F.3d 245 (4th Cir. 2009).

221. 6 S.W.3d 843 (Ky. Ct. App. 1999).

prohibited from leaving the country. The court held that the Greek non-removal order did not invalidate the habitual residence that the child had established in Greece.

v. Illegal Alien Status and Habitual Residence. The question of a child's status as an illegal alien can arise in two contexts. First, it can arise as a factor in considering whether the child has become sufficiently acclimatized to a place so as to qualify as the child's habitual residence. It can also be part of a two-part defense under Article 12: (1) an application for return has been filed more than one year after the date of wrongful removal or retention, *and* (2) the child has become settled in his or her environment. As the considerations are essentially the same, cases relating to both situations are discussed below.

In *Mozes*, the court noted: "While an unlawful or precarious immigration status does not preclude one from becoming a habitual resident under the Convention, it prevents one from doing so rapidly."[222] This was the issue in the case *In re Koc*,[223] where both mother and child were subject to deportation because they remained in the United States after their visas expired. Although it appeared that U.S. immigration officials were not looking to deport them, the court could not rule out future deportations. This reality, in addition to other reasons cited by the court, compelled the conclusion that the child had not become "well settled" in the United States.[224]

In *Kijowska v. Haines*,[225] mother, a citizen of Poland, gave birth to a child in the United States. She and the child's father, a U.S. citizen, were not married. The child's father told mother that he was not going to seek custody of the child. Two months later, mother and the child left for Poland, where they remained for six months. When the child was eight months old, mother and the child flew to the United States

222. Mozes v. Mozes, 239 F.3d 1067, 1082 n.45 (9th Cir. 2001) (citing E.M. Clive, *The Concept of Habitual Residence*, 3 Jurid. Rev. 137, 147 (1997)).

223. 181 F. Supp. 2d 136 (E.D.N.Y. 2001).

224. *Id.* at 154; *accord In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004).

225. 463 F.3d 583 (7th Cir. 2006).

based upon mother's hope of reconciling with the father. Father, armed with an Illinois state court order granting him custody of the child, met her at the airport, obtained custody of the child, and convinced immigration authorities that mother was entering the United States with the intention of overstaying her visa. Mother was required to return to Poland without the child. Mother's citizenship status, though not determinative, was deemed a factor in the court's finding that Poland was the child's habitual residence. Mother could not remain in the United States, and father earlier disavowed any interest in child custody. When mother and child initially moved to Poland, it was clear that both parents intended Poland to become the child's new habitual residence.[226]

In the Ninth Circuit, immigration status is not dispositive as to whether the child has become settled. The court in *In re B. Del C.S.B.*[227] examined whether a child's status as an illegal alien affects his or her ability to become "settled" pursuant to Article 12 of the Convention. The eleven-year-old spent the first four years of her life in Mexico, came to California for approximately five months, and then returned to Mexico. She returned to California a year later, where she remained for the next five years. The district court found that the child had not become settled within the meaning of Article 12 because of her unlawful immigration status and ordered her returned to Mexico. The court of appeals reversed, noting immigration status will be considered by courts if there is "an immediate, concrete threat of deportation."[228]

> We can see nothing in the Convention itself, in our case law, or in the practical reality of living in this country without documented status, to persuade us that immigration status should ordinarily play a significant, let alone dispositive, role in the "settled" inquiry. . . . [P]rior district court cases that have concluded that an undocumented child is not "settled" have considered status as only one element among

226. *Id.* at 587–88.
227. 559 F.3d 999 (9th Cir. 2009).
228. *Id.* at 1009.

> many pointing to a lack of significant ties to the United States.[229]
>
> Immigration status cannot be determinative for purposes of the "settled" inquiry if, as here, there is no imminent threat of removal. We agree with the district court that but for the immigration question, Brito has demonstrated that "Brianna has developed significant connections to the United States," including a stable home and school life in which she has consistently "achieved academic and interpersonal success" in her five years here. (citation omitted) We conclude that, given these circumstances, Brianna is "now settled" in the United States within the meaning of Article 12.[230]

The determination of a child's habitual residence does not appear to be impacted by a grant of asylum. In *Miltiadous v. Tetervak*,[231] mother removed herself and her two children from Cyprus, their habitual residence, to the United States. As father had rights of custody and did not consent, the removal was wrongful. Both mother and children were granted asylum on the basis that if she returned to Cyprus, she would be subject to additional domestic abuse by her husband.[232] Father petitioned for the return of the children and mother objected, arguing that returning the children to Cyprus under the Hague Convention would result in a violation of section 1158(c)(1) of the Immigration and Nationality Act,[233] thus contravening her right to

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229. *Id.* at 1011 (citing Lopez v. Alcala, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008)); *see also In re* Ahumada Cabrera, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004); Giampaolo v. Erneta, 390 F. Supp. 2d 1269, 1281–83 (N.D. Ga. 2004); *Koc*, 181 F. Supp. 2d at 152–55.

230. *B. Del C.S.B.*, 559 F.3d at 1014.

231. 686 F. Supp. 2d 544 (E.D. Pa. 2010).

232. "Respondent filed for political asylum in the United States on May 9, 2008, seeking permanent asylum for herself and her children due to the fear of imminent physical and mental abuse by her husband in Cyprus. (Doc. no. 9, Ex. 2). On July 22, 2009, Respondent was granted asylum and her children's immigration status is derived from hers. Trial Tr. at 7:19–21, Oct. 29, 2009. Respondent and the children currently reside with her parents in Philadelphia, Pennsylvania." *Miltiadous*, 686 F. Supp. 2d at 547.

233. 8 U.S.C. § 1158 (2009).

asylum. The court found that the mother and the children were illegally in the United States until their grant of asylum and noted the indefinite nature of their asylum status. For these reasons, the court concluded that mother failed in her argument that the United States had become the children's habitual residence:

> Thus, although the Respondent has temporarily been granted asylum, her asylum status is still tenuous. Indeed, her own asylum approval letter indicates that her asylum status may be terminated at any time for a variety of reasons. (reference omitted). [T]he children's immigration status is derived from Respondent's and is uncertain. (citation omitted). The Court finds that Respondent's somewhat uncertain asylum status weighs against finding the United States as the children's habitual residence.[234]

vi. The Habitual Residence of Infants. Courts are generally in agreement that infants cannot acquire a habitual residence separate and apart from their parents. If the parents have a shared intent that an infant will reside with them, the child will acquire that habitual residence. Where there is an absence of mutual intent, however, courts tend to look at the factual circumstances relating to the child. Courts have rejected the notion that an infant's habitual residence will follow the mother, even where the child is of a very young age.[235] An infant may not actually acquire habitual residence if where the infant's location at the time of litigation has nothing to do with establishing a new home and residence and the parties have no shared intent as to where, or if, they will live as a family. One commentator has suggested:

> [A] newborn child born in the country where his . . . parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem, however, that

234. *Miltiadous*, 686 F. Supp. 2d at 552 n.9.

235. *See* Meredith v. Meredith, 759 F. Supp. 1432 (D. Ariz. 1991); Kijowaska v. Haines, 463 F.3d 583, 587–88 (7th Cir. 2006); Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 379 (8th Cir. 1995).

> the child will normally have no habitual residence until living in a country on a footing of some stability.[236]

The First Circuit followed this reasoning in *Nicolson v. Pappalardo*.[237] In that case, an American mother became pregnant by an Australian father. Mother moved back to the United States before the birth of the baby; after father proposed marriage, mother returned to Australia. In Australia, the couple married, and the child was born in December 2008. Even before the birth of the child, the parties experienced marital difficulties, and mother indicated that as soon as she could travel after the birth, she would return to the United States. After the child's birth, the couple remained together in Australia for three months. With father's consent, mother moved back to the United States with the child and refused return to Australia thereafter. The court found that the child's habitual residence was in Australia based upon mother's intent to initially relocate to Australia and not return to the United States. Additionally, although the child was but an infant, she had lived in Australia for all of her life until she was removed to the United States.

In *Delvoye v. Lee*,[238] mother, a U.S. citizen, and father, a Belgian citizen, developed a romantic relationship in the United States. When mother discovered that she was pregnant, she acquired a limited visa to travel to Belgium in order to take advantage of the free medical services there. Mother left her New York apartment intact. When the baby arrived in May 2001, the parties' relationship had already disintegrated, and father reluctantly consented to mother's return to New York with the child. Given that the parties shared no intention that they would settle in Belgium, the father's application was denied on the basis that he failed to prove Belgium, not the United States, was the child's habitual residence.[239] The court reasoned that when the parties' intentions are in agreement regarding their location, then the

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236. Delvoye v. Lee, 329 F.3d at 334 (quoting E.M. Clive, *The Concept of Habitual Residence*, 3 Jurid. Rev. 137, 146 (1997)).

237. 605 F.3d 100 (1st Cir. 2010).

238. 329 F.3d 330 (3d Cir. 2003).

239. *Id.* at 333–34.

infant's habitual residence is fixed. Where, however, the child is born into an already conflicted and disintegrating parental relationship, the child may not acquire a habitual residence.

In *Nunez-Escudero v. Tice-Menley*,[240] an American mother and Mexican father lived in Mexico during their marriage until their child was six weeks old. Mother then separated from her husband and took the child to Minnesota. In response to father's petition for return, mother argued that a six-week-old child cannot make its own determination of habitual residence and that an infant's place of habitual residence should be with the mother. Her reasoning for rejecting Mexico as the child's habitual residence was: (1) she had no intention of remaining permanently in Mexico herself; and (2) an infant is dependent upon the mother to make the choice of habitual residence. The court rejected the argument that habitual residence necessarily follows a mother's determination when the child is too young to establish its own habitual residence. Because the parties lived together in Mexico for nearly a year, a factual basis existed for finding that Mexico was the child's place of habitual residence.

E. Age of the Child

Article 4 limits the application of the Convention to children under the age of sixteen. Even if the child is under the age of sixteen at the time of the wrongful removal or retention, if the child has reached sixteen when return is requested, the Convention does not require the child's return.[241] Both the *Pérez-Vera Report* and the *Text & Legal Analysis* of the U.S. State Department interpret the age limitation as jurisdictional.[242] When a child reaches the age of sixteen, both parents

240. 58 F.3d 374 (8th Cir. 1995).

241. *Text & Legal Analysis*, *supra* note 65, at 10,504.

242. "Consequently, no action or decision based upon the Convention's provisions can be taken with regard to a child after its sixteenth birthday." *Pérez-Vera Report, supra* note 18, ¶ 77. "Absent action by governments to expand coverage of the Convention to children aged sixteen and above pursuant to Article 36, the Convention itself is unavailable as the legal vehicle for securing return of a child sixteen or older." *Text & Legal Analysis*, *supra* note 65, at 10,504.

and custody decision makers must, practically speaking, give consideration to the child's wishes, a concept embodied in Article 13 of the Convention.

Despite this age cutoff, Article 29 allows a court to consider a petition for return, or to enforce access rights, under the aegis of other laws that do apply to children over the age of sixteen.[243] In other words, the Convention does not restrict other laws that may provide remedies for children over the age of sixteen.[244]

The sixteen-year-old age limit in the Convention has not presented interpretive problems for courts.[245] However, this provision has posed some practical challenges where a return order applies to siblings under the age of sixteen, but the court is unable to make orders with regard to another sibling who is over the age of sixteen. Such an order effectively strands the child over sixteen in a location that may

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243. *Id.*

244. This concept was discussed in *In re R.P.B.*, No. CA2009-07-097, 2010-Ohio-322, 2010 WL 339812 (Ct. App. 2010) (unpublished disposition), wherein a Brazilian father had visitation rights under a Brazilian decree. When the mother's new husband brought proceedings to adopt the child over father's objection, father brought an action under Article 21 of the Convention (relating to organizing access rights) to compel mother to allow visits with the child, who by then was over the age of sixteen, but still under eighteen. Father conceded that the Convention was inapplicable because the child had reached age sixteen, but contended that the Ohio juvenile court had jurisdiction to grant father relief under state law. The court of appeals disagreed with this contention, noting that father did not bring an action under state law, but brought the action under the Convention to establish his access rights. As such, the Convention by its terms did not apply, and father had not petitioned under state law to establish or enforce those access rights.

245. *See, e.g.*, Duarte v. Bardales, 526 F.3d 563 (9th Cir. 2008) (during the litigation for return of four children, the older two children had reached age sixteen and were dropped from the case); Flynn v. Borders, 472 F. Supp. 2d 906 (E.D. Ky. 2007) (ordering younger child returned to Ireland, but older sibling not named in petition); *see also* Gaudin v. Remis, 334 Fed. Appx. 133, 2009 WL 3345760 (9th Cir. 2009) (unreported disposition) (determining that where at the time of hearing the children had both attained age sixteen, the matter of the pending petition for return was moot); Mohamud v. Guuleed, No. 09-C-146, 2009 WL 1229986 (E.D. Wis. 2009) (unreported decision) (denying return where petition filed before child reached sixteen, but was sixteen at the time the hearing occurred).

strain sibling relationships unless the parents voluntarily return the older child with the younger children.

III. Defenses to the Petition for Return

A. Summary

The Convention sets forth five defenses that may be raised in proceedings for the return of a child. Pursuant to the International Child Abduction Remedies Act (ICARA),[246] different burdens of proof are required depending upon the defense proffered:

Preponderance of the evidence:

- Delay (Article 12)—more than one year has passed since the wrongful removal or retention occurred and the child has become settled in his or her new environment
- Consent or acquiescence (Article 13(a))—the person seeking return consented or acquiesced to the child's removal or retention
- Non-exercise of custody rights (Article 13(a))—the party seeking return was not exercising rights of custody at the time of the wrongful removal or retention

Clear and convincing evidence:

- Grave risk (Article 13(b))—return of the child would expose that child to a grave risk of harm or place the child in an intolerable situation
- Human rights (Article 20)—return of the child would be in violation of the requested state's fundamental principles relating to the protection of human rights and fundamental freedoms

In addition to these defenses, courts have entertained three other "procedural" defenses that are not specifically mentioned in the Convention: waiver, unclean hands, and fugitive disentitlement.

Article 13 contains an unnumbered paragraph that sets forth another basis for refusing return: the objection to return by a mature child. The mature child's objection is not technically a defense to re-

246. 42 U.S.C. §§ 11601–11610 (1988).

turn, but it has been treated as a defense[247] and is subject to proof by a preponderance of the evidence.[248]

1. Narrow Interpretation of Defenses

U.S. courts have uniformly acknowledged that defenses available under the Convention should be interpreted narrowly.[249] The *Pérez-Vera Report* recognizes that the defenses must be applied "only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter."[250] The *Text & Legal Analysis* explains:

> In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children. Further, it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof.[251]

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247. *See, e.g.*, Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002); England v. England, 234 F.3d 268 (5th Cir. 2000); Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010); Falk v. Sinclair, 692 F. Supp. 2d 147 (D. Me. 2010).

248. *See* 42 U.S.C. § 11603(e)(2)(B) (1988).

249. *See, e.g.*, Nicolson v. Pappalardo, 605 F.3d 100, 107 (1st Cir. 2010); Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009); *Duarte*, 526 F.3d at 569 (using Article 12 defense); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008) (using Article 13(b) defense); Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 271 (3d Cir. 2007) (using Article 13 defense); Karkkainen v. Kovalchuk, 445 F.3d 280, 288 (3d Cir. 2006); Miller v. Miller, 240 F.3d 392 (4th Cir. 2001); Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001); *England*, 234 F.3d 268; Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060 (6th Cir. 1996); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995).

250. *Pérez-Vera Report, supra* note 18, ¶ 34.

251. *Text & Legal Analysis*, *supra* note 65; *accord Rydder*, 49 F.3d at 372.

2. Court May Order Return Even If Defense Established

Uniquely, Article 18 of the Convention asserts that even if a defense to return is proven, the court may nevertheless order the child returned.[252] One case has implied that this provision may also apply to return a child of sufficient age and maturity to make a valid objection.[253]

Although it appears that Article 18 confers discretion to order a child returned regardless of which defense is proven, courts around the world have interpreted the breadth of this discretion in different ways. Some foreign courts have pointed out that this discretion may not exist with regard to the defense described in Article 12 (delay plus settlement of the child). Decisions in the United Kingdom and Australia have focused on the language differences between Article 12 (delay), Article 13 (exercise of custody rights, or grave risk), and Article 20 (human rights violations). Those differences appear to imply that if an Article 12 defense is established, denying return may be mandatory.[254] However, if an Article 13 or Article 20 defense is established, the Convention's language seems to indicate that return is discretionary.[255]

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252. "Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." *Text & Legal Analysis*, *supra* note 65; *see also Friedrich II*, 78 F.3d at 1067.

253. *See* Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010); *see also In re* B. Del C.S.B., 559 F.3d 999, 1016 (9th Cir. 2009) ("Where, as here, the child at issue is settled in her new environment and has been so for years; and where, as here, there was no showing of 'concealment' such that the reprehensibility of the abducting parent's conduct should trump the finding that the child is 'settled,' we can see no reason justifying an exercise of discretion under Article 18 to order Brianna's return to Mexico.").

254. Convention, *supra* note 10, Article 12: The Court "shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

255. *Id.*, Article 20: "[T]he judicial . . . authority of the requested State *is not bound to order the return of the child* . . . if the defenses in (a) or (b) are established." 13(b): "The return of the child under the provisions of Article 12 *may be refused* if this

Until 2008, case law in most common-law countries assumed that Article 12 gave the court discretion to order return of a child even if more than a year had passed and the child had become settled.[256] In the case *Re M.*,[257] England's House of Lords specifically rejected the notion that Article 18 conferred discretion to order the child's return if the child had been found to be settled pursuant to the Article 12 defense. The Lords held that Article 18 does not establish any residual jurisdiction under the Convention to order a child's return despite the establishment of the defense of delay under Article 12. However, if provisions of domestic law exist to authorize the return of the child, then Article 18 merely clarifies that the Convention will not bar the return of the child under domestic law. For example, hypothetically, if the United Kingdom had a domestic law similar to the U.S.'s UCCJEA, it would be possible that a return of the child pursuant to the Hague Convention would be denied on the basis of the Article 12 limitation of one year. Despite the bar of Article 12, an English court could order a child returned to Canada if Canada met all of the requirements for the child's "home state."

Both the *Pérez-Vera Report* and the *Text & Legal Analysis* state that domestic laws may authorize the return of a child, independent of the Convention.[258] The *Text & Legal Analysis* explains: "Under Article 29 a

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would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." (emphasis added)

256. Families, Youth & Community Care, Dir.-Gen., Dep't of v. Moore, [1999] 24 Fam LR 475, 150 FLR 59 (Austl.) (inferring court's discretion from Article 12); Re S. (A Minor) (Abduction), [1991] Fam. 224 (EWCA (Civ.)) (Eng.); P. v. B. (No. 2) (Child Abduction: Delay), [1999] 4 I.R. 185, 2 I.L.R.M. 401 (Ir.); Soucie v. Soucie, [1995] S.C. 134, S.C.L.R. 203 (Scot.) (discussing Article 12's discretion *in dicta*); Secretary for Justice (New Zealand Central Authority) v. H.J., [2007] 2 NZLR 289 (SC) (N.Z.) (stating that discretion had been conferred by virtue of New Zealand's legislation implementing the Convention).

257. Re M. and Another (Children) (Abduction: Rights of Custody), [2008] 1 A.C. 1288 (H.L.) (app. taken from Eng. (U.K.)).

258. *Pérez-Vera Report*, *supra* note 18, ¶ 112 (1981). In the United States, the UCCJEA might provide the authority for a court to order that a child be returned to

person is not precluded from seeking judicially-ordered return of a child pursuant to laws and procedures other than the Convention. Indeed, Articles 18 and 34 make clear that nothing in the Convention limits the power of a court to return a child at any time by applying *other laws and procedures* conducive to that end" (emphasis added).[259] Courts may find this commentary helpful when adjudicating Hague petitions that raise a complex web of defenses.

Thus far, there have been no U.S. cases analyzing Article 18 in any detail. One reason may be that the doctrine of "equitable tolling" has been used to bar the Article 12 defense of delay in filing where the delay was caused by the abductor's efforts to conceal the child. As a general rule, U.S. cases have held that where the petitioner is not responsible for the delay, the abductor's concealment of the child will not be rewarded by allowing the use of the delay defense. (See the discussion on equitable tolling *infra* at page 70.)

In *Blanc v. Morgan*,[260] the father's petition was filed only a few weeks after the one-year period had run. The court found that father was diligent in pursuing remedies in the courts of the habitual residence and that he had acted with reasonable diligence in pursuing the child's return. In refusing mother's proffer of an Article 12 defense, the court stated in dicta that even if mother had proven the delay defense, it would have been proper for the court to order the child returned:

> Under the Hague Convention, it is of paramount concern that courts prevent a party in a custody dispute from deriving a benefit through wrongdoing. "In fact, a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention."[261]

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another country based upon a finding that the country was properly exercising jurisdiction over child custody issues.

259. Holder v. Holder (*Holder I*), 305 F.3d 854, 860 (9th Cir. 2002) (citing *Text & Legal Analysis*, *supra* note 65, at 10,507–08).

260. 721 F. Supp. 2d 749 (W.D. Tenn. 2010).

261. *Id.* at 765 (W.D. Tenn. 2010) (quoting Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996)).

B. Delay of More Than One Year

Article 12 sets forth a two-prong defense of delay: (1) the party requesting return of the child has delayed more than one year in the filing of an application for return, and (2) the child has become settled in his or her new environment.

The first two paragraphs of Article 12 provide:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

The one-year limitation runs from the date the wrongful removal or retention occurred. The date of a wrongful removal is usually a simple matter, since one may presume that a parent with custody rights will have an accurate understanding of when those custody rights were violated. However, the task of determining the date of a wrongful retention can be more complicated. See discussion *supra* at page 24.

U.S. courts have interpreted the term "commencement of proceedings" in Article 12 to mean that an action must be filed in court.[262] An application made to the Central Authority will not suffice.[263]

1. Child Settled in New Environment

Neither the Convention nor ICARA define the term "settled" as it is used in Article 12. The *Text & Legal Analysis* opines: "To this end,

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262. *See* 42 U.S.C. § 11603(f)(3) (1988).

263. *See* Wojcik v. Wojcik, 959 F. Supp. 413 (E.D. Mich. 1997).

nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof."[264] Again, this is a fact-intensive defense, and courts have looked to a variety of factors when assessing whether settlement has occurred, including:[265]

- age of the child
- language fluency
- duration and stability of residence in new environment
- concealment of child's whereabouts
- consistent attendance at school or day care
- attendance at church
- friends and relatives in new environment
- participation in school, extracurricular activities, community, sports, clubs
- financial stability and employment of parent
- academic progress
- immigration status[266]

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264. *Text & Legal Analysis*, *supra* note 65, at 10,509.

265. *See, e.g.*, *In re* B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2009); *see also Wojcik*, 959 F. Supp. 413 (analyzing factors like time in the new location, school attendance, parent with stable employment, day care); *In re* Robinson, 983 F. Supp. 1339 (D. Colo. 1997) (looking to involvement with extended family, participation in extracurricular activities, and friends); *In re* Koc, 181 F. Supp. 2d 136 (E.D.N.Y. 2001) (weighing child's church attendance, stability of parental employment, relatives in the area, relatives and friends in habitual residence, immigration status of parent and/or child, financial stability, ability to visit with other parent because of immigration issues); *In re* Coffield, 644 N.E.2d 662, 666, 96 Ohio App. 3d 52, 58 (Ct. App. 1994) (assessing child's friends and relatives, participation in organized activities, connections within community); *Blanc*, 721 F. Supp. 2d 749 (viewing child's stable home, employment, family vacations, day care, summer camp, age of the child as settlement factors); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004); *In re* Ahumada Cabrera, 323 F. Supp. 2d 1303 (S.D. Fla. 2004) (viewing child's fluency in English as a settlement factor); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); Lutman v. Lutman, No. 1:10-CV-1504, 2010 WL 3398985 (M.D. Pa. 2010) (unreported disposition) (looking to child's academic progress).

266. *See B. Del C.S.B.*, 559 F.3d at 1009 ("[W]e will also consider the immigration status of the child and the respondent. In general, this consideration will be rele-

The fact that the child may have a more affluent lifestyle with one parent has no relevance for determining whether the child has become settled in that location.[267] Also, concealment of the child militates against the conclusion that the child has become settled.[268]

2. Equitable Tolling

The United States is the only country that recognizes the doctrine of equitable tolling in the context of Hague Convention proceedings. This doctrine is applied specifically to situations where the delay in petitioning for the return of a child is in whole or in part the result of the concealment of the child by the abducting parent. Where both of these elements are present, courts have shown an unwillingness to reward the abductor's conduct in successfully concealing the child by allowing the abducting parent to use the one-year limit of Article 12 as a defense to the child's return. In doing so, courts that have adopted equitable tolling characterize the language in Article 12 as the equivalent of a statute of limitations. Typically, courts will toll the running of the one year period until such time that the child has been located[269] or sufficient information has been found to point to the approximate location of the child.[270]

Two circuit courts have approved the application of equitable tolling: the Ninth and Eleventh Circuits. In *Duarte v. Bardales*,[271] the Ninth Circuit held that equitable tolling may apply to toll the running of the one-year filing period in Article 12. The Ninth Circuit reasoned

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vant only if there is an immediate, concrete threat of deportation."); *see also* Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009) (father expected to become U.S. citizen soon, and child would therefore be eligible for citizenship as well).

267. *See Koc*, 181 F. Supp. 2d at 152 (citing Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998)).

268. *See Lops*, 140 F.3d at 946 (finding children not settled where children were concealed from mother and elaborate steps taken to avoid detection).

269. *See, e.g.*, Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630 (S.D. Tex. 2007); Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828, 850 (S.D. Tex. 2006); Belay v. Getachew, 272 F. Supp. 2d 553 (D. Md. 2003).

270. *See, e.g.*, *Van Driessche*, 466 F. Supp. 2d at 853.

271. 526 F.3d 563 (9th Cir. 2008).

that although neither the Convention nor ICARA explicitly mention equitable tolling, "we must give significant consideration to the overarching intention of the Convention—deterring child abductions."[272] The court cited to *Young v. United States*, which noted that periods of limitation are "subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute."[273] Rewarding abductors who were able to successfully conceal the child would encourage child abductions.[274] In a later case, the Ninth Circuit determined that the standard of review for equitable tolling is clear error, and the district court's application of the doctrine is reviewed de novo.[275]

In *Furnes v. Reeves*,[276] the Eleventh Circuit affirmed the application of equitable tolling[277] and held that the one-year limit in Article 12 commences from the date the left-behind parent confirms the location of the child in the United States. The evidence in *Furnes* showed that mother concealed the child in the United States and father's extensive efforts to find the child resulted in his filing the petition for return outside the time limits of Article 12. Equitable tolling has also been applied in U.S. state courts.[278]

Equitable tolling has been rejected by courts when either (1) there was insufficient evidence to prove concealment[279] or (2) the intentions

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272. *Id.* at 570.

273. Young v. United States, 535 U.S. 43, 49–50 (2002).

274. *Duarte*, 526 F.3d 563 (quoting *Belay*, 272 F. Supp. 2d 553 ("[C]ourts must be wary of rewarding an abductor for concealing the whereabouts of a child long enough for the child to become 'well settled'; to reward the abductor as such would be to condone the exact behavior the Convention seeks to prevent.")).

275. *See, e.g.*, *In re* B. Del C.S.B., 559 F.3d 999, 1008 (9th Cir. 2009).

276. 362 F.3d 702 (11th Cir. 2004).

277. *Id.* at 723 (citing to Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M.D. Fla. 2002) and Bocquet v. Ouzid, 225 F. Supp. 2d 1337 (S.D. Fla. 2002)).

278. *See* Perez v. Garcia, 198 P.3d 539, 148 Wash. App. 131 (Ct. App. 2009) (allowing equitable tolling to permit application to go forward where child was concealed for three days immediately after removal and father missed the one-year limit by three days).

279. *See, e.g.*, Lutman v. Lutman, No. 1:10-CV-1504, 2010 WL 3398985 (M.D. Pa. 2010); Edoho v. Edoho, No. H-10-1881, 2010 WL 3257480 (S.D. Tex. 2010);

of the parent removing the child had become clear well in advance of the running of the time limit and the location of the child was known or could have been ascertained through reasonable inquiry by the left-behind parent.[280]

a. District Courts Not Unanimous on Applicability. Although a majority of district courts have accepted the application of equitable tolling to Convention proceedings, some district courts have declined to apply equitable tolling on the basis that the language in Article 12 is not equivalent to a statute of limitations and does not call for the exercise of equitable intervention. Rather than artificially extending Article 12's one-year time limit, these cases instead focus on whether the child has become settled. With more than one year having gone by with the child in another location, the courts examined whether there might be a point in time when it would be more harmful to order the child returned than to allow the child to remain where he or she is. These decisions reject the notion that there is discretion to extend the time limit. If the child was settled in the new location, the defense of delay under Article 12 is established.[281]

Blanc v. Morgan, 721 F. Supp. 2d 749 (W.D. Tenn. 2010); Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009).

280. *See, e.g.*, Mero v. Prieto, 557 F. Supp. 2d 357 (E.D.N.Y. 2008) (finding lack of diligence by left-behind parent); Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008) (finding children were not concealed).

281. *See* Toren v. Toren, 26 F. Supp. 2d 240, 244 (D. Mass. 1998), *vacated on other grounds*, 191 F.3d 23 (1st Cir. 1999); *see also* Anderson v. Acree, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) ("[T]he drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child's return. This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child's whereabouts. There is nothing in the language of the Hague Convention that suggests that the fact that the child is settled in his or her new environment may not be considered if the petitioning parent has a good reason for failing to file the petition within one year."); Matovski v. Matovski, No. 06 Civ. 4259 (PKC), 2007 WL 2600862, p. 12 (S.D.N.Y. 2007) (unreport-

b. Rejected by Other Common-Law Countries. Equitable tolling has been rejected in other common-law countries. In *A.C. v. P.C.*,[282] father took the children from Australia to Hong Kong and shortly thereafter to mainland China. The children returned to Hong Kong despite their names being placed on a watch list and were concealed there for nearly four years. The Hong Kong court declined to suspend the one-year limitation until the children were discovered, ruling that notwithstanding the moral culpability of the father, ordering a return would be disruptive for the children.

In the case of *Re C.*,[283] mother abducted her daughter to Ireland. After father petitioned under the Hague Convention for a return order, mother voluntarily returned to California. One month later, mother re-abducted the child to England, changed both her and her daughter's names to avoid detection, and changed the child's birth date to that of a deceased child. Father did not locate the child until more than four years later. The British High Court ruled: (1) after the period of one year had passed from the time of the child's abduction and the child had become settled, the court has no discretion to order the child's return under the Convention; (2) Article 18 does not confer residual jurisdiction under the Convention to order the child returned, since it applies only to the domestic law of a country to order return; and (3) deliberate concealment will not stop the one-year limit from running, but is relevant to the issue whether a child is settled.

While some countries reject the doctrine of equitable tolling in this context, courts in those countries will conduct a factual inquiry to assess whether an abducted child has become "settled" during this

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ed disposition) (relating that "Because the denial of a petition pursuant to Article 12 is discretionary, equitable tolling is unnecessary to deter an abductor from concealing the whereabouts of a wrongfully removed or retained child. Equitable tolling would be inconsistent with the Convention's careful balancing of interests and this court concludes it has no application to Article 12.").

282. A.C. v. P.C., [2004] H.K.E.C. 839, 2005 WL 836263 (C.F.I.) (H.K.) (Hong Kong, Special Administrative Region). Hong Kong's legal system is based on the common-law system, as it was a British colony from 1842–1997.

283. Re C. (Abduction: Settlement), [2004] EWHC (Ch) 1245 (Eng.).

extended period of time. Courts have ordered return in the concealment context, even where the time limit of one year has long passed, if there is a showing that the child has not become settled.[284]

C. Consent and Acquiescence

Article 13 provides that a court is not bound to order a child returned if:

> the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention.[285]

This defense must be proven by a preponderance of the evidence.[286]

The term "consent" refers to permission given before the child is removed, whereas "acquiescence" refers to conduct after the removal.[287] Consent can be established by either statements or conduct indicating that a parent has given consent to the removal and retention of a child, for an indefinite period of time or permanently.[288] This defense, like the others, is to be interpreted narrowly.[289] The cases tend to center around the parents' conduct occurring in the context of the end of their domestic relationship. Courts generally look at the overall conduct of the parties in determining whether consent or acquiescence has occurred, as opposed to focusing upon isolated words or conduct.

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284. Re C. (Abduction: Settlement) (No. 2), [2005] 1 FLR 938 (Eng.) (ordering a child's return after four years had elapsed); Justice de Paix du cercle de Lausanne [Magistrates Court] July 6, 2000, J 765 C.I.E.V. 112E (Switz.) (ordering a child's return after four years); J.E.A. v. C.L.M., 2002 NSCA 127, [2004] 220 D.L.R. 4th 577 (Can. N.S.); A.C. v. P.C., [2004] H.K.E.C. 839, 2005 WL 836263 (C.F.I.) (H.K.) (returning child that had been concealed for over four years).

285. Convention, *supra* note 10, Article 13(a).

286. *See* Burdens of Proof, *supra* page 21.

287. *See, e.g.*, Baxter v. Baxter, 423 F.3d 363, 371 (3d Cir. 2005).

288. *See, e.g.*, Gonzalez-Caballero v. Mena, 251 F.3d 789, 793–94 (9th Cir. 2001); *Baxter*, 423 F.3d 363.

289. *See In re* Kim, 404 F. Supp. 2d 495, 512 (S.D.N.Y. 2005) ("To view the defenses more broadly would frustrate the core purpose of the Hague Convention. . . .").

The words or actions of a party should not be "scrutinized for a possible waiver of custody rights," nor should isolated statements to third parties be sufficient.[290] Consent or acquiescence should be based on clear and unambiguous conduct.[291] This defense is fact-intensive,[292] as explained in *Baxter v. Baxter*:

> Although the law construing the consent defense under the Convention is less developed, the defense of acquiescence has been held to require "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." Friedrich, 78 F.3d at 1070 (internal footnotes omitted). Courts have held the acquiescence inquiry turns on the subjective intent of the parent who is claimed to have acquiesced. (citations omitted)
>
> Consent need not be expressed with the same degree of formality as acquiescence in order to prove the defense under article 13(a). Often, the petitioner grants some measure of consent, such as permission to travel, in an informal manner before the parties become involved in a custody dispute. The consent and acquiescence inquiries are similar, however, in their focus on the petitioner's subjective intent. In examining a consent defense, it is important to consider what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country. The nature and scope of the petitioner's consent, and any condi-

290. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1067 (6th Cir. 1996); *see also* Wanninger v. Wanninger, 850 F. Supp. 78 (D. Mass. 1994).

291. *See* Simcox v. Simcox, 511 F.3d 594, 603 (6th Cir. 2007); *see also* Asvesta v. Petroutsas, 580 F.3d 1000 (9th Cir. 2009) (circuit court found that the district court should not have granted comity to a Greek court's order denying a child's return under the Convention, where the Greek court's order was based on a factually unsupported finding that father consented to the permanent removal of the child from the United States).

292. *See* Stevens v. Stevens, 499 F. Supp. 2d 891, 897 (E.D. Mich. 2007) (reviewing conflicting evidence that tends to show consent, but not to the level of a preponderance of the evidence).

> tions or limitations, should be taken into account. The fact that a petitioner initially allows children to travel, and knows their location and how to contact them, does not necessarily constitute consent to removal or retention under the Convention.[293]

In *Nicolson v. Pappalardo*,[294] the parties experienced marital difficulties before the birth of their daughter. Three months after the child's birth, mother and child left Australia and went to the United States. Father reluctantly consented to this travel based upon the hope that allowing mother and the child to travel to the United States would result in reconciliation. After a month in the United States, mother decided not to return to Australia. She subsequently filed and received a temporary domestic violence protection order. That order was modified, with the consent of father's attorney, to provide that mother was to have temporary custody of the child. The First Circuit held that father neither consented nor acquiesced in the permanent removal of the child to the United States. Although the stipulated order to temporary custody was a strong indication of father's acquiescence, the district court found no intent on father's part to consent to permanent removal. The First Circuit deferred to that finding, noting that courts (such as *Baxter*, *supra*)[295] treat the issue of acquiescence as one involving pure subjective intent.

D. Failure to Exercise Rights of Custody

The exercise of custody rights arises in two contexts under the Convention. Under Article 3(b), a party petitioning for return must make a preliminary showing that he or she was exercising custody rights before the removal of the child.[296] Article 13(a) discusses the exercise of custody rights as an affirmative defense that must be established by a

293. Baxter v. Baxter, 423 F.3d 363, 371–72 (3d Cir. 2005).

294. Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010).

295. *Baxter*, 423 F.3d at 371–72.

296. See discussion of exercise of custody right as part of the case in chief, *supra* at page 21.

preponderance of the evidence; that is, the party resisting return may assert the affirmative defense that "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention."[297] This affirmative defense must be established by a preponderance of the evidence.

If the family was intact prior to the wrongful removal or retention, the exercise of custody rights is clear.[298] Similarly, where one parent has sole custody of the child, the exercise of custody rights by that parent is easily shown.[299] A parent need not have constant physical custody and control of a child in order to be exercising his or her rights; a parent may place a child with another party, such as a grandparent. This, in and of itself, may constitute the exercise of custody rights.[300]

Friedrich II outlined the requirements for the defense of failure to exercise custodial rights:

> Enforcement of the Convention should not to be made dependent on the creation of a common law definition of "exercise." The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, 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.

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297. Convention, *supra* note 10, Article 13(a).

298. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067, 1085 (9th Cir. 2001); Jenkins v. Jenkins, 569 F.3d 549 (6th Cir. 2009); Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996).

299. *See, e.g.*, Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259 (3d Cir. 2007) (allowing custody rights for mother with sole custody who sent child to live with father while mother was undergoing medical treatment and kept contact with child as her medical condition permitted); *see also* Morrison v. Dietz, No. 07-1398, 2008 WL 4280030 (W.D. La. 2008) (unreported disposition) (children taken from mother who was their primary custodian by virtue of Mexican divorce decree).

300. *See, e.g.*, *Text & Legal Analysis*, *supra* note 65; *see also* Sampson v. Sampson, 975 P.2d 1211, 267 Kan. 175 (1999) (finding the exercise of custody rights where father placed children with his parents, supported children, and visited them on weekends).

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> We therefore hold 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. (footnote omitted). Once it determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts.[301]

Both state and federal courts have uniformly accepted *Friedrich II*'s analysis of this issue.

E. Grave Risk of Harm—Intolerable Situation

Under Article 13(b) of the Convention, a court may refuse to return a child if it finds that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." This defense must be proved by clear and convincing evidence.[302]

As with the previous defenses, even if the grave risk defense is established, the court is not required to deny the petition,[303] and the court may exercise its discretion to order the child returned.[304]

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301. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1065–66 (6th Cir. 1996).

302. 42 U.S.C. § 11603(e)(2)(A) provides: "In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing . . . by clear and convincing evidence that one of the exceptions set forth in Article 13b or 20 of the Convention applies."

303. "Most experts reported that in their jurisdictions Article 13(b) is given a very narrow interpretation and that therefore few defences based upon this argument are successful." The American Society of International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 I.L.M. 225, 241, 1994 WL 327559 (1994).

1. Defining Grave Risk and Intolerable Situation

The language used in Article 13(b) was chosen carefully and was meant to exclude the type of evidence that is typical to a determination of the merits of a custody case.[305] Article 13(b) does not apply to "value judgment" evidence relating to economic conditions, educational benefits, lifestyles, or disparate quality of parenting styles.[306] As a result, evidence focusing on the child's "best interests" or a choice between parents is not relevant.

The term "grave" means "more than a serious risk."[307] The situation contemplated by Article 13(b) would include sending a child back to a "zone of war, famine, or disease" as well as "cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapa-

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304. The *Pérez-Vera Report* explains at paragraph 113: "In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion—and does not impose upon them a duty—to refuse to return a child in certain circumstances." *See also Text & Legal Analysis*, 51 Fed. Reg. at 10,510 ("Under Article 13(b), a court in its discretion need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation.").

305. "Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered." *Pérez-Vera Report, supra* note 18, ¶ 116.

306. *See, e.g.*, Cuellar v. Joyce, 596 F.3d 505, 509 (9th Cir. 2010) ("Billions of people live in circumstances similar to those described by Richard. If that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living."). The Circuit Court also noted that the district court had denied return on the basis that the child would suffer psychological harm if separated from her father. The court stated: "This was a very serious error. The fact that a child has grown accustomed to her new home is never a valid concern under the grave risk exception, as 'it is the *abduction* that causes the pangs of subsequent return'" (citations omitted). *Cuellar*, 596 F.3d at 511.

307. *See, e.g.*, Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 14 (1st Cir. 2002).

ble or unwilling to give the child adequate protection."[308] It is universally accepted that the "grave risk" defense is subject to narrow interpretation. Even when a grave risk defense is proven, the court retains discretion to order the child's return with appropriately crafted undertakings or conditions. (See discussion *supra* beginning at page 65.) But two circuits have cautioned that in situations involving grave risk, "the safety of children is paramount."[309]

In *Nunez-Escudero v. Tice-Menley*, the court relied upon language from a Canadian Supreme Court case:

> . . . [T]he word "grave" modifies "risk" and not "harm," this must be read in conjunction with the clause "*or otherwise* place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation.[310]

However, the Eleventh Circuit in *Baran v. Beaty*,[311] declined to follow the dicta *Friedrich II*, that courts have a duty to assess the ability of the habitual residence to protect a child from harm.[312] The *Baran* court noted that the history surrounding the adoption of the Convention failed to discuss such a condition. Although *Baran* did not prohibit courts from considering this evidence, it held that the parent requesting return had no duty to present such evidence.[313]

A majority of courts have declined to find grave risk when the abducting parent claims that an order of return will cause a separation

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308. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1069 (6th Cir. 1996) (indicating that an intolerable situation would also arise if a parent sexually abuses a child).

309. *See* Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007) (quoting Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005)).

310. Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (citing Thomson v. Thomson, [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253 (Can. S.C.C.)).

311. 526 F.3d 1340 (11th Cir. 2008).

312. *Accord* Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005); Blondin v. Dubois, 78 F. Supp. 2d 283, 297–98 (S.D.N.Y. 2000).

313. *Baran*, 526 F.3d at 1349.

between the child and the abductor that will result in psychological damage to the child.[314]

Courts have defined "intolerable situation" to include sexual or physical abuse of a child.[315] The *Text & Legal Analysis* notes that an "'intolerable situation' was not intended to encompass return to a home where money is in short supply."[316] Two recent district court cases have discussed whether return to a situation with desperate financial conditions involves an "intolerable situation."[317] Both cases determined that the financial situations in question did not rise to the level of an intolerable situation, but nevertheless imposed undertakings upon the children's return, requiring the petitioning parent to defray financial expenses until the matters could be heard in the courts of the habitual residence.[318]

2. Child Abuse

It is clear from the case law and legislative history of the Convention that abuse of a child—sexual, physical, or emotional—may form the

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314. *See, e.g.*, Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995); Norden-Powers v. Beveridge, 125 F. Supp. 2d 634 (E.D.N.Y. 2000); *Nunez-Escudero*, 58 F.3d 374; Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295 (D.P.R. 2004); Antunez-Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800 (N.D. Iowa 2003); *but see* Steffen F. v. Severina P., 966 F. Supp. 922 (D. Ariz. 1997) (holding that proof that a child's bond with parent would suffer if ordered returned may qualify as grave risk under Article 13).

315. *See, e.g.*, *In re* Application of Adan, 437 F.3d 381, 395 (3d Cir. 2006); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002); *see also* Neves v. Neves, 637 F. Supp. 2d 322 (W.D.N.C. 2009) (finding allegations that level of neo-Nazi activities in Germany, and racial prejudice against children, insufficient to rise to the level of an intolerable situation).

316. *Text & Legal Analysis*, *supra* note 65, at 10,510.

317. *See* Krefter v. Wills, 623 F. Supp. 2d 125 (D. Mass. 2009); Wilchynski v. Wilchynski, No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. 2010).

318. There is a question whether "undertakings" may be imposed where there is no finding of an Article 13(b) defense. See discussion *infra* beginning at page 98.

basis of an Article 13(b) defense.[319] In *Danaipour I*,[320] mother alleged that the children had been subjected to sexual abuse by their father in Sweden. The district court deferred to the courts of Sweden the issue of whether the abuse actually occurred and ordered the children returned upon the condition that there would be a full forensic evaluation. The First Circuit reversed, remanding the case to district court for a determination of whether the children had been subjected to sexual abuse. The court noted the duty of trial courts to determine whether the facts underlying an Article 13(b) claim are present:

> It is not a derogation of the authority of the habitual residence country for the receiving U.S. courts to adjudicate the grave risk question. Rather, it is their obligation to do so under the Convention and its enabling legislation. Generally speaking, where a party makes a substantial allegation that, if true, would justify application of the Article 13(b) exception, the court should make the necessary predicate findings.[321]

Some courts have ordered the return of children who were subjected to abuse upon the acceptance of "undertakings" from the parent requesting return. For a discussion of undertakings, see *infra* page 98.

3. Domestic Violence

Domestic violence has been recognized as a defense pursuant to Article 13(b) that may justify a refusal to return children.[322] Some courts have allowed the defense even if the children involved were not them-

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319. *Text & Legal Analysis*, *supra* note 65, at 10,510; *Pérez-Vera Report*, *supra* note 18, ¶ 2; Baran v. Beaty, 526 F.3d 1340, 1352 (11th Cir. 2008); *Danaipour I*, 286 F.3d at 15.

320. *Danaipour I*, 286 F.3d at 25–26.

321. *Id.* at 18.

322. *See, e.g.*, *Walsh*, 221 F.3d 204; Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000); Blondin v. Dubois (*Blondin I*), 189 F.3d 240 (2d Cir. 1999); *In re* Application of Adan, 437 F.3d 381 (3d Cir. 2006); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005); *Baran*, 526 F.3d 1340.

selves subjected to physical abuse,[323] while others have ruled that the defense is not available if the children were not the direct victims of abuse.[324]

"Domestic violence" is an all-inclusive term, including physical, emotional, and psychological abuse. It produces a spectrum that involves minor and isolated incidents on one end and high degrees of lethality and death on the other. In terms of Article 13(b), domestic violence may point to clear and convincing evidence that the return of a child would subject the child to a grave risk of harm or place the child in an intolerable situation; but evidence of domestic violence is not automatically dispositive. In order to bring some clarity to this spectrum, the Sixth Circuit in *Simcox v. Simcox*[325] sought to categorize the levels of domestic violence and their importance in the Article 13(b) analysis:

> First, there are cases in which the abuse is relatively minor. In such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a "grave risk" or otherwise place the child in an "intolerable situation" under Article 13b. In these cases, undertakings designed to protect the child are largely irrelevant; since the Article 13b threshold has not been met, the court has no discretion to refuse to order return, with or without undertakings. (footnote omitted) Second, at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect. (citations omitted) In these cases, undertakings will likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner will not be deterred by a foreign

323. *See, e.g.*, Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010); *see also Walsh*, 221 F.3d 204. The abuse of a parent can qualify as an Article 13(b) defense, even though the child was not physically abused.

324. *See, e.g.*, *Whallon*, 230 F.3d at 460; McManus v. McManus, 354 F. Supp. 2d 62 (D. Mass. 2005); Aldinger v. Segler, 263 F. Supp. 2d 284, 289 (D.P.R. 2003).

325. *Simcox*, 511 F.3d 594.

> court's orders. Consequently, unless "the rendering court [can] satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody," (citation omitted) the court should refuse to grant the petition. Third, there are those cases that fall somewhere in the middle, where the abuse is substantially more than minor, but is less obviously intolerable. Whether, in these cases, the return of the child would subject it to a "grave risk" of harm or otherwise place it in an "intolerable situation" is a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.[326]

The facts of *Walsh v. Walsh*[327] set forth a series of concerns resulting in the First Circuit denying return.[328] The district court ordered the children returned to Ireland, finding that there was no "immediate, serious threat" to the safety of the children that could not be dealt with by Irish authorities. The First Circuit reversed, finding that under Article 13(b) a risk only needed to be grave, not immediate. The court of appeals concluded that in light of father's persistent disobedience of authority—absconding from criminal charges in the United States and

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326. *Id.* at 607–08.

327. 221 F.3d 204 (1st Cir. 2000).

328. In *Walsh*, father was a serial abuser who absconded to Ireland after he was criminally charged for breaking and entering and for making threats to kill a neighbor. Mother, pregnant with a second child, followed the father to Ireland with their child. A profound history of subsequent abuse occurred over the following four years, consisting of numerous beatings and instances of physical and emotional abuse. The abuse continued despite protection orders and orders barring father from the family residence. Mother surreptitiously returned with the children to the United States. Although the abuse was directed toward the children's mother, and the children themselves were not physically abused, the parties' oldest child was diagnosed with Post Traumatic Stress Disorder (PTSD). Although this condition was in remission at the time of the trial, the child's therapist felt that if the child were returned to Ireland, that she would relapse.

disobeying restraining orders and barring orders[329]—it was unlikely that he would adhere to any undertakings that a court might impose as a condition of return of the children. The court remanded the case with instructions to dismiss father's petition.[330]

F. Violations of Human Rights and Fundamental Freedoms

Article 20 of the Convention provides:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

This provision was intended to address "the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[331] A claim under this provision first must be assessed in the context of the country where the child currently resides. That is, if a child in the United States is the subject of a return application, U.S. values regarding human rights and fundamental freedoms are the measure by which the facts are judged. In addition, those "fundamental principles" must be applied without discrimination in the requested state.

As a practical matter, defenses mounted on the basis of an Article 20 violation are rare, and those raised in the United States have not been successful.[332]

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329. A barring order is one that prohibits the restrained person from inhabiting or entering a home.

330. *Walsh*, 221 F.3d at 222.

331. *Text & Legal Analysis*, *supra* note 65.

332. *See, e.g.*, Aldinger v. Segler, 263 F. Supp. 2d 284 (D.P.R. 2003) (finding no evidence of violation of Article 20); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M.D. Fla. 2002) (ruling that economic crisis in Argentina does not amount to Article 20 violation); Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603 (E.D. Va. 2002) (finding that procedures of Colombian family law court have no bearing on whether return of child would violate human rights provisions); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (finding contention that treatment by

In *Carrascosa v. McGuire*,[333] the parties, both represented by counsel, signed a "parenting agreement." This agreement prohibited either parent from traveling outside the United States with the child without the other parent's written permission. Although the parties did not seek to make the agreement a court order, the agreement was valid and enforceable under New Jersey law. In Spain, mother filed an action to annul her marriage while father filed a divorce action in New Jersey. Shortly thereafter, mother removed the child to Spain. In response to the removal of the child, the New Jersey court awarded custody of the child to father and ordered mother to return the child to the United States. Father thereafter filed a Hague Convention return case in Spain. The Spanish courts denied father's Hague application and entered an order that the child was not to be removed from Spain until her eighteenth birthday. Mother was subsequently ordered by the New Jersey court to appear with the child, which she failed to do. A warrant was issued for her arrest, resulting in her apprehension and incarceration. She continued to refuse to produce the child in New Jersey. Mother's petition for writ of habeas corpus in district court was denied and the denial was appealed to the Third Circuit.

The Third Circuit found that the Spanish courts committed several errors in denying father's Hague case: The Spanish court made custody

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Greek police and court system amounted to Article 20 violation to be "totally without merit"); Caro v. Sher, 687 A.2d 354, 296 N.J. Super. 594 (Super. Ct. Ch. Div. 1996) (ruling delays in Spanish court system do not amount to Article 20 violation); Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) (holding no Article 20 violation where an Israeli restraining order compelled mother to remain until divorce settled as mother had right to challenge injunction but did not); Sewald v. Reisinger, No. 8:08-CV-2313-JDW-TBM, 2009 WL 150856 (M.D. Fla. 2009) (unreported disposition) (alleging violation based on German court entering an ex parte ruling without notice); *In re* Hague Child Abduction Application, No. 08-2030-CM, 2008 WL 913325 (D. Kan. 2008) (unreported disposition) (finding no evidence of human rights violations in Mexico); McCubbin v. McCubbin, No. 06-4110-CV-C-NKL, 2006 WL 1797922 (W.D. Mo. 2006) (unreported disposition) (denying contention that mother's and children's establishment of a habitual residence in Australia was a violation of the Servicemembers Civil Relief Act (50 U.S.C. § 501) and an Article 20 violation).

333. 520 F.3d 249 (3d Cir. 2008).

determinations in direct violation of the Hague Convention; the court failed to consider father's custody rights under New Jersey law; it wrongly applied Spanish law to the parenting agreement that was valid under New Jersey law; and the Spanish court found that the parenting agreement violated a Spanish citizen's right to travel and thus violated Article 20 of the Hague Convention. The Third Circuit refused to grant comity to the Spanish order denying father's Hague Convention case finding that the errors committed by the Spanish courts were sufficient grounds for declining enforcement of the Spanish judgments. The denial of mother's writ of habeas corpus was affirmed.

G. Child's Objection to Return

Article 13 (in an unnumbered paragraph) recognizes that a child may object to being returned:

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The child's objection to return is sometimes referred to as the "age and maturity defense."

The party opposing the child's return must prove this defense by a preponderance of the evidence.[334] The objection of a child of sufficient age and maturity may form the sole basis for denying that child's return.[335] However, the child's objection to return does not amount to a veto power. The language of this exception to return is permissive, allowing court discretion to disregard a child's objection, even if his or

334. *See, e.g.*, England v. England, 234 F.3d 268, 272 (5th Cir. 2000); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008); Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008); 42 U.S.C. § 11601(a)(4) (1988).

335. *See, e.g.*, Blondin v. Dubois (*Blondin II*), 238 F.3d 153, 166 (2d Cir. 2001) ("We agree with the government that the unnumbered provision of Article 13 provides a *separate* ground for repatriation and that, under this provision, a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child.").

her age and level of maturity supports consideration of that objection.[336]

If the child's objection is the sole basis for challenging return, courts apply a stricter standard when evaluating the child's opinion than when considering the child's testimony as part of a broader analysis of other issues in the case.[337] Article 13 must be construed narrowly.[338] A child's objection is not tantamount to "the wishes of the child." While the wishes or desires of a child may be appropriate for a court to consider in a custody case, they are not relevant in a Hague return case.[339]

A finding "of sufficient age and maturity" under Article 13 is a two-step process. First, the court assesses whether the child is sufficiently mature. Then, the court must determine if the child should be returned despite his or her objection.[340] Factors may exist that coun-

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336. *Text & Legal Analysis*, *supra* note 65, at 10,510.

337. *See, e.g.*, *Blondin II*, 238 F.3d at 166. In *Blondin II*, the child was too young for the court to accept her objections to return to France. However, her opinions were properly considered as part of an Article 13(b) defense. *See also* de Silva v. Pitts, 481 F.3d 1279, 1285 (10th Cir. 2007).

338. *See, e.g.*, Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259 (3d Cir. 2007); *England*, 234 F.3d at 272; Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010).

339. "The Hague Convention also provides a limited opportunity for the child to be heard provided it has obtained an 'age and degree of maturity' at which it is appropriate to take its views into account. But a main intention of this article was to draw a clear distinction between a child's objections, as defined in the article, and a child's wishes as commonly expressed in a custody case. This is logical, given that the Convention is not intended as an instrument to resolve custody disputes per se. It follows, therefore, that the notion of 'objections' under Article 13b is far stronger and more restrictive than that of 'wishes' in a custody case." Morrison v. Dietz, No. 07-1398, 2008 WL 4280030, p. 12 (W.D. La. 2008) (unreported disposition) (quoting Response to International Parental Kidnapping: Hearing Before the S. Comm. on Criminal Justice Oversight, 106th Cong. (1999) (statement of Catherine L. Meyer, British Embassy Co-Chair of the International Centre for Missing & Exploited Children)).

340. *See, e.g.*, Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295, 298 (D.P.R. 2004) (holding where child was found to be articulate and mature enough to express objection to return, child's objection was not conclusive given the narrow interpretation to be given to the exception); Matovski v. Matovski, No. 06 Civ. 4259(PKC), 2007 WL 2600862 (S.D.N.Y. 2007) (unreported disposition) (declining

terbalance the objections of a mature child. A court should consider those factors and exercise its discretion in light of all available evidence.[341]

The *Text & Legal Analysis* cautions: "A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child."[342] Undue influence need not be the result of deliberate attempts to influence the child, but may arise from the circumstances surrounding the child's wrongful retention.[343]

1. Age and Maturity

The court must make a factual determination of whether a child is of sufficient age and maturity to express a meaningful opinion. Courts of appeal accord deference to the discretion of the district court and will set aside a factual finding only upon a showing of clear error.[344] Given the broad range of combinations of age and degree of maturity, it is difficult to generalize as to what age a child is presumptively able to express a mature opinion. Efforts to create a tipping point based on

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use of discretion to overrule children where court finds children's objections valid and considers return in spite of objection); Barrera Casimiro v. Pineda Chavez, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. 2006) (using discretion to overrule child's objection to return).

341. *See, e.g.*, *de Silva*, 481 F.3d at 1285; Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (ordering child returned); *Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 2600862 (considering objections valid and exercising discretion, but ultimately declining to order return); *Barrera Casimiro*, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (exercising discretion to order return despite mature objection to return).

342. *Text & Legal Analysis*, *supra* note 65, at 10,510. *See also* Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603 (E.D. Va. 2002) (finding thirteen-year-old's objection was not strongly stated and appeared to be the product of suggestion of parent).

343. *See, e.g.*, *Tsai-Yi Yang*, 499 F.3d at 280.

344. *See, e.g.*, Simcox v. Simcox, 511 F.3d 594, 603 (6th Cir. 2007). *But see* England v. England, 234 F.3d 268, 272–73 (5th Cir. 2000) (reversing district court's order for child's return based on wishes of fourteen-year-old child with ADD, learning disabilities, and successive foster mothers, and who is on medication and is scared and confused by litigation).

age alone have been criticized.[345] Courts have found the opinions of children as young as eight years old to be sufficiently mature,[346] whereas other courts have found the opinions of fourteen- and fifteen-year-olds failed to meet this standard.[347]

2. Manner of Hearing Child's Objection

In cases considering Article 13 objections, judges have adopted four procedures for receiving evidence of a child's objection:[348] (1) allowing the child to testify in court in an evidentiary hearing;[349] (2) interviewing the child in camera; (3) requesting a psychological evaluation of the child;[350] and (4) appointing an attorney[351] or guardian ad litem[352]

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345. *See* Tahan v. Duquette, 613 A.2d 486, 259 N.J. Super. 328 (Super. Ct. App. Div. 1992) (finding nine years old to be too young to consider at all); *cf.* Ngassa v. Mpafe, 488 F. Supp. 2d 514 (D. Md. 2007) (declining to speak directly to seven-year-old child); Grijalva v. Escayola, No. 2:06-cv-569-FtM-29DNF, 2006 WL 3827539, p. 4 (M.D. Fla. 2006) (unreported disposition) (finding that children, ages seven and four, were not mature enough for court to take into account their views).

346. *See, e.g.*, Anderson v. Acree, 250 F. Supp. 2d 876 (S.D. Ohio 2002); Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953, 957–58 (E.D. Mich. 2001) (ordering psychological examination to determine degree of maturity of eight-year-old); *cf.* Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (not allowing an eight-year-old to testify).

347. *See England*, 234 F.3d at 272–73 (finding fourteen-year-old child did not meet standard); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (returning a fifteen-and-a-half-year-old despite objection); Barrera Casimiro v. Pineda Chavez, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. 2006) (unreported disposition) (finding fifteen-year-old failed to appreciate her immigration status as an incident of her non-return).

348. *See* James D. Garbolino, International Child Custody: Handling Hague Convention Cases in U.S. Courts (National Judicial College 2000).

349. *See, e.g.*, *In re* Skrodzki, 642 F. Supp. 2d 108 (E.D.N.Y. 2007) (submitting declaration of child); McManus v. McManus, 354 F. Supp. 2d 62 (D. Mass. 2005) (allowing children to testify at trial).

350. *See, e.g.*, *McManus*, 354 F. Supp. 2d 62 (appointing a psychologist); *Raijmakers-Eghaghe*, 131 F. Supp. 2d 953 (ordering psychological report regarding wishes of eight-year-old).

351. *See, e.g.*, Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009) (appointing attorney to meet with child and to determine issue of maturity).

352. *See, e.g.*, Diaz Arboleda v. Arenas, 311 F. Supp. 2d 336 (E.D.N.Y. 2004).

for the child. Courts have used all four of these methods, but the majority have employed in camera interview of the child.[353]

H. Nonstatutory Defenses: Equitable Defenses

The Convention itself recognizes only those defenses set forth in Articles 12, 13, and 20. However, courts occasionally have considered the application of certain equitable principles in Hague return cases: waiver,[354] unclean hands, and fugitive disentitlement.

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353. *See, e.g.*, de Silva v. Pitts, 481 F.3d 1279 (10th Cir. 2007) (receiving child's objection in camera with court reporter and law clerk present); Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010) (hearing child's objection in camera); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (hearing child's objection in camera); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008) (meeting all three children in chambers ex parte); *Diaz Arboleda*, 311 F. Supp. 2d 336 (interviewing children in camera); Andreopoulos v. Nickolaos Koutroulos, No. 09-cv-00996-WTD-KMT, 2009 WL 1850928 (D. Colo. 2009) (allowing child to testify in chambers and appointing a therapist); Laguna v. Avila, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. 2008) (interviewing child in chambers without parties or counsel); Di Giuseppe v. Di Giuseppe, No. 07-CV-15240, 2008 WL 1743079 (E.D. Mich. 2008) (interviewing children in camera); McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. 2007) (interviewing children in camera without parties or counsel); Wasniewski v. Grzelak-Johannsen, No.5:06-CV-2548, 2007 WL 2344760 (N.D. Ohio 2007) (hearing child's objection in camera); Kofler v. Kofler, No. 07-5040, 2007 WL 2081712 (W.D. Ark. 2007) (unreported disposition) (interviewing three children together in chambers without parties but with counsel present); Tsai-Yi Yang v. Fu-Chiang Tsui, No. 2:03-cv-1613, 2006 WL 2466095 (W.D. Pa. 2006) (interviewing child with counsel in camera).

354. Courts should distinguish between a waiver of the right to proceed with a Convention case and a waiver of custody rights in connection with an Article 12 defense. Some decisions use the term "waiver" to indicate an abandonment of custody rights. *E.g.*, Nicolson v. Pappalardo, 605 F.3d 100, 107 (1st Cir. 2010). While the court in *Nicolson* referenced the holding in *Journe v. Journe*, 911 F. Supp. 43 (D.P.R. 1995), the court declined to find a waiver (acquiescence) of father's custody rights by signing of a temporary order in a domestic violence prevention case, providing that mother had rights of custody and father had limited visitation rights. *Nicolson*, 605 F.3d at 107.

1. Waiver

The first U.S. case to accept a waiver defense was *Journe v. Journe*.[355] In *Journe*, the parties lived exclusively in France, where father commenced a divorce and custody action when the parties separated. Mother absconded with the children to Puerto Rico, alleging a history of spousal abuse. Some months later, father filed his Hague petition in Puerto Rico. After moving to Puerto Rico, mother voluntarily appeared in the French custody action and opposed father's request for custody of the children. Father then dismissed his French divorce action. Objecting to father's petition for return, mother argued that father's dismissal of the very action in which custody would be decided indicated he intended to have the children returned to relitigate the issue of custody—a claim he earlier withdrew. In essence mother argued that father was attempting to get a "second bite at the apple." The district court agreed with the argument and declined to order the children returned.[356]

The waiver argument was rejected in *Holder v. Holder* (*Holder I*)[357] where the Ninth Circuit held father did not waive his right to pursue a Hague claim because he contemporaneously filed an action for custody in a state court:

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355. 911 F. Supp. 43 (D.P.R. 1995).

356. "Dr. Journe's voluntary dismissal of his action for divorce and custody of the children acts as a waiver of his rights under the Convention. Throughout this process, his petition to the French Central Authority was premised on the underlying action for divorce then pending before the French courts. His remedy under the Convention would put him in the same position he was on November 17, 1994. Once again, he would have his choice of a French forum to decide the custody issues under French law, as contemplated by the Convention. Given these circumstances, his voluntary dismissal of the action for divorce can only be characterized as indicative of an intent to relinquish his rights to have the custody issues decided by the courts of France (citation omitted). No other reasonable explanation of his conduct is possible. (footnote omitted). Having eschewed this opportunity to resolve the custody dispute in his native France, we hold that Dr. Journe has waived his right to pursue a claim under the Convention, and therefore dismiss the complaint in this case." *Id.* at 48.

357. 305 F.3d 854 (9th Cir. 2002).

> This is not to say that a court, reviewing a Hague Convention Petition, could not consider as *one* of the circumstances that might indicate waiver the act of filing for custody in the jurisdiction to which a left-behind parent's children were removed. We hold that it is insufficient, however, to find an "uncoerced intent to relinquish" Hague Convention rights on this basis alone, because, as discussed above, filing for custody might simply indicate an intention to mitigate the litigation advantage that an abducting parent would obtain by wrongfully removing his or her children.[358] (emphasis in original)

2. Unclean Hands

The defense of "unclean hands" has not yet been successful in a Hague Convention case.[359] In *Karpenko v. Leendertz*,[360] the court declined to apply the equitable doctrine of "unclean hands," concluding:

> [A]pplication of the unclean hands doctrine would undermine the Hague Convention's goal of protecting the well-being of the child, of restoring the status quo before the child's abduction, and of ensuring "that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, Art. 1(b).[361]

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358. *Id.* at 873 n.7.

359. *Cf.*, *Von Wussow-Rowan v. Rowan*, No. CIV.A.98-3641, 1998 WL 461843 (E.D. Pa. 1998), where the court stated in dicta that "the 'clean hands' doctrine militates against granting the present application," where the only conduct involved by the petitioner (mother) was the abduction of the child to Switzerland, after which the father re-abducted the child back to the United States. In another unreported case, *Delgado-Ramirez v. Lopez*, 2011 WL 692213 (W.D. Tex. 2011) (unreported disposition), the district court refused to grant an attorney's fee award to the parent successfully petitioning for the return of a child on the basis that both parties to the case had unclean hands.

360. 619 F.3d 259 (3d Cir. 2010).

361. *Id.* at 265.

The court went on to note that child abductions occur in the context of strained relations between the parties, and both parties may be guilty of acts that compromise the custody rights of the other parent.

3. Fugitive Disentitlement

The doctrine of fugitive disentitlement has been accepted in a few Hague cases, but has not been applied in a uniform manner, which appears to be the result of different factual contexts rather than differences in doctrinal analysis.

The first appellate case to apply the doctrine of fugitive disentitlement was *Prevot v. Prevot*.[362] In *Prevot*, father was on probation for a state court felony. Together with his wife and family, he left the United States, eventually arriving in France. Despite father's attempts to prevent mother and the children from leaving France, she succeeded in returning to the United States two years later. Father brought an action in federal court for the return of the children to France. The Sixth Circuit reversed the district court's refusal to apply the fugitive disentitlement doctrine and held:

> The fugitive disentitlement doctrine limits access to courts in the United States by a fugitive who has fled a criminal conviction in a court in the United States. The doctrine is long-established in the federal and state courts, trial and appellate. The power of an American court to disentitle a fugitive from access to its power and authority is an equitable one (citations omitted).
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> * * * * *
>
> We find nothing in the Convention or the Act that purports to strip an American court of the powers inherent to it as a court. Because of the unique facts, the core of this case is not custody, or competing interests of parents, but fundamental concerns of how the United States operates its courts and how those courts may react to abuses of American criminal process, to defiance of judicially imposed obligations

362. 59 F.3d 556 (6th Cir 1995).

> owed to victims of crime, and to flights from financial responsibilities to our government.[363]

In *Walsh v. Walsh*,[364] the First Circuit declined to impose fugitive disentitlement upon a father who absconded felony probation from a Massachusetts state court conviction for assaultive and threatening conduct. The First Circuit analyzed the Supreme Court's consideration of fugitive disentitlement in *Degen v. United States*[365] and found that the case for disentitlement was too weak to bar father's proceedings:

> [A]pplying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights. Parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationships with their children. See generally *Troxel v. Granville*, 530 U.S. 57, ____, 120 S. Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) (plurality opinion) ("The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."). To bar a parent who has lost a child from even arguing that the child was wrongfully removed to another country is too harsh. It is too harsh particularly in the absence of any showing that the fugitive status has impaired the rights of the other parent.[366]

In *March v. Levine*,[367] the Sixth Circuit declined to extend its fugitive disentitlement analysis in *Prevot* to a conviction for civil contempt. The children in *March* were habitual residents of Mexico. Maternal grandparents wrongfully retained the children in the United States after a visit. They contested father's petition for return, arguing that the children's mother, who had been missing for four years, was presumed dead, and they secured a default judgment against father for

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363. *Id.* at 562, 566. *Prevot* was decided prior to *Degen v. United States*, 517 U.S. 820 (1996), which clarified the use of the doctrine.

364. 221 F.3d 204 (1st Cir. 2000).

365. 517 U.S. 820 (1996).

366. *Walsh*, 221 F.3d at 216.

367. 249 F.3d 462 (6th Cir. 2001).

the wrongful death of the children's mother. The default judgment was based upon a discovery sanction holding father in civil contempt. The wrongful death action was never heard on the merits. Refusing to apply the fugitive disentitlement doctrine to civil contempt, the court cautioned:

> It is worth re-emphasizing the *Degen* Court's guidance to courts in deciding whether to disentitle a claimant: there must be "restraint in resorting to inherent power" and its use must "be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823–24, 116 S. Ct. 1777.[368]

In another post-*Degen* case, the Eleventh Circuit applied the fugitive disentitlement doctrine to bar a parent from appealing the district court's grant of a return petition. In *Pesin v. Rodriguez*,[369] father's Hague Convention petition was granted by the district court, and mother was ordered to return the children to Venezuela within ten days.[370] She returned the children to Venezuela within the ten-day limit, but paid only lip service to the court's order by removing herself and the children the very next day. The district court issued an order to show cause regarding contempt and set the matter for hearing. The mother failed to attend that hearing. The court found her in contempt and indicated that the contempt could be purged by presenting the children before the district court or before a Venezuelan court; mother did neither. While still in contempt, mother appealed the order of return. Noting that the doctrine had been previously used to bar proceedings by those held in civil contempt,[371] the court held that application of the doctrine was appropriate and dismissed mother's appeal.[372] Most courts have held that the doctrine of fugitive disentitle-

368. *Id.* at 470.

369. 244 F.3d 1250 (11th Cir. 2001).

370. *See Pesin*, 77 F. Supp. 2d 1277.

371. *See, e.g.*, United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997).

372. *Pesin*, 244 F.3d at 1253. *See also In re* Leslie, 377 F. Supp. 2d 1232 (S.D. Fla. 2005) (applying fugitive disentitlement to bar mother's defenses, based upon criminal contempt of a Belize court in connection with the custody action there).

ment should be narrowly construed and applied under only the most compelling circumstances.

All fifty states and the federal government have penal statutes that criminalize parental abduction. The International Parental Kidnapping Crime Act (IPKCA) makes parental abduction a federal crime.[373] IPKCA was intended to complement the Convention, and its proceedings were meant to make the return of a child the first priority in the legal issues surrounding the abduction of a child.[374] This legislation responded to the concern that prosecuting authorities may be requested to pursue criminal charges against a parent who takes custody of his or her child under legally questionable circumstances and as a result becomes unable to pursue a potentially legitimate Hague

373. 18 U.S.C. § 1204 (1988). The IPKCA was partly motivated by a void in the law that existed because there was no remedy for international parental abductions involving a non-Hague country. *See, e.g.*, Mezo v. Elmergawi, 855 F. Supp. 59 (E.D.N.Y. 1994) (dismissing complaint against the Secretary of State compelling the U.S. government to pursue procedures under the Convention where children were abducted to Egypt and then Libya, both non-Hague signatories).

374. William J. Clinton, President's Signing Statement for H.R. 3378, 1993 U.S.C.C.A.N. 2424-1, 1993 WL 591942 (1993):

> Today I have signed into law H.R. 3378, the "International Parental Kidnapping Crime Act of 1993." This legislation underscores the seriousness with which the United States regards international child abduction. It makes this crime, for the first time, a Federal felony offense.
>
> H.R. 3378 recognizes that the international community has created a mechanism to promote the resolution of international parental kidnapping by civil means. This mechanism is the Hague Convention on the Civil Aspects of International Child Abduction. H.R. 3378 reflects the Congress' awareness that the Hague Convention has resulted in the return of many children and the Congress' desire to ensure that the creation of a Federal child abduction felony offense does not and should not interfere with the Convention's continued successful operation.
>
> This Act expresses the sense of the Congress that proceedings under the Hague Convention, where available, should be the "option of first choice" for the left-behind parent. H.R. 3378 should be read and used in a manner consistent with the Congress' strong expressed preference for resolving these difficult cases, if at all possible, through civil remedies.

claim.[375] Although criminal proceedings exist as a possibility in parental kidnapping cases, it is often the case that a civil action under the Hague Convention is the more appropriate first option.[376]

I. Undertakings

An undertaking may be defined as an official promise, agreement, or concession by a party to perform, or refrain from performing, a particular task. For example, a father who had petitioned for the return of his abducted child promises or "undertakes" to not petition the court in the child's habitual residence for a modification of custody until sixty days after the child has returned to the habitual residence if the court grants the return of the child.

Undertakings include agreements to a restraining order or protective order, assumption of the cost of transportation back to the habitual residence, or providing financial support for a period of time. A party seeking return of children may offer to give certain undertakings in connection with an order of return of the children on the theory that the court would be more amenable to that party's petition for return of the children. Undertakings are most frequently utilized in common-law countries.

There is disagreement among U.S. courts as to when it is appropriate to accept undertakings. One line of cases supports the acceptance of undertakings without an established defense, primarily on the basis that undertakings may ensure the child is safely returned to the habitual residence. In *Krefter v. Wills*,[377] the court held that a court has authority to accept undertakings as part of an order returning a child, even though an Article 13(b) defense was not established. In reaching

375. *See, e.g.*, Brooke v. Willis, 907 F. Supp. 57 (S.D.N.Y. 1995) (issuing state arrest warrants after mother fled jurisdiction violates state court order); Crall-Shaffer v. Shaffer, 663 N.E.2d 1346, 105 Ohio App. 3d 369 (Ct. App. 1995) (finding mother in contempt of court, warrant issued for her arrest in custody proceeding).

376. *See* The American Society of International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention*, 33 I.L.M. 225, 249, 1994 WL 327559 (1994).

377. 623 F. Supp. 2d 125, 137–38 (D. Mass. 2009).

this conclusion, the court cited to *Feder v. Evans-Feder*, which ruled that the lower court on remand should consider undertakings if the Article 13(b) defense is not sustained.[378] In *Kufner v. Kufner*,[379] the district court ordered undertakings even though mother's Article 13(b) defense was denied. On appeal, the First Circuit held that awarding undertakings in this situation was appropriate. The court noted that a district court's acceptance of undertakings was reversed only when an Article 13(b) defense had been established and the undertakings were insufficient to mitigate the harm.[380]

The Sixth Circuit has taken a different approach, ruling that undertakings are only appropriate where an Article 13(b) defense exists:

> Absent a grave risk finding, the Convention leaves no room for a court to establish, as the district court did in this case, ameliorative undertakings designed to protect children against the risk of harm upon their return. *See* Hague Convention, Article 13b (noting that a court is "not bound to order the return of the child" only if the exception applies). Once the district court determines that the grave risk threshold is met, only then is the court vested by the Convention with the *discretion* to refuse to order return. It is

378. Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995) (instructing district court on remand that if the Article 13(b) defense fails, that "an unqualified return order would be detrimental" to the child, and that "the court should investigate the adequacy of undertakings . . . to ensure that [the child] does not suffer short term harm").

379. 480 F. Supp. 2d 491 (D.R.I. 2007).

380. Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (citing to Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002)). *Danaipour I* raises the issue that undertakings that are accepted with the intention that a foreign court will enforce them raise issues of comity in the sense that an expectation of enforcement may violate the foreign nation's right to determine for itself what is appropriate. *Danaipour I*, 286 F.3d at 22–25. *See also* Krefter v. Wills, 623 F. Supp. 2d 125, 138 (D. Mass. 2009) (noting that undertakings that do not require action or enforcement by foreign courts will not offend principles of comity).

> with this discretion that the court may then craft appropriate undertakings.[381]

However, undertakings are essentially unenforceable if they will be performed in the country of habitual residence or after the child has left U.S. soil. For example, if a parent promises, as a condition of return, not to attempt to modify custody in the habitual residence for sixty days, there is a chance that upon the child's return the parent will nevertheless institute proceedings to modify child custody, contravening the undertakings. The other parent may petition the court in the habitual residence and offer proof of the undertaking, but that court has no obligation to honor the promise made to another court, especially a foreign one. In addition, a U.S. court will lose jurisdiction over the matter, as the child would be subject to the jurisdiction of the habitual residence. For this reason, mirror-image orders, discussed *infra* at page 108, are sometimes used to enforce arrangements surrounding the return of the child.[382]

A court might have greater control over the performance of an undertaking if it is possible to perform the undertaking before the order of return becomes effective. If a parent promises to vacate a "chasing order" that shifted full custody of the child to that parent

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381. Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007). Note that the court did not consider as inappropriate orders relating to logistic matters that usually occur in connection with an order of return. "We do not mean to suggest, however, that a court is powerless to deal with ordinary logistical considerations that frequently accompany the return of any child, such as deciding which parent will pay for the child's return airfare. Although these have sometimes been referred to as 'undertakings,' *see, e.g.*, Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1366 (M.D. Fla. 2002), we are speaking specifically of those conditions on return designed to ameliorate the risk of harm in the context of abusive situations." *Simcox*, 511 F.3d at 608.

Simcox also addressed the issue of undertakings in domestic violence cases by noting that undertakings would be inappropriate in situations like that found in *Walsh*. The court stated that "Where a grave risk of harm has been established, ordering return with feckless undertakings is worse than not ordering it at all." *Id.*

382. A "mirror-image" order is one that contains identical terms, and is entered in both the courts of the habitual residence and the court making a return order. Such an order allows judges in both jurisdictions to have the power to enforce the conditions of the child's return.

after the abduction, a court might order the return of the child conditioned upon proof that the "chasing order" has actually been vacated. Similarly, promises for the payment of money for housing, support, costs, or attorney fees are frequently given as undertakings.

It may be possible to make such payments available to the parent returning the child before the court sets a date for the actual return of the child. Such an approach seems reasonable, especially where a defense has been proven and the undertaking is a material part of the court's decision to return the child because the undertakings will overcome the risk of harm to the child upon return. However, if undertakings are given when no defense has been proven, a court may choose to consider whether the performance of the undertaking should be elevated to a *quid pro quo* for the return of the child.

Undertakings typically fall into categories designed to address certain perceived hardships that may befall parents or children compelled to return to the habitual residence. These include, but are not limited to: (1) promises relating to the entry of protective orders in the habitual residence in connection with domestic violence or child abuse;[383] (2) promises designed to minimize emotional trauma to a child threatened with separation from a primary caretaker;[384] (3) promises designed to provide temporary financial assistance to a parent required to return in the company of a child or children;[385]

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383. *See, e.g.*, Blondin v. Dubois (*Blondin I*), 189 F.3d 240, 248 (2d Cir. 1999); Turner v. Frowein, 752 A.2d 955, 974, 253 Conn. 312, 345 (2000) (following *Blondin*); *but see* Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005) (questioning the appropriateness of undertakings in domestic violence and abuse cases); *Danaipour I*, 286 F.3d at 25 ("[U]ndertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the status quo was abusive."); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).

384. *But see Simcox*, 511 F.3d 594 (holding that undertaking that children were to be returned in the custody of their mother until Mexican court could hear issue of protective order was an invalid order compelling the mother to return to Mexico).

385. *See, e.g.*, *Krefter*, 623 F. Supp. 3d at 138 (finding airline tickets, payment of support of housing for three months in advance sufficient); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1061 (E.D. Wash. 2001) (considering lack of offer of

(4) promises to take measures to dismiss criminal prosecution for abduction or to refrain from initiating criminal proceedings;[386] and (5) promises not to seek or enforce orders that require a transfer of the child from the primary caretaker until there has been a final determination of the child custody case on the merits.[387]

J. Exhausting All Possible Alternatives to Refusing Return—Circuit Split

Once a court determines that a grave-risk defense has been established, the question arises whether the court should examine and consider all possible alternatives to refusing an order for the return of the child. There appears to be a division among the circuits concerning this question. The Second, Third, and Seventh Circuits point to a two-prong analysis for determining whether to grant an order for return: (1) Has the Article 13(b) defense been proven? and (2) Do measures exist to ameliorate the risk?

The First, Sixth, and Eleventh Circuits have taken the position that once an Article 13(b) defense has been proven, a court may, but is not required to, examine whether there are any alternatives or measures that will permit the court to order return of the child. Under this latter approach, once a defense has been established, a court may simply deny the child's return without inquiring into alternatives that might promote a safe return.

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undertakings in upholding Article 13(b) defense); *accord* Wilchynski v. Wilchynski, No. 3:10-CV-63-FKB, 2010 WL 1068070 (S.D. Miss. 2010) (unreported disposition).

386. *See, e.g.*, Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (ordering father to obtain dismissal of criminal charges); Ciotola v. Fiocca, 684 N.E.2d 763, 86 Ohio Misc. 2d 24 (1997); Jaet v. Siso, No. 08-81232-CIV, 2009 WL 32570 (S.D. Fla. 2009) (unreported disposition) (dismissal of pending criminal action in Mexico).

387. *See, e.g.*, *Kufner*, 519 F.3d 33. Where a left-behind parent secures a "chasing order" granting that parent full custody of the child, such an order may result in a shift of custody from the primary caretaker. As a result, some undertakings have been negotiated to require vacating the chasing order, thus allowing the abducting parent to return to the habitual residence without fear of losing custody prior to a hearing on the merits.

In *Blondin v. Dubois (Blondin I)*,[388] the court examined the issue of how far judges should go in exploring such alternatives. After the initial trial, the district court found the Article 13(b) defense had been established and denied father's return petition. The Second Circuit remanded the case to the district court with instructions to "take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation."[389] On remand, the district court again refused to order return, finding that no measures could be taken to ameliorate the grave risk to the children posed by a return to France.[390] Father again appealed, and the Second Circuit affirmed the denial of father's petition.[391] The *Blondin* approach was followed by the Third Circuit in *In re Application of Adan*[392] and by the Seventh Circuit in *Van De Sande v. Van De Sande*.[393]

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388. 189 F.3d 240 (2d Cir. 1999).

389. *Id.* at 248.

390. Blondin v. Dubois, 78 F. Supp. 2d 283, 294 (S.D.N.Y. 2000) ("I again find, by clear and convincing evidence, that return of [the children] to France, under any arrangement, would present a 'grave risk' . . . for three reasons: first, removal of the children from their presently secure environment would interfere with their recovery from the trauma they suffered in France; second, returning them to France, where they would encounter the uncertainties and pressures of custody proceedings, would cause them psychological harm; and third, [one child] objects to being returned to France.").

391. Blondin v. Dubois (*Blondin II*), 238 F.3d 153 (2d Cir. 2001).

392. 437 F.3d 381 (3d Cir. 2006); *accord* Foster v. Foster, 654 F. Supp. 2d 348, 352 (W.D. Pa. 2009) ("[I]f a respondent is able to produce clear and convincing evidence of a grave risk of harm to the child, she must then demonstrate that 'the court[s] in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection'.") (citing *Adan*, 437 F.3d at 395 and *Blondin II*, 238 F.3d at 162).

393. 431 F.3d 567 (7th Cir. 2005). In *Van De Sande*, father was willing to have the court consider conditions on an order of return. "This concession alone requires that we remand the case to the district court for further consideration, for 'in order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon "undertakings" from the petitioning parent'." *Id.* at

The First Circuit has noted that in some cases, measures and legal safeguards that might be available in the habitual residence will have little or no effect in ameliorating the grave risk to the child.[394] In *Danaipour II*,[395] the First Circuit clarified the burden of courts to consider ameliorative measures:

> [Father] cites to our holding in *Danaipour I* stating the standard for qualifying for the Article 13(b) exception, for the proposition that a district court cannot properly find that an Article 13(b) exception exists unless it examines the remedies available in the country of habitual residence.[Fn5]
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> [FN5.] Danaipour also relies heavily on a footnote in *Blondin* for the proposition that assessing the capacity of the courts of the country of habitual residence is a prerequisite to an Article 13(b) exception. 238 F.3d at 163 n.11. We do not read *Blondin* to require the court to make findings about the institutional capacity of the home country in all cases. To the extent that *Blondin* does stand for such a proposition, we disagree that Article 13(b) requires such findings in all cases.
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> Our holding in *Danaipour I* does not stand for the proposition that every Article 13(b) analysis requires two such distinct prongs. In fact, *Danaipour I* specifically identified the limited role undertakings may play in certain situations. *See Danaipour I,* 286 F.3d at 21. *Danaipour I* also noted the great weight afforded to the State Department policy concerning undertakings in a situation involving child abuse:
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> "If the requested state court is presented with unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context would embroil the court in the merits of the underlying custody issues and would tend to di-

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571 (citing to Feder v. Evans-Feder, 63 F.3d 217, 226 (3d Cir. 1995); Gaudin v. Remis, 415 F.3d 1028, 1035–36 (9th Cir. 2005); and *Blondin I*, 189 F.3d at 248–49).

394. *See, e.g.*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001).

395. 386 F.3d 289 (1st Cir. 2004).

> lute the force of the Article 13(b) exception. *Id.* at 25 (quoting Department of State Comment on Undertakings)."
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> The district court properly followed *Danaipour I*'s mandate; its finding of the existence of sexual abuse and that the return of the children to Sweden would result in a grave risk of psychological harm was adequate to satisfy the Article 13(b) exception, and no further inquiry into remedies available to the Swedish courts was required.[396]

Quoting the First Circuit with approval, the Sixth Circuit held: "[U]ndertakings would be particularly inappropriate, for example, in cases where the petitioner has a history of ignoring court orders. See *Walsh*, 221 F.3d at 220."[397] The circuit court found that the undertakings ordered by the district court were "unworkable"[398] and remanded the case to the district court to determine whether undertakings or other measures would be sufficient to protect the children.[399]

Similarly, in *Baran v. Beaty*,[400] the Eleventh Circuit determined that a court could consider whether authorities in a child's habitual residence were capable of ameliorating the risk of harm upon return. However, the court clearly indicated that a party resisting return had no obligation to prove that the habitual residence is unable or unwilling to take measures for such protection.[401]

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396. *Id.* at 303–04.

397. Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007).

398. The court was particularly concerned about the district court's order that the children be returned in the company of their mother. Under the Convention, courts have the power to order children returned to their habitual residence, but they do not have the power to order an unwilling adult to accompany those children. *See Simcox*, 511 F.3d at 610.

399. *Id.* at 608. On remand, the district court found that there were no undertakings that would adequately protect the children, and the petition for return was denied. *See* Simcox v. Simcox, No. 1:07CV96, 2008 WL 2924094 (N.D. Ohio 2008).

400. 526 F.3d 1340 (11th Cir. 2008).

401. *Id.* at 1348.

IV. Issuing Orders of Return

When an order for the return of a child is made, courts should focus on enforcement, specificity, and the safety of the child.[402] In most circumstances once a child crosses the U.S. border, a court loses jurisdiction to enforce the provision of any orders made regarding the manner or conditions of the child's return. For this reason, return orders should clearly state the provisions that must be followed while the child still remains on U.S. soil.

Occasionally, a child is removed from the state making the return order and is later found in another state. The initial order of return is entitled to "full faith and credit"[403] and is enforceable in state courts "as if it were a child-custody determination."[404]

A. Specificity: Time, Manner, and Date of Return

Orders should clearly state the mandated time, place, and details of the child's return.[405] In order to incorporate detailed information

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402. *See* Hague Conference on Private International Law, Special Commission to Review the Operation of the Hague Convention, Conclusions and Recommendations on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980, § 1.8.2 (2006) ("When considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including 'mirror' orders) made in that country before the child's return, as well as to the provisions of the 1996 Convention.").

403. 42 U.S.C. § 11603(g) (1988): "Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter."

404. Uniform Child Custody Jurisdiction and Enforcement Act §§ 301–302 (1997).

405. *See, e.g.*, Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) (ordering the dates and flight numbers of the child's return); Moreno v. Martin, No. 08-22432-CIV, 2008 WL 4716958 (S.D. Fla. 2008) (unreported disposition) (ordering U.S. Marshals Service to accompany petitioner to airport and notifying all other federal, state, and

about the transportation of the child back to the habitual residence, it may be necessary to schedule an additional brief hearing after ordering the child's return to finalize transportation arrangements and incorporate them into the order of return. The order may include any provisions that must be enforced by the U.S. Marshals Service or by any other relevant law enforcement agency.[406]

B. Mirror-Image Orders

Mirror-image orders may be more effective than undertakings in certain situations. These orders are entered in both the courts of the states hearing the petition and the courts in the child's habitual residence. The orders are "mirror images" of one another, containing the same terms with differences only in syntax. They are enforceable in both jurisdictions.[407] Mirror-image orders give some assurance that the court of the habitual residence will enforce the order in the event that the petitioning parent defaults on obligations contained within the order.

However, there are some limitations to mirror-image orders. First, the time necessary to enter orders in both jurisdictions may cause undue delay. Second, if there is no existing custody case pending in the court of the habitual residence, there may be technical difficulties with creating a new case and requesting an order to be entered. Third,

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local law enforcement officers that petitioner has the right to remove the child from the United States).

406. *See* Cuellar v. Joyce, 596 F.3d 505, 512 (9th Cir. 2010); Sullivan v. Sullivan, No. CV-09-545-S-BLW, 2010 WL 227924 (D. Idaho 2010) (unreported disposition) ("IT IS FURTHER ORDERED that the United States Marshals Service is directed to assist in the execution of this Order as necessary, and the United States Marshals Service may enlist the assistance of other law enforcement authorities, including the local police, as necessary to aid in any aspect of securing the safe return of C.S. to New Zealand.").

407. *See, e.g.*, Grammes v. Grammes, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. 2003) (unreported disposition) (entering mirror orders in Pennsylvania and Canada); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 11 (1st Cir. 2002) (noting that the district court ordered return under twelve conditions, including a mirror-image order entered in Sweden).

it is possible that the domestic law of the habitual residence either does not recognize or simply does not understand the concept of a mirror-image order, making it difficult to obtain such an order. In some circumstances the courts of the habitual residence are not permitted to order the kind of relief that the mirror order requires. This is an issue that the parties' counsel should clarify, but judges should be aware of the procedural complexities that may result from dealing with the courts of another nation.

C. Safe Harbor Orders

Safe harbor orders are designed to avoid severe and immediate physical or psychological harm to the child as a result of the conditions of return. The orders may provide, *inter alia*, for delivery of the child by a parent or relative back to the habitual residence, for the involvement of a child welfare agency in the placement or monitoring of the child, or for the involvement of the habitual residence Central Authority in the physical return of the child.

First, a U.S. court that is prepared to order a child's return may direct counsel for the parent requesting return to obtain a safe harbor order from the courts of the habitual residence. The order of return may be conditioned upon obtaining such an order. Secondly, where the parties are in agreement that a safe harbor order should issue, the U.S. court may wish to engage in direct judicial communication with the appropriate court in the habitual residence and address any matters related to the order. This type of order remains in effect until the courts of the child's habitual residence assume jurisdiction over the child's welfare. A safe harbor order issued by a court in the child's habitual residence is more likely to ensure the parties' compliance than one issued only by the court hearing the petition for return.[408]

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408. *Danaipour* describes a "safe harbor" order as one that is entered in the courts of the habitual residence before the entry of an order of return from a U.S. court. This "approach would avoid the unseemliness of a U.S. court issuing orders for a foreign court to enforce, and the foreign court's possible noncompliance . . . ." *Danaipour I*, 286 F.3d at 22.

D. Returns to Countries Other Than Habitual Residence

Both the *Pérez-Vera Report* and the *Text & Legal Analysis* interpret the Convention to mean that the child need not be returned to his or her habitual residence if the petitioning parent no longer lives in that location.[409] If this is the case, the child must be returned to the successful petitioning parent, regardless of his or her place of residence.[410]

E. Stays and Mootness

Neither the Convention nor ICARA contain guidelines for the issuance of stays by a court hearing a Hague Convention case.[411] Granting a stay after a return order is issued is governed by the law concerning the issuance of stays generally.[412] In the federal courts, four factors are considered when determining whether a matter should be stayed pending appeal:[413]

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409. "The Convention does not technically require that the child be returned to his or her State of habitual residence, although in the classic abduction case this will occur. If the petitioner has moved from the child's State of habitual residence the child will be returned to the petitioner, not the State of habitual residence." *Text & Legal Analysis*, 51 Fed. Reg. 10,494, 10,511 (Mar. 26, 1986).

410. *See, e.g.*, *Pérez-Vera Report*, *supra* note 18, ¶ 110. *See also* Pielage v. McConnell, 516 F.3d 1282 (11th Cir. 2008); Von Kennel Gaudin v. Remis, 282 F.3d 1178 (9th Cir. 2002).

411. In *Kijowska v. Haines*, the court rejected the argument that the UCCJEA controls the issuance of stays in Hague Convention return cases. 463 F.3d 583, 589 (7th Cir. 2006). The UCCJEA prohibits the issuance of a stay of a "child custody determination" (§ 314) unless the circumstances authorize a temporary emergency order (abandonment, mistreatment, or abuse). However, a Hague Convention return case is purposely omitted from the UCCJEA's definition of a "child custody determination," because Hague cases do not result in custody awards. *See* Comment to § 102 of the UCCJEA. Hence, the UCCJEA does not control the issuance of stays for state or federal courts.

412. *See* Fed. R. Civ. P. 62(c). Pursuant to Federal Rule of Appellate Procedure 8(a)(1)(A), a party must ordinarily apply for a stay in the district court for a stay pending appeal.

413. *See* Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987).

1. the strength of the applicant's showing of a likelihood of success on appeal;
2. whether the applicant will suffer irreparable injury in the absence of a stay;
3. whether the stay will cause substantial injury to parties opposed to the stay; and
4. any risk of harm to the public interest.

The factors above should be considered on a "sliding scale" so that a stronger showing on one factor may excuse a lesser showing on others.[414] The nearest quote to a policy statement on stays comes from *Friedrich v. Friedrich*, wherein the court noted:

> Staying the return of a child in an action under the Convention should hardly be a matter of course. The aim of the Convention is to secure prompt return of the child to the correct jurisdiction, and any unnecessary delay renders the subsequent return more difficult for the child, and subsequent adjudication more difficult for the foreign court.[415]

When appellate courts order stays in Hague cases, they also usually order expedited appeals.[416] The decision whether or not to grant a stay of an order of return lies within the sound discretion of the court.[417]

The federal circuits are split on a related issue regarding stays: after a district court orders a child returned, if a stay is not granted and the child returns to his or her habitual residence, does the child's return render the case moot? The Third and Fourth Circuits answer

414. *See* Thapa v. Gonzales, 460 F.3d 323 (2d Cir. 2004).

415. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1063 n.1 (6th Cir. 1996).

416. *See, e.g.*, Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010); Koch v. Koch, 450 F.3d 703, 710 (7th Cir. 2006); Simcox v. Simcox, 511 F.3d 594, 601 (6th Cir. 2007); Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 11 (1st Cir. 2002).

417. *See, e.g.*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001); Nicolson v. Pappalardo, 605 F.3d 100, 103 (1st Cir. 2010).

this question in the negative; the Eleventh Circuit has taken the opposite view.

In *Fawcett v. McRoberts*,[418] mother filed an application for the return of the parties' child from Virginia to Scotland. The district court granted mother's petition and ordered the child returned. Father voluntarily returned the child, but appealed the order of return and the order awarding fees. The Fourth Circuit determined that the case was not moot, acknowledging its departure from the Eleventh Circuit. Citing opinions in the Tenth[419] and the Eighth Circuits,[420] as well as state appellate decisions,[421] the court determined that despite the return of the child to the habitual residence, an appeal could "affect the matter in issue."[422] In support of this holding, the court noted that if the district court's order of return was set aside, the petitioning parent could voluntarily return the child to the United States.

Adopting the reasoning in *Fawcett*, the Third Circuit, in *Whiting v. Krassner*,[423] found that an appeal from an order directing the return of a child to Canada was not rendered moot by the child's return. The court reasoned that the state of affairs existing at the time of the appeal could change and require court action. The court also noted that relief from an award of attorney fees was part of the appeal; therefore

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418. 326 F.3d 491 (4th Cir. 2003), *abrogated on other grounds*, Abbott v. Abbott, 130 S. Ct. 1983 (2010).

419. *See* Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997); Navani v. Shahani, 496 F.3d 1121 (10th Cir. 2007). Both cases contained unusual facts, and it is unclear whether the Tenth Circuit's position on this issue is as clear as *Fawcett* assumed.

420. *See* Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995).

421. *See, e.g.*, Janakakis-Kostun v. Janakakis, 6 S.W.3d 843 (Ky. Ct. App. 1999); Dalmasso v. Dalmasso, 9 P.3d 551, 269 Kan. 752 (2000); Harkness v. Harkness, 577 N.W.2d 116, 227 Mich. App. 581 (Ct. App. 1998); Sampson v. Sampson, 975 P.2d 1211, 267 Kan. 175 (1999); *In re* Marriage of Jeffers, 992 P.2d 686 (Colo. App. 1999); Bless v. Bless, 723 A.2d 67, 318 N.J. Super. 90 (Super. Ct. App. Div. 1998), *superseded on other grounds,* Dalessio v. Gallagher, 997 A.2d 283, 414 N.J. Super. 18 (Super. 2010).

422. *Fawcett*, 326 F.3d at 494 (citing Church of Scientology v. United States, 506 U.S. 9, 12, 113 S. Ct. 447, 449 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895))).

423. 391 F.3d 540 (3d Cir. 2004).

the issue of fees could not be moot either. These issues were held to "affect the matter at issue," and as a result the case was not moot.[424]

The Eleventh Circuit reached a contrary result. In *Bekier v. Bekier*,[425] the district court entered a stay of an order returning the child, as mother filed a timely appeal and represented that she posted a bond. Though mother filed the appeal, she did not actually post the bond. Some time later, father returned with the child to Israel. The Eleventh Circuit dismissed the case as moot, finding that since the father had obtained the relief that he sought—the return of the child—the court was "powerless to grant the relief requested by [mother]."[426]

The Tenth Circuit has also addressed the question of whether the return of a child to the habitual residence moots the case. In *Ohlander v. Larson*,[427] mother petitioned for the return of her child from Utah to Sweden. She subsequently abducted the child to Sweden without waiting for the court to rule on her petition. The district court refused to grant mother's motion to dismiss her own case on the basis that she was in contempt of the district court's orders. The Tenth Circuit, however, ordered the case dismissed on other grounds. The court made reference to the third paragraph of Article 12 of the Convention, which states: "Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child." This provision was interpreted to mean that the court no longer had jurisdiction over the case. Without specifically holding that the case was moot because of the child's absence, the court did note that it found little merit in mother's argument that the case was moot, because finding so would legitimize the actions of a parent who filed a case, obtained temporary custody of the child, and then abducted the child herself.

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424. *Id.* at 546.
425. 248 F.3d 1051 (11th Cir. 2001).
426. *Id.* at 1055.
427. 114 F.3d 1531 (10th Cir. 1997).

However, in a later case, *Navani v. Shahani*,[428] the Tenth Circuit did find mootness, but not based simply on the child's return to the habitual residence. Father returned with the child to England, and while there he secured a custody order granting him full custody of the child and forbidding the child's return to the United States for visits with his mother. Mother's appeal, even if granted and the case reversed, would leave the U.S. court in the position of having to order the child returned to England. The English court already determined that father, post-abduction, was the appropriate parent to have custody of the child. Because the UK was found to be the child's habitual residence, and the UK court's order prohibited the child from visiting his mother in the United States, there was no possible way mother could obtain the relief she sought, which was to have the child retained in the United States. The Tenth Circuit dismissed mother's appeal on grounds that it was moot. However, the court specifically deferred ruling on the question whether the removal of the child, by itself, would moot an appeal.[429] See also *Leser v. Berridge*,[430] holding that a stipulation between parents to return children to their habitual residence for the purpose of child custody proceedings in the Czech Republic caused the return case in the U.S. to become moot.

428. 496 F.3d 1121 (10th Cir. 2007).
429. *Id.* at 1132.
430. 668 F.3d 1202 (10th Cir. 2011).

V. Procedural Issues

A. Expeditious Handling Required

The Convention makes very clear that abduction cases should be handled promptly and expeditiously. Article 11 states:

> The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

This principle is reflected in the Convention's stated purpose of protecting children from the effects of parental abduction and ensuring "their prompt return,"[431] and there are two separate provisions in the Convention discussing the expectation that judicial proceedings will be administered without delay. In addition to the requirement that courts "act expeditiously" in handling proceedings for return of children,[432] the Convention exhorts contracting states to use "the most expeditious procedures available."[433]

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431. Convention, *supra* note 10, Preamble, Article 1.

432. *See, e.g.*, Daunis v. Daunis, 222 Fed. Appx. 32, 2007 WL 786331 (2d Cir. 2007).

433. Convention, *supra* note 10, Article 2. *See* Holder v. Holder (*Holder II*), 392 F.3d 1009, 1022 (9th Cir. 2004) (overruling objections to use of a magistrate judge to conduct hearings pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b), and finding that the assignment of the case to a magistrate judge was in keeping with using the most expeditious procedures available). *See also Pérez-Vera Report, supra* note 18, ¶ 63.

This emphasis on prompt disposition applies to appellate proceedings as well.[434] Expedited procedures for briefing and handling of appeals have become common in most circuits.[435] Appellate courts have also avoided remand by identifying potential remand issues[436] and resolving factual matters where it is possible to do so based upon a "well developed record."[437]

For example, in *Charalambous v. Charalambous*,[438] the district court issued an order of return of a child to Cyprus. The First Circuit stayed the order of return on October 28, 2010, and expedited the appeal. Oral argument was held on December 7, 2010, and the court issued its opinion affirming the district court on December 8, 2010—57 days after the district court's decision.

1. Application of Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure govern the handling of cases arising under the 1980 Convention in the federal court system. In *Kijowska v. Haines*,[439] the court noted that Illinois law prohibited a stay of an order enforcing a child custody proceeding while an appeal was pending, absent exigent circumstances. However, the Seventh Circuit noted that matters relating to procedure in federal courts are governed

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434. *See, e.g.*, *In re* Application of Adan, 437 F.3d 381, 398 (3d Cir. 2006).

435. *See, e.g.*, Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Kijowska v. Haines, 463 F.3d 583 (7th Cir. 2006); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005) (ordering any subsequent appeal to be assigned to the same panel and advising counsel of provisions for requesting an expedited briefing schedule); Sealed Appellant v. Sealed Appellee, 394 F.3d 338 (5th Cir. 2004); *Holder II*, 392 F.3d 1009; Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1 (1st Cir. 2002); Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001); England v. England, 234 F.3d 268 (5th Cir. 2000); Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000); Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); *cf.* Whiting v. Krassner, 391 F.3d 540 (3d Cir. 2004) (denying requests for stay of return order and expedited appeal).

436. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001); *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009).

437. *See, e.g.*, Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

438. 627 F.3d 462 (1st Cir. 2010).

439. 463 F.3d 583, 589 (7th Cir. 2006).

by federal law, not state law, and upheld the stay of an order of return and the denial of a subsequent application to dissolve the stay pending appeal.

2. Expedited Discovery

A court may adopt an expedited discovery schedule when considering a petition for return. Both the provisions of the 1980 Convention and ICARA contemplate the use of expedited procedures to "guarantee that children are returned quickly to the correct jurisdiction."[440] The *Norinder* court reasoned that:

> . . . [T]he adjudication of a petition for return of a child is much like a district court's exercise of equitable power in the context of a preliminary injunction or a temporary restraining order. In both circumstances, discovery often must proceed quickly, the district court must apprise itself of the relevant facts, and a decision must be rendered on an expedited basis. [441]

3. Relaxed Rules for Admissibility of Documents

Furthering the goal of expedited procedures, ICARA provides a "generous authentication rule"[442] that eliminates the need for authentication for documents that are submitted with the petition for return.[443]

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440. Norinder v. Fuentes, 657 F.3d 526, 533 (7th Cir. 2011).

441. *Id.*

442. March v. Levine, 249 F.3d 462 (6th Cir. 2001). *See* 42 U.S.C. § 11605:

> With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

443. Brosselin v. Harless, 2011 WL 6130419 (W.D. Wash. 2011) (unreported disposition). *Brosselin* cites to *Danaipour v. McLarey* (*Danaipour II*), 386 F.3d 289, wherein the First Circuit noted that the district court held that Hague Convention cases do not require the application of the Federal Rules of Evidence regarding hearsay, as such cases are summary proceedings. *Danaipour II,* 386 F.3d at 296. *Cf.* Aven-

Section 11605 of ICARA has been held to authorize consideration of translated excerpts from foreign law,[444] foreign custody decisions,[445] translated documents from foreign courts,[446] and affidavits submitted by the parties.[447]

B. Parallel Jurisdiction Issues

The grant of concurrent original jurisdiction by ICARA has resulted in Convention litigation raising issues of abstention and, to a lesser extent, removal. When a state case is pending, an abstention argument may emerge. Federal courts must then examine whether the state case involved is actually adjudicating a claim under the Convention or is principally a custody dispute.

1. *Younger* Abstention

If federal adjudication would disrupt an ongoing state proceeding, the *Younger*[448] abstention doctrine may apply. Three elements must be present for abstention under *Younger* to apply: (1) the federal plaintiff is a party in an ongoing state judicial action and federal proceedings would interfere with that action; (2) the state court litigation implicates important state interests; and (3) the state proceedings afford the parties the opportunity to raise the claims they seek to present in fed-

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dano v. Smith, ___ F. Supp. 2d ___, 2011 WL 3503330 (D.N.M. 2011) ("This provision [11605] of the International Child Abduction Remedies statute, 42 U.S.C. §§ 11601 to 11611, which implements by congressional statute the Hague Convention, supports the Court's conclusion that the Federal Rules of Evidence apply to its consideration of the Petition, because, if the Federal Rules of Evidence did not apply, there would be no need for a statute eliminating the authentication requirement for certain documents.").

444. Seaman v. Peterson, 762 F. Supp. 2d 1363 (M.D. Ga. 2011); Norinder v. Fuentes, 2010 WL 4781149 (S.D. Ill. 2010) (unreported disposition).

445. Chechel v. Brignol, 2010 WL 2510391 (M.D. Fla. 2010) (unreported disposition); Doudle v. Gause, 282 F. Supp. 2d 922 (N.D. Ind. 2003).

446. Kufner v. Kufner, 480 F. Supp. 2d 491 (D.R.I. 2007).

447. *In re* Walsh, 31 F. Supp. 2d 200 (D. Mass. 1998), *reversed in part on other grounds*, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

448. Younger v. Harris, 401 U.S. 37 (1971).

eral court.[449] Courts have been reluctant to apply *Younger* abstention in the context of Hague Convention cases.[450]

Where state custody proceedings are ongoing, but Hague Convention claims have not been raised in state court, the first element of *Younger* is not satisfied.[451] Article 16 of the Convention requires that the merits of any custody dispute be stayed pending the outcome of the Hague application. If a federal court has been presented with a Hague application while a state custody action is proceeding, abstention should not apply.[452]

The second element under *Younger*—that state proceedings must implicate important state interests—has been interpreted not to apply to Hague cases.[453]

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449. *See* Yang v. Tsui, 416 F.3d 199, 202 (3d Cir. 2005) (citing FOCUS v. Allegheny Cnty. Ct. Com. Pl., 75 F.3d 834, 843 (3d Cir. 1996)). *Yang* adopts a broader interpretation of the *Younger* abstention doctrine than that of other circuits. *See Yang*, 416 F.3d at 202 n.1.

450. *See, e.g.*, Silverman v. Silverman (*Silverman I*), 267 F.3d 788, 792 (8th Cir. 2001) ("[A]bstention principles do not permit an outright dismissal of a Hague petition."); Silverman v. Silverman (*Silverman II*), 338 F.3d 886, 891 (8th Cir. 2003) ("abstention does not apply in Hague Convention cases"); Barzilay v. Barzilay (*Barzilay I*), 536 F.3d 844, 850, (8th Cir. 2008) ("The pendency of state custody proceedings therefore does not support *Younger* abstention in the Hague Convention context."); *but see* Witherspoon v. Orange Cnty. Dep't of Soc. Servs., 646 F. Supp. 2d 1176 (C.D. Cal. 2009) (holding *Younger* abstention applied and federal action dismissed where mother filed Hague return petition in state court, which was stayed by state appeals court pending determination of dependency petition, whereupon mother filed identical Hague return petition in federal court).

451. *See, e.g.*, *Barzilay I*, 536 F.3d at 850.

452. *See, e.g.*, *id.*; *Yang*, 416 F.3d at 203; Karpenko v. Leendertz, 619 F.3d 259, 262 (3d Cir. 2010).

453. *See, e.g.*, *Yang*, 416 F.3d at 204 (finding that adjudication of a Hague return case is a federal statutory matter, entirely distinct from a state custody case); Escaf v. Rodriguez, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. 2002) (finding second prong absent because the Hague Convention involves issues relating to the international movement of children, which is a federal, not a state, interest); Grieve v. Tamerin, 269 F.3d 149, 153 (2d Cir. 2001) (". . . Grieve's claim implicates a paramount federal interest in foreign relations and the enforcement of United States treaty obligations. Deference to a state court's interest in the outcome of a child custody dispute

2. *Colorado River*[454] Abstention

Federal courts may abstain if there are parallel proceedings in state and federal courts that involve the same parties and the same issues. The consideration of "wise judicial administration" may justify a decision by a court to stay federal proceedings in deference to the parallel state proceedings.[455] Abstention under the *Colorado River* doctrine allows for either a stay of proceedings in federal court or a dismissal of the action.[456]

As with *Younger* abstention, if Hague claims have not been raised in the state action, *Colorado River* abstention does not apply.[457] In *Holder v. Holder (Holder I)*,[458] the Ninth Circuit reversed the district court's abstention pursuant to *Colorado River*, where the district court stayed proceedings in favor of California custody proceedings. In *Holder I*, father was in the U.S. Air Force, stationed in Germany. Mother brought the parties' two children to the state of Washington. Father filed a divorce action in California, where the parties previously lived. Mother filed a divorce action in Washington, but later dropped that action, conceding that jurisdiction in California was appropriate. Temporary custody orders were entered in California, placing the children in the primary custody of mother in Washington. The California court did not consider any Hague issues, but recognized that those issues might be brought "on a separate track." Father thereafter filed his Hague petition in federal court in Washington where the children were located. The district court stayed proceedings on the grounds that father had initiated the custody proceedings in state

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would be particularly problematic in the context of a Hague Convention claim inasmuch as the Convention divests the state of jurisdiction over these custody issues until the merits of the Hague Convention claim have been resolved.").

454. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

455. Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 912 (9th Cir. 1993).

456. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

457. *Yang*, 416 F.3d at 204 n.5; *Escaf*, 52 Fed. Appx. 207, 2002 WL 31760202.

458. 305 F.3d 854 (9th Cir. 2002).

court in California, even though he did not pursue a Hague claim in that court. The district court reasoned that California's custody determination would likely result in the preclusion of father's Hague claims. The Ninth Circuit court reversed, noting that the finality of the California state custody case would not resolve the Hague Convention issues because the Hague issues were not raised in the California action.[459]

Colorado River abstention is often invoked when the parallel state proceeding includes a claim under the Hague Convention.[460] However, a federal court may choose not to abstain for other reasons. In *Lops v. Lops*,[461] the Eleventh Circuit affirmed the district court's refusal to abstain even though the petitioning mother initially filed a Hague Convention petition in state court and then filed an identical petition in federal court. The Eleventh Circuit noted that the state court could not hear the Hague proceeding for at least two months. The federal district court was prepared to, and did, hear the case on a more expedited basis. Noting that federal courts have the "virtually unflagging obligation . . . to exercise the jurisdiction given them,"[462] the court of appeals applied the factors governing whether to stay or dismiss a federal action and ultimately affirmed the district court's refusal to abstain.[463]

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459. *Id.* at 868.

460. *See, e.g.*, Copeland v. Copeland, 134 F.3d 362, 1998 WL 45445 (4th Cir. 1998) (unpublished table decision) (upholding abstention where state court denied mother's return petition); Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002) (arguing Hague issues to state court).

461. 140 F.3d 927 (11th Cir. 1998).

462. McClelland v. Carland, 217 U.S. 268, 282 (1910).

463. Factors include "(1) whether one of the courts has assumed jurisdiction over any property in issue; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the parties' rights." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15–16, 23–27 (1983); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

3. *Rooker-Feldman* Doctrine

The *Rooker-Feldman*[464] doctrine is a narrowly applied rule that bars a losing party in a state court action from invoking federal jurisdiction to review and set aside the state judgment resting on federal law. Such a tactic is tantamount to having the federal court act as a court of appeal to the state court judgment. Similarly, federal courts must abstain from relitigating issues that are "inextricably intertwined" with the state court decision.[465]

In the context of Hague Convention actions, *Rooker-Feldman* would apply if a party filed an application for return in federal court after a state court denied the Hague petition, alleging the state court decided the case erroneously.[466]

4. Removal

Removal has been mentioned in only a few Hague cases, none of which has analyzed the issue of whether the petitioner's selection of forum must be honored.[467] In *In re Mahmoud*,[468] mother filed a Hague petition in state court. On the first day of trial, father filed a notice of removal in both jurisdictions and advised the state court judge that the action had been removed to federal court. Mother opposed removal, arguing that she had the right to select a state court forum. The state

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464. Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Ct. of App. v. Feldman, 460 U.S. 462 (1983).

465. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282–86, 125 S. Ct. 1517, 1521–23 (2005).

466. *See* Holder v. Holder (*Holder I*), 305 F.3d 854 (9th Cir. 2002) (ruling district court should proceed with hearing of Hague case even though pending state court case would resolve issues of custody); *see also* Rigby v. Damant 486 F. Supp. 2d 222 (D. Mass. 2007) (finding district court could not enjoin state court from proceeding with custody determination during pendency of Hague case in the federal court—if the state court is required to stay its proceedings because of the pendency of the Hague petition in federal court, it must do so on its own).

467. *See* Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289 (1st Cir. 2004); Morrison v. Dietz, No. 07-1398, 2008 WL 4280030 (W.D. La. 2008) (unreported disposition).

468. No. CV 96 4165 (RJD), 1997 WL 43524 (E.D.N.Y. 1997) (unreported disposition).

court proceeded to hear the case and ordered the child returned to England with the mother. Father moved to vacate the state court order, principally to attack the award of attorney fees and costs. The district court found that once removal was effective, the entry of any order thereafter by a state court was void.[469]

C. Comity

In *Hilton v. Guyot*,[470] the Supreme Court held comity is neither a matter of absolute obligation nor of mere courtesy and good will. Rather, under the principles of international comity, the United States may recognize the judicial, executive, or legislative actions of another nation, as long as doing so is consistent with U.S. law.[471] If a court deems that according comity to a foreign judgment is appropriate, it should not readjudicate the foreign court proceeding unless there are specific and compelling reasons to do so.[472] For a discussion of comity as it pertains to the issue of undertakings, see *supra* page 99, note 380.

1. Hague Convention Orders of Other Nations

Notwithstanding the language of *Hilton*, U.S. courts sometimes have scrutinized the substance of foreign rulings on Hague petitions when determining whether to grant comity. In *Asvesta v. Petroutsas*,[473] mother abducted the child to Greece. Father's petition for return under the Hague Convention was denied by the Greek court on the basis that father consented to the child's removal, mother had not wrongfully retained the child, and the child would suffer grave harm if returned to the United States. Father thereafter re-abducted the child back to the United States, and mother filed a petition for return. The district court granted mother's petition, according comity to the previous Greek order. The Ninth Circuit reversed, distinguishing the broad

469. *Id.* at 2 (citing Tarbell v. Jacobs, 856 F. Supp. 101, 104 (N.D.N.Y. 1994)).
470. 159 U.S. 113, 16 S. Ct. 139 (1895).
471. *Id.* at 113, 16 S. Ct. at 163–64.
472. *Id.* at 113, 16 S. Ct. at 202–03.
473. 580 F.3d 1000 (9th Cir. 2009).

language of *Hilton* and pointing out that in the context of Hague litigation, an international legal framework has been agreed upon by all contracting nations. After a review of the decisions of other circuits,[474] the court reasoned:

> In this context, we are in a better position to examine the merits of a foreign court's Hague decision in deciding whether that decision warrants deference. Although we recognize that our careful examination of the merits of another contracting nation's Hague adjudication could, in some circumstances, undermine the mutual trust necessary for the Convention's continued success, we also recognize that its success relies upon the faithful application of its provisions by American courts and the courts of other contracting nations. For this reason, we follow the path charted by *Diorinou*, *Carrascosa*, and *Pitts* and conclude that we may properly decline to extend comity to the Greek court's determination if it clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.[475]

474. Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001) (extending comity to Greek order denying father's petition for return, while still critical of some of the conclusions reached by the Greek court); Carrascosa v. McGuire, 520 F.3d 249 (3d Cir. 2008) (denying comity to Spanish denial of Hague Convention petition where Spanish court ignored New Jersey law in determining whether father had custody rights, and impermissibly considered the merits of the custody case in deciding the Hague Convention case); Pitts v. de Silva, 2008 ONCA 9, [2008] 289 D.L.R. 4th 540 (Can. Ont.). In *Pitts*, appellate court in Ontario examined whether the Tenth Circuit properly handled an Article 13(b) analysis in *de Silva v. Pitts*, 481 F.3d 1279 (10th Cir. 2007). Upon determining that the circuit court did, the Ontario appellate court granted comity.

475. *Asvesta*, 580 F.3d at 1013–14. *See also Carrascosa*, 520 F.3d at 259, 263–64 (denying comity based upon the finding that Spanish courts "departed from the fundamental premise of the Hague Convention and violated principles of international comity by not applying New Jersey law").

2. Enforcement of Foreign Custody Decisions

Comity has been extended to the custody orders of other nations. In *Navani v. Shahani*,[476] the Tenth Circuit found that comity should be given to a family court order of England, based upon the English court's interpretation of English law.[477]

Comity, however, may not be used to confer jurisdiction in a federal court that does not have subject-matter jurisdiction under any other theory. In *Taveras v. Taveras*,[478] father filed an action for return of the children to the Dominican Republic. However, the Convention had not yet entered into force between the Dominican Republic and the United States. Father argued that comity should be given to an order of the Dominican courts granting him temporary custody of the children. The district court denied father's requested relief. The decision was affirmed by the Sixth Circuit, which noted that "no court has held or suggested that the mere existence of a foreign judgment, much less an order, supplies a federal court with subject matter jurisdiction."[479]

D. Petitions for Access Only

Federal courts do not have jurisdiction to order access to a child. In *Cantor v. Cohen*,[480] mother petitioned for return and access (visitation) with two children. The district court dismissed the access claim and mother appealed. The Fourth Circuit affirmed the dismissal of the action, finding that Article 21 of the Convention did not create an

476. 496 F.3d 1121 (10th Cir. 2007).

477. *Navani*, 496 F.3d at 1128. *See also* Miller v. Miller, 240 F.3d 392 (4th Cir. 2001) (extending comity to a Canadian custody order that conflicted with a state court order); *but see* Van Driessche v. Ohio-Esezeoboh, 466 F. Supp. 2d 828 (S.D. Tex. 2006) (refusing comity to Belgian custody orders).

478. 477 F.3d 767, 783–84 (6th Cir. 2007).

479. *Id.* at 783 n.12.

480. 442 F.3d 196 (4th Cir. 2006). *See also* Wiezel v. Wiezel-Tyrnauer, 388 F. Supp. 2d 206 (S.D.N.Y. 2005); Ly v. Heu, 296 F. Supp. 2d 1009 (D. Minn. 2003); Wiggill v. Janicki, 262 F. Supp. 2d 687 (S.D. W. Va. 2003); Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998).

obligation upon courts to enforce access rights. No federal case that has considered this issue has ruled to the contrary.[481]

E. Contacting Judges in Foreign Jurisdictions

Although there are few reported examples of U.S. courts communicating directly with courts in other countries,[482] it is well known that these communications take place. Direct communication with a judge in another country may be helpful in resolving issues surrounding the logistics of the return of a child or to answer questions relating to foreign law.

The Convention has enjoyed unparalleled acceptance within the international community—eighty-seven countries are now signatories. Broad acceptance of the Convention brings with it a corresponding diversity of legal systems. Notions of judicial independence may vary widely among countries. In the United States, discussions among state judges dealing with the same parties in a custody case are usually mandatory.[483] In some countries, however, any contact with any other person, even a judicial colleague in the same country, is considered both an infringement upon judicial independence and a violation of judicial ethics; in essence, an ex parte communication. This may be

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481. *See Cantor*'s discussion and rejection of contrary interpretations of *Katona v. Kovacs*, No. 04-2040, 148 Fed. Appx. 158, 2005 WL 2105600 (4th Cir. 2005) (unreported disposition), and *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000); *Cantor*, 442 F.3d at 202–06.

482. *See, e.g.*, Innes v. Carrascosa, 918 A.2d 686, 391 N.J. Super. 453 (Super. Ct. App. Div. 2007) (attempting contact with judge in Spain by phone and fax unsuccessfully); Grammes v. Grammes, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. 2003) (unreported disposition) (discussing details of mirror-image order between U.S. judge and Canadian judges).

483. Both the UCCJEA and its predecessor, the UCCJA, made communication with other courts a requirement where it appeared that two courts were attempting to exercise jurisdiction in a child custody matter simultaneously. The principal difference between the UCCJEA and its predecessor is that under the UCCJEA a record must be made of the communications with the other court. The language of the UCCJEA requiring communication with other states is expansive enough to include communication with courts of foreign countries.

true even though there is no discussion concerning the facts or merits of the case.

Communications with judges in other countries should avoid any reference to the merits of the underlying case. The most accepted form of interjudicial communication involves obtaining information regarding: (1) an understanding of foreign law and procedure;[484] (2) how to better expedite proceedings; and (3) jurisdictional matters.[485]

An emerging guidance and statement of general principles for direct judicial communications has been prepared by the Hague Permanent Bureau as a result of the general endorsement of the Special Commission, held June 2011, on the 1980 Child Abduction Convention and the 1996 Hague Child Protection Convention. This document embodies many of the same principles set forth in the Uniform Child Custody Jurisdiction and Enforcement Act relating to judicial communications between state court judges on matters relating to the exercise of child custody jurisdiction.[486] The principles recommended by the Permanent Bureau's Report on Judicial Communications are:

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484. Article 15 of the Convention provides:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

It may be more expedient than using the procedures under Article 15 to engage in judicial communication regarding the existence of the type of order envisioned by Article 15.

485. In some countries, cases are not assigned to an individual judge until there is actually a matter pending. Many countries refer to this as being "seized" with the case. If there is no case pending at all in a foreign court, one may be hard pressed to be able to effectively communicate with any judge on anything but rudimentary legal principles.

486. Hague Conference on Private International Law, Special Commission to Review the Operation of the 1980 Hague Convention, Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, Including Commonly Accepted Safeguards for

- Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.
- When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.
- In Contracting States in which direct judicial communication are practiced, the following are commonly accepted procedural safeguards:
  - except in special circumstances, parties are to be notified of the nature of the proposed communication;
  - a record is to be kept of communications, and that record is to be made available to the parties;
  - conclusions reached should be in writing;
  - parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

In order to facilitate communication between judges in different countries, the Hague Permanent Bureau has created a network of judges who will assist and advise judges regarding communication with foreign counterparts. The Permanent Bureau is working on establishing a protocol to facilitate interjudicial communication. Currently this network includes more than 65 judges from 45 different nations,[487] including four U.S. network judges designated by the U.S. State Department.[488] These judges are available to facilitate contacts with foreign judges and to provide logistical information and assistance to judges handling Hague cases.

Direct Judicial Communications in Specific Cases, in the Context of the International Hague Network of Judges.

487. Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, June 2011, p. 8.

488. The list of judges may be found on the Hague website at http://www.hcch.net/upload/haguenetwork.pdf.

F. Attorney Fees and Costs

1. Authority for Awards

Article 26 of the Convention provides for an award of attorney fees and incidental costs to the person who successfully obtains the return of a child. It states:

> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.[489]

ICARA implements the attorney fee and costs provision by providing that:

> Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.[490]

Note that ICARA's provisions relating to fees and costs differ from the language contained in Article 26 of the Convention. The Convention makes an award of fees and costs discretionary, but ICARA states that the court "shall" make the award. ICARA further allocates to the abducting parent the burden of proving that the order is clearly inappropriate. The purpose of encouraging courts to make this award is twofold: first, to place the parties in the same condition they were in prior to the wrongful removal or retention of the child; and second, to deter

489. Convention, *supra* note 10, Article 26.
490. 42 U.S.C. § 11607(b)(3) (1988).

future similar conduct.[491] The provision for reimbursement of fees and costs is not reciprocal—a party that successfully defends against an application for return of a child is not entitled to an award of attorney fees or other listed costs.[492]

2. Amount of Awards

Federal courts typically apply the lodestar method of determining the amount of attorney fees to be awarded. Under this method, the court determines a reasonable hourly rate and multiplies this rate by the number of hours reasonably expended.[493] After making a lodestar determination, courts may examine whether it is necessary to adjust the lodestar figure based on other factors. Those other factors typically[494] include the following:

1. the time and labor required
2. the novelty and difficulty of the questions involved
3. the skill requisite to perform the legal service properly
4. the preclusion of other employment by the attorney owing to acceptance of the case
5. the customary fee
6. whether the fee is fixed or contingent
7. time limitations imposed by the client or the circumstances
8. the amount involved and the results obtained

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491. *See Text & Legal Analysis*, *supra* note 65, at 10,511 (Mar. 26, 1986); Roszkowski v. Roszkowska, 644 A.2d 1150, 1160, 274 N.J. Super. 620, 639 (Super. Ct. Ch. Div. 1993), *abrogated on other grounds*, Ivaldi v. Ivaldi, 685 A.2d 1319, 147 N.J. 190 (1996) (referring to provisions of ICARA relating to fees as a "sanction").

492. *Cf.* Slagenweit v. Slagenweit, 64 F.3d 719 (8th Cir. 1995) (costs of depositions and translations awarded to prevailing party defending against return).

493. Neves v. Neves, 637 F. Supp. 2d 322, 339 (W.D.N.C. 2009); Distler v. Distler, 26 F. Supp. 2d 723 (D.N.J. 1998).

494. Norinder v. Fuentes, 657 F.3d 526, 536 (7th Cir. 2011); *Neves*, 637 F. Supp. 2d 322; Ballen v. City of Redmond, 466 F.3d 736, 746 (9th Cir. 2006); Trudrung v. Trudrung, 2010 WL 2867593 (M.D.N.C. 2010). The twelve factors listed above are referred to as the "Johnson" factors. *See* Johnson v. Georgia Highway Exp. Inc., 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds*, Blanchard v. Bergeron, 489 U.S. 87 (1989); Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999).

9. the experience, reputation, and ability of the attorneys
10. the "undesirability" of the case
11. the nature and length of the professional relationship with the client
12. awards in similar cases

Legal services provided to parents seeking the return of their children are frequently provided on a pro bono or reduced-fee basis. Courts may still award fees to the petitioning parent in such cases.[495]

ICARA gives courts discretion to reduce or to eliminate attorney fees and cost awards where such awards would be "clearly inappropriate."[496] In determining what factors may influence the question whether an award is "clearly inappropriate," courts have looked to some of the following factors: the impact on the abducting parent's ability to care for the child,[497] a party's lack of financial resources,[498] disparity between parties' financial resources,[499] representation by multiple law firms,[500] unclean hands, and failure to provide adequate financial support for the subject child.[501]

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495. Cuellar v. Joyce, 603 F.3d 1142, 1143 (9th Cir. 2010); Haimdas v. Haimdas, 720 F. Supp. 2d 183, 209 (E.D.N.Y. 2010).

496. Distler v. Distler, 26 F. Supp. 2d 723, 729 (D.N.J. 1998).

497. Whallon v. Lynn, 356 F.3d 138, 140 (1st Cir. 2004); Berendsen v. Nichols, 938 F. Supp. 737 (D. Kan. 1996).

498. Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995).

499. *In re* Polson, 578 F. Supp. 2d 1064 (S.D. Ill. 2008).

500. Aldinger v. Segler, 338 F. Supp. 2d 296 (D.P.R. 2004).

501. Silverman v. Silverman, 2004 WL 2066778 (D. Minn. 2004) (unreported disposition).

VI. Case Management

Effective case management of Hague Convention cases can significantly facilitate the adjudication of these time-sensitive matters.[502] As soon as a court determines that a Hague Convention return case has been filed or assigned, it should consider pretrial conferences and scheduling issues,[503] including setting a timetable for discovery and motions, trial on an expedited basis, and other pretrial considerations.[504]

A. Securing the Child's Safety from Further Removal or Concealment

As soon as possible, the court must address the issue of ensuring that the child is safe and not in danger of being re-abducted. ICARA vests courts with the power to use provisional remedies available under state or federal law to secure the child.[505] These potential remedies are discussed below. The circumstances of the abduction should be considered as well as any history of threats of concealment or abduction.

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502. *See, e.g.*, Glagola v. Glagola, No. 03-10106-BC, 2003 WL 22992591 (E.D. Mich. 2003) (unreported disposition); Pesin v. Rodriguez, 244 F.3d 1250 (11th Cir. 2001).

503. *See* Fed. R. Civ. P. 16. Different courts and jurisdictions use different labels for these conferences, such as pretrial conferences, status conferences, or case-management conferences.

504. *See* Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. 2010) (unreported disposition) (covering numerous issues by conference and scheduling order).

505. 42 U.S.C. § 11604(a) (1988) provides: "In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition."

1. State Laws Regarding Removal of Child from Home Without Notice

ICARA also provides that a child may not be provisionally removed from a person having physical control of the child "unless the applicable requirements of State law are satisfied."[506] This is the only situation in a Hague Convention case where state law governs procedures used in federal courts. Where a court is asked to issue an order removing a child from a parent who has physical custody of the child pending a hearing on the Hague application, the court must abide by the relevant state laws that would govern removal of the child in a state action.

In *Application of McCullough on Behalf of McCullough*,[507] mother abducted children from Canada and took them to Pennsylvania. This abduction was in furtherance of mother's plan to bring the children to Petra, Jordan in anticipation of the Apocalypse. Mother explained, citing her religious beliefs, that she and the children would be safe there. The court granted father's ex parte application for a warrant of arrest of the children and an order to transfer the children to father's custody. The court had jurisdiction under Pennsylvania law to enter the orders and noted its authority to issue a temporary restraining order under the provisions of Federal Rule of Civil Procedure 65. The court held that the requirements for issuing a temporary restraining order had been met:

- a reasonable probability of eventual success in the litigation;
- evidence of irreparable injury;

506. 42 U.S.C. § 11604(b) (1988); *see also* Klam v. Klam, 797 F. Supp. 202 (E.D.N.Y. 1992) (denying issuance of a warrant of arrest for the children based upon insufficiency of evidence that the children were in danger of removal); Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685 (E.D. Va. 2002); Casulli v. Falcone, No. Civ. 02-123-M, 2002 WL 479855 (D.N.H. 2002) (unreported disposition).

507. 4 F. Supp. 2d 411 (W.D. Pa. 1998).

and when relevant,

- the possibility of harm to other disinterested persons; and
- consideration of the public interest.[508]

2. Foster Care

In cases where there is a showing that the child is in danger of being concealed or re-abducted and no other suitable arrangements can be made, it may be necessary to place the child temporarily in foster care or the care of a third party.[509] In *Velez v. Mitsak*,[510] each parent alleged that the other constituted a flight risk should the child be placed with the other parent during the pendency of the Hague petition. As a result, the child was placed in temporary foster care by the court pending a hearing on the merits of the case.

3. Bonds

Some courts have required, or considered, the posting of bonds to ensure that children are not spirited away from the jurisdiction of the court.[511] The purpose of the bonds is to provide some measure of insurance to a left-behind parent that if the child is re-abducted pending the proceedings, sufficient resources will be available to fund efforts to

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508. *Id.* at 415 (citing Acierno v. New Castle Cnty., 40 F.3d 645, 653 (3d Cir. 1994) (citations omitted)).

509. *See, e.g.*, Lops v. Lops, 140 F.3d 927 (11th Cir. 1998); David S. v. Zamira S., 574 N.Y.S.2d 429, 151 Misc. 2d 630 (Fam. Ct. 1991); Velez v. Mitsak, 89 S.W.3d 73 (Tex. App. 2002).

510. *Velez*, 89 S.W.3d 73.

511. *See* Greene v. Greene, C.A. 89-392-II, 1990 WL 56197 (Tenn. Ct. App. 1990); David S. v. Zamira S. 151 Misc. 2d 630, 574 N.Y.S.2d 429 (1991). Most cases that discuss the posting of bonds relate to custody matters where it is envisioned that there is either a risk of abduction or that once a child has lawfully been taken to another country for visitation, that the child will not be returned. Bonds are required in these cases as a measure to provide the left-behind parent with the ability to fund the expenses necessary to reacquire the child. *See, e.g.*, *In re* Marriage of Saheb and Khazal, 880 N.E.2d 537, 546–49, 377 Ill. App. 3d 615, 627–29 (App. Ct. 2007); Samman v. Steber, No. 1577-04-4, 2005 WL 588313 (Va. Ct. App. 2005).

locate and file new litigation. For example, in *Lops v. Lops*,[512] the South Carolina state court allowed the abducted children to be placed in the custody of the paternal grandmother subject to an "adequate security bond."[513]

4. Deposit Passports

In order to deter any threat of re-abduction to another country, many courts have required that the parties deposit their passports and the passports of the children with the court or other agency.[514] This measure is one of the least invasive available and provides an effective method of securing the child in most cases. Requiring the deposit of passports is an effective deterrent against the re-abduction of children who are U.S. citizens.[515] However, it is less effective for those who hold passports from other nations because of the ability of a foreign national to request the reissuance of a passport from local embassies or consulates.

B. Establishing Timelines

Given that there is an expectation that a case for return will be dealt with in a six-week period, the court has the obligation to manage the case consistent with that timeline. Many cases, if not most, are susceptible of disposition within this time frame. There will be, however, cases where complex issues of law or fact arise that require additional time to resolve. Even if complex issues arise, the case nevertheless

512. 140 F.3d 927 (11th Cir. 1998).

513. *Id.* at 948.

514. *See, e.g.*, Neves v. Neves, 637 F. Supp. 2d 322 (W.D.N.C. 2009); Kufner v. Kufner, 480 F. Supp. 2d 491 (D.R.I. 2007); Axford v. Axford, No. 09-2914, 2009 WL 2030755 (E.D. Pa. 2009) (unreported disposition).

515. The U.S. State Department operates the Children's Passport Issuance Alert Program, which allows parents to register the names of their children who are U.S. citizens, so that they can be informed if an application for a passport for that child has been made. As a practical matter, this is a stopgap measure only in situations where a court is holding the child's passport, and a parent or other person makes application for issuance of another passport for the child.

must be expedited. Time frames for discovery, the submission of briefs, and other processes should be shortened, enabling efficient and expedited preparation for trial.

C. Legal Representation

When ratifying the Convention, the United States made a reservation concerning the provisions in Article 26, relating to funding legal representation for the applicant or petitioner.[516] ICARA makes no provisions for funding court-appointed counsel. The parties are responsible for their own legal representation. The court should inquire, if it is not apparent, whether the parties intend to seek representation and, if so, how much time will be needed to secure counsel.

As Central Authority for the United States, the U.S. State Department assists applicants seeking the return of their children with identifying experienced counsel. Counsel may be available on a pro bono, reduced-fee, or full-fee basis.[517] The U.S. State Department utilizes federal poverty guidelines in assessing whether a person qualifies for pro bono or reduced-fee representation.[518] Once a person qualifies, the U.S. State Department will attempt to find attorneys from the geographic area involved. The names of counsel willing to take the case will be sent to the prospective client. This service is available only to those seeking the return of their children. It is not available to those resisting return cases.

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516. The second paragraph of Article 26 provides that "[A] Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice."

517. As a result of taking the reservation described in note 516 above, the U.S. government does not provide any funds for the payment or reimbursement of legal costs incurred by the parties.

518. The 2009 Federal Poverty Guidelines for a family of four persons is $27,563. This guideline is published by the Legal Services Corporation, 45 C.F.R. § 1611. Qualification for reduced-fee representation is $44,100 for a family of four.

Under some circumstances, courts will appoint an attorney pro bono to represent the parent who allegedly abducted the children.[519] Courts have also appointed counsel for children who are the subject of the action.[520]

D. Narrowing the Issues for Trial

As with any litigation, one of the benefits of conducting a pretrial case-management conference is the opportunity to narrow the issues for trial. In many cases, the standard form submitted to the Central Authorities to begin a case will accompany the petitioner's moving papers for return of the child. This form sets forth the facts surrounding the alleged abduction, providing the court with notice of the issues likely to be raised.[521] If an agreement among the parties can be reached concerning the facts of the case or issues deemed established, a more streamlined trial plan can be developed,[522] saving time by focusing on the issues in contention.

At the case-management conference, the court can inquire as to how the parties intend to present their evidence.[523] Some cases can be

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519. *See, e.g.*, Krefter v. Wills, 623 F. Supp. 2d 125, 127 n.1 (D. Mass. 2009); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008); Laguna v. Avila, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. 2008) (unreported disposition).

520. *See, e.g.*, Wasniewski v. Grzelak-Johannsen, 549 F. Supp. 2d 965 (N.D. Ohio 2008); Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (appointing counsel as guardian ad litem and attorney for the children under the authority of Federal Rule of Civil Procedure 17(c)).

521. These forms are not required when a petitioner files a case directly with the court. When the petitioner has started the proceedings by contacting the Central Authority in the habitual residence or in the requested state, this form will be used.

522. *See, e.g.*, Baran v. Beaty, 526 F.3d 1340, 1342 (11th Cir. 2008) (finding mother conceded that the child was wrongfully removed from his habitual residence); Walsh v. Walsh, 221 F.3d 204, 216 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001) (finding mother conceded Ireland was the child's habitual residence); Currier v. Currier, 845 F. Supp. 916 (D.N.H. 1994) (abducting parent conceding that Germany is the child's habitual residence).

523. In discussing the issue of delay in handling Hague return cases, the *Report of the Second Special Commission Meeting* noted the following: "Delay in legal proceedings is

tried by submitting the matter on the parties' declarations or affidavits.[524] Other cases require live testimony or a combination of declarations and testimony. In some cases, the petitioning parent or material witnesses may not have the ability to physically attend the trial because of the distance and expense of coming to the United States from the foreign country. The respondent, the alleged abducting parent, will almost always be available to appear and testify at the trial, as that parent will likely be within the court's geographic jurisdiction. For this reason, some latitude should be considered in the manner by which the petitioning parent is allowed to contradict the oral testimony of the parent who is actually before the court.[525]

E. Mediation

It is possible for the parties to participate in mediation after a petition for return has been filed.[526] A court may properly inquire at a pretrial

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a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody." The American Society of International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 I.L.M. 225, 229–30, 1994 WL 327559 (1994).

524. *See, e.g.*, Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289, 294 (1st Cir. 2004) (allowing direct testimony provided by affidavit with cross examination); Hanley v. Roy, 485 F.3d 641, 644 (11th Cir. 2007) (district court declined to take testimony and case was submitted on the pleadings, affidavits, and oral argument); Wipranik v. Superior Court, 63 Cal. App. 4th 315 (Ct. App. 1998) (hearing and determining case on the parties' declarations in addition to testimony); *Lieberman*, 625 F. Supp. 2d at 1114.

525. *See* Scheduling Order in Charalambous v. Charalambous, No. 2:10-cv-375, 2010 WL 3613747 (D. Me. 2010) (unreported disposition); Escobar v. Flores, 107 Cal. Rptr. 3d 596, 183 Cal. App. 4th 737 (Ct. App. 2010) (having petitioner participate in pretrial hearing by telephone).

526. Gatica v. Martinez, 2011 WL 2110291 (S.D. Fla. 2011) (unreported disposition) (court referred parties to mediation); Krefter v. Wills, 623 F. Supp. 2d 125 (D.

or case-management conference whether the parties had considered mediation and whether they would be amenable to mediation. Mediation in the context of a pending Hague case can be challenging, owing to the high levels of anxiety of the parties, the necessity of dealing with differing legal systems, and the potential impact of different languages and cultural values. Some cases will be inappropriate for mediation because of the existence of domestic violence or because of an imbalance of power in the relationship between the parties. As an initial step, courts considering mediation might refer the parties to an experienced mediator for the purpose of determining whether mediation is appropriate.

It is essential that a court not permit a significant delay to occur because of attempts to mediate. Any delay in the litigation process inures to the benefit of the taking parent, as the passage of time increases the difficulty of restoring the relationship between the child and the left-behind parent.[527] In addition, a party resisting the return of a child may allow the taking parent to manipulate the other party by feigning good faith in the mediation process, only to resist an eventual agreement, or to fail to comply with the agreement.[528]

In the event a mediated agreement is reached, it is recommended that the agreement be structured in such a manner as to be enforceable in both U.S. courts and the courts of the other country.

Mass. 2009) (mediation held before a magistrate judge); Philippopoulos v. Philippopoulou, 461 F. Supp. 2d 1321 (N.D. Ga. 2006) (mediation conducted pending the filing of a petition for return of the child); Blondin v. Dubois, 78 F. Supp. 2d 283 (S.D.N.Y. 2000) (court appointed a mediator to assist parties in working out their custody dispute).

527. Hague Conference on Private International Law, *Preliminary Document, Draft Guide to Good Practice, Part V—Mediation, May 2011.*

528. *See, e.g.*, Van de Sande v. Van de Sande, 2008 WL 239150 (N.D. Ill. 2008) (unreported disposition) (father engaged in protracted mediation negotiations, and eventually breached an interim mediated agreement to return the children to the United States).

Appendix A: Text of the 1980 Convention

28. Convention on the Civil Aspects of International Child Abduction

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their

powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to betaken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual

residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V – GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child. However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

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

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted. Any State may at any time withdraw a reservation it has

made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
2) the accessions referred to in Article 38;
3) the date on which the Convention enters into force in accordance with Article 43;
4) the extensions referred to in Article 39;
5) the declarations referred to in Articles 38 and 40;
6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Appendix B: International Child Abduction Remedies Act

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes -

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

§ 11602. Definitions

For the purposes of this chapter -

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 11606(a) of this title.

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence -

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing -

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter -

(1) the term "authorities," as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained," as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings," as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

§ 11604. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

§ 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

§ 11606. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act (42 U.S.C. § 301 et seq.), obtain information from the Parent Locator Service.

§ 11607. Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

§ 11608. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority -

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which -

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

§ 11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The

agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

§ 11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

Appendix C: Checklist for Hague Convention Cases

Procedural Issues

Expedited Proceedings

- ☐ Goal is to complete case in six weeks

Case-Management Conference

- ☐ Safety of the child
  - o Obtain parties and children's passports
- ☐ Set timelines—determine how much time to allocate to trial
- ☐ Should a discovery plan be adopted?
- ☐ Narrow the issues to be tried
- ☐ Determine use of declarations or affidavits
- ☐ Do the parties wish to engage in mediation?
  - o Is the case appropriate for mediation?
  - o If so, can mediation take place without resulting in a significant delay of the trial?
- ☐ Legal representation
  - o Is the petitioning parent represented by counsel? If not, consider referring that parent to the State Dept. Office of Children's Issues to see if the parent can secure counsel

Parallel Jurisdiction Issues

- ☐ Are there any state custody cases pending?
- ☐ If so, has the custody proceeding been stayed?
- ☐ Has the Hague Convention issue been litigated in state court or is it scheduled to be litigated there?

Case for Return—Burden of Proof—Preponderance of the Evidence

- ☐ Is the child under age 16?
- ☐ What country is alleged to be the child's habitual residence?
  - o Has the treaty "entered into force" between the U.S. and the other country as of the date of the wrongful removal or retention?
- ☐ On what date did the wrongful removal or retention occur?
- ☐ Was the child removed or retained in violation of the custody rights of the left-behind parent?

- Does the left-behind parent have rights of custody?
  - By operation of law
  - By court or administrative decision
  - By legally binding agreement
- Was the child removed from the habitual residence when a *ne exeat* clause or restraining order prohibited removal?

☐ Was the left-behind parent exercising his or her custody rights before the child was removed from the habitual residence?

Defenses—Burden of Proof—Preponderance of the Evidence

☐ Was the request for return filed within one year of the wrongful removal or retention?

☐ If it was not filed within one year, has the child become settled in his or her new environment?

- Did the abducting parent conceal the child from the left-behind parent (equitable tolling of one-year period)?

☐ Did the left-behind parent consent or acquiesce in the removal or retention of the child?

☐ Does the child object to return?

- If so, is the child old enough and sufficiently mature for the court to take account of the child's objection?

Defenses—Burden of Proof—Clear and Convincing Evidence

☐ Would a return expose the child to a grave risk of physical or psychological harm or place the child in an intolerable situation?

☐ Would a return violate fundamental principles relating to the protection of human rights and fundamental freedoms?

Order Return Even Though Defense Established

☐ Should the court order the child's return even if a defense has been established?

- If so, consider undertakings, or mirror-image orders, or other measures to ensure the child's safe return

Making Return Orders

☐ Is the order for return specific as to time, manner, and date of return?

☐ Who is responsible for arranging the logistics of the child's return?

Attorney Fees and Costs

☐ Order only if petitioner prevails

Appendix D: Countries Where Convention Is In Force with United States

(current to May 2012)

Country	Date of EIF
Argentina	06/01/91
Australia	07/01/88
Austria	10/01/88
Bahamas, The	01/01/94
Belgium	05/01/99
Belize	11/01/89
Bosnia/Herzegovina	12/01/91
Brazil	12/01/03
Bulgaria	01/01/05
Burkina Faso	11/01/92
Canada	07/01/88
Chile	07/01/94
China (Hong Kong and Macau only)	
Hong Kong	09/01/97
Macau	03/01/99
Colombia	06/01/96
Costa Rica	01/01/08
Croatia	12/01/91
Cyprus	03/01/95
Czech Republic	03/01/98
Denmark	07/01/91
Dominican Republic	06/01/07
Ecuador	04/01/92
El Salvador	06/01/07
Estonia	05/01/07
Finland	08/01/94
France	07/01/88
Germany	12/01/90
Greece	06/01/93
Guatemala	01/01/08
Honduras	06/01/94
Hungary	07/01/88
Iceland	12/01/96
Ireland	10/01/91
Israel	12/01/91
Italy	05/01/95
Latvia	05/01/07
Lithuania	05/01/07
Luxembourg	07/01/88
Macedonia, Rep. of	12/01/91
Malta	02/01/03
Mauritius	10/01/93
Mexico	10/01/91
Monaco	06/01/93
Montenegro	12/01/91
Netherlands	09/01/90
New Zealand	10/01/91
Norway	04/01/89
Panama	06/01/94
Paraguay	01/01/08
Peru	06/01/07
Poland	11/01/92
Portugal	07/01/98
Romania	06/01/93
Saint Kitts & Nevis	06/01/95
San Marino	01/01/08
Serbia	12/01/91
Slovakia	02/01/01
Slovenia	04/01/95
South Africa	11/01/97
Spain	07/01/88
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The Federal Judicial Center

Board

The Chief Justice of the United States, *Chair*
Judge Catherine C. Blake, U.S. District Court for the District of Maryland
Magistrate Judge John M. Facciola, U.S. District Court for the District of Columbia
Judge James B. Haines, Jr., U.S. Bankruptcy Court for the District of Maine
Judge James F. Holderman, Jr., U.S. District Court for the Northern District of Illinois
Judge Michael M. Melloy, U.S. Court of Appeals for the Eight Circuit
Judge Edward C. Prado, U.S. Court of Appeals for the Fifth Circuit
Judge Kathryn H. Vratil, U.S. District Court for the District of Kansas
Judge Thomas F. Hogan, Director of the Administrative Office of the U.S. Courts

Director
Judge Jeremy D. Fogel

Deputy Director
John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Information Technology Office and the Communications Policy & Design Office—in using print, broadcast, and online media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.