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Where to Decide the "Best Interests" of Elian Gonzalez: The Law of Abduction and International Custody Disputes

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COMMENT

WHERE TO DECIDE THE "BEST INTERESTS" OF ELIAN GONZALEZ: THE LAW OF ABDUCTION AND INTERNATIONAL CUSTODY DISPUTES

I. INTRODUCTION

Increased divorce rates and ready access to international travel have contributed to the growing problem of national and international child abduction.[1] The prime abductors are parents who hope to gain full-time custody of their child by moving from state to state to avoid detection or by moving to a new state and establishing a "habitual" residence.[2] State or federal law must resolve the resultant jurisdictional dilemma. If a parent takes a child out of the United States, issues of international law complicate the problem of jurisdiction.

"The touchstone concept of the Hague Convention is that it was enacted to determine a choice between competing forums, not a choice between competing parents."[3] The goal of this law is to return children to the factual setting that existed before their wrongful removal or retention in another state or country.[4] Once a child is returned to his or her "habitual residence," the courts of that state will determine the parental rights based on the laws of the "home state" and hopefully in the "best interests of the child."

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1. *See* Brenda J. Shirman, *International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L.J. 188 (1991).

2. After one year, the courts of the newly acquired "home state" are hesitant to disrupt the child's life with another change in custody, thereby giving an advantage to the abducting parent.

3. The Honorable James D. Garbolino, Superior Court of the State of California, Placer County, Cal., *The Cause of Action for Return Under the Hague Convention When a Child is Abducted to the United States: A View from the Bench* 9 (unpublished manuscript, on file with the *University of Miami Inter-American Law Review*).

4. *See id.*

What is in the best interests of the child, however, is often compromised in the attempt to address the jurisdictional question. In most instances, the child has been removed from his habitual residence without warning.[5] Unless the child is an infant or very young, this is a traumatic occurrence.[6] The child needs a streamlined mechanism for quick return to his habitual residence.

Recent events provide a prime example of how the best interests of an abducted child often take a back seat to jurisdictional issues. On Thanksgiving Day, 1999, a six-year old Cuban child named Elian Gonzalez arrived in U.S. waters clinging to an inner tube off of the beach in Fort Lauderdale, Florida.[7] The child had left Cuba with his mother on a small boat that had capsized in rough waters, killing his mother.[8] According to Elian's father, Juan Miguel Gonzalez, the mother had taken Elian on the voyage to America without his consent and now the father wants Elian returned to Cuba.[9] As of the writing of this comment, Elian is being held in Virginia, the subject of a political tug-of-war extending from Cuba, through Miami, and up to Washington D.C.

This comment will discuss the plight of Elian Gonzalez and other children by exploring three statutes that address the procedures for returning abducted children to their "home state." The Uniform Child Custody Jurisdiction Act of 1968 (UCCJA),[10]

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5. *See* Robin Jo Frank, Note, *American and International Responses to Child Abductions*, 16 N.Y.U J. OF INT'L L. & POL. 415, 416 n.3 (1984).

6. *See* Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?* 2 IND. J. OF GLOBAL LEGAL STUD., 565 (1995). Loss of the primary custodial parent causes disruption, even if the abducting parent played an important role in the child's life to this point. Supportive extended family members and friends are lost in an instant. If the abducting parent decides to hide the child and remain on the run, new identities are created. The child loses even the association with his own name and address and is forced to lie about who he is. Even when the child remains at a new address and the left-behind parent learns the child's location, unraveling the legal issues may be a slow process. Meanwhile, the child has to adjust to new schools, new friends and an unfamiliar daily routine. *See id.*

7. *See* Complaint for Injunctive Relief and Petition for Writ of Mandamus at 4, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206).

8. *See id.*

9. *See* Defendant's Motion to Dismiss or Alternative Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Preliminary and Permanent Injunctive Relief and Petition for Writ of Mandamus at 11, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206).

10. 9 U.L.A. § 115 (1988).

the Parental Kidnapping Prevention Act of 1980 (PKPA),[11] and the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)[12] each have specific functions to assist the legal system in resolving the confusion that occurs when the child is taken across state or national lines.

Part II will begin by addressing the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, and will explore how the two work in tandem to resolve jurisdictional conflicts between states prior to determining the question of child custody. Part III will explain the applicability of the Hague Convention in reducing the jurisdictional red tape of international abductions. Part III will also highlight the exceptions to the Convention and discuss how the procedure differs in cases involving non-contracting states. Part IV will demonstrate through case analysis that, although the emphasis of each document is the jurisdictional decision, the custody issues influence and complicate the outcome of the case.

II. LEGAL MECHANISMS AVAILABLE TO U.S. PARENTS OF AN ABDUCTED CHILD TAKEN ABROAD

A. Uniform Child Custody Jurisdiction Act

Before 1968, parents who abducted their children after separation or divorce had an excellent chance of being rewarded custody of their children.[13] State courts had virtually unlimited discretion to refuse to recognize or enforce custody decrees of sister states and foreign nations.[14] Courts tended to give great weight to the presence of the child in the state when making custody determinations.[15] This encouraged forum shopping by

11. § 8(a), 28 U.S.C. § 1738A (1994).

12. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

13. *See* Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies* 2 (presented at the Annual Conference of the Association of Family and Conciliation Courts, May 11, 1994) (on file with the *University of Miami Inter-American Law Review*).

14. *See* Esther Levy Blynn, *In re: International Child Abduction v. Best Interests of the Child: Comity Should Control*, 18 U. MIAMI INTER-AM. L. REV. 353, 356 (1986) (citing Note, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L L. 669, 670 (1980)).

15. *Id.* (citing Patricia M. Hoff, *Child Snatching: Interstate and International Child*

allowing the abducting parent to find a state that permitted the parent to remain legally unchallenged.[16] If the child-snatcher was able to retain the child for a considerable length of time, he or she could argue the child should remain in the new jurisdiction for stability and security.[17] The result was that child abductors would be rewarded "in the best interests of the child."[18]

Before widespread adoption of the UCCJA, courts gave only lip service to the "best interests of the child" and frequently refused to recognize custodial decisions of other jurisdictions, essentially allowing abducting parents to manipulate the custodial determinations.[19] There was a void in the federal scheme to stop child snatching because there was no uniform method of dealing with the violation from state to state.[20] There was a crying need for establishment of a national standard.

Recognizing this, the National Conference of Commissioners on Uniform State Laws drafted the UCCJA to create a national standard to deter parental child abduction.[21] By limiting jurisdiction of custody matters to the courts of a single state, efforts to litigate related custody matters in more than one jurisdiction were thwarted.[22] Under the UCCJA, a court only has jurisdiction to make a custody determination if (1) the state is the home state of the child at the time of the commencement of the proceeding; (2) the child and his parent or his custodian have a significant connection with the state; (3) the child is physically present in the state and has been abandoned or subject to mistreatment, abuse, or neglect; or (4) if no other state would have jurisdiction under (1), (2), or (3).[23]

These uniform criteria for selecting the appropriate forum help to avoid jurisdictional competitions and prevent forum shopping. By prohibiting a second court from assuming

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Custody Litigation, *in* INTERSTATE AND INTERNATIONAL CHILD CUSTODY DISPUTES 10 (ABA Monograph, 4th ed. 1984).

16. *See* Blynn, *supra* note 14.

17. *See id.*

18. *See id.*

19. *See id.*

20. *See* Toby Solomon, *Interstate Custody: The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act* 1 (unpublished manuscript on file with the *University of Miami Inter-American Law Review*).

21. *See id.*

22. *See* Blynn, *supra* note 14, at 361.

23. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT OF 1968, 9 U.L.A. § 3(a) (1988).

jurisdiction once litigation has commenced, the UCCJA promotes cooperation between jurisdictions and facilitates enforcing decrees of sister states.[24] The UCCJA also codified the "clean hands" principle where the state to which an abducting parent flees is required to decline jurisdiction, thereby preventing the child-snatcher from benefiting from his or her wrongdoing.[25]

This Act has been adopted by every state and territory, and, although there are some troublesome variations among the different states, the overall acceptance has proved to be a major deterrent to interstate kidnapping in this country.[26]

Pryor v. Pryor[27] is a good example of how the proper application of the UCCJA by a trial court can resolve competing child custody orders issued by different states.[28] *Pryor* involved a husband who sought dissolution of marriage in an Indiana court.[29] The Indiana court issued a temporary restraining order granting the husband temporary custody of the child.[30] The husband then subpoenaed his wife to appear at the Indiana hearing by sending the subpoena to her home in Kentucky, where she and the child had been living for the past year.[31] The wife, however, filed a petition for divorce in a Kentucky court also seeking custody of the child.[32] When she appeared at the Indiana provisional hearing without counsel, she failed to notify the court of her pending petition in Kentucky.[33] The Indiana court granted the husband temporary custody of the child, which required the wife to turn over custody.[34]

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24. *See* Solomon, *supra* note 20, at 1.

25. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT, *supra* note 23, § 8. Section 8 permits the court to decline jurisdiction if the petitioner comes to the court with "unclean hands." For instance if the child has been abducted, or otherwise improperly retained the child from the custodial parent. *See id*; Walsh v. Walsh, 80 A.D. 2d 894 (N.Y. App. Div. 1981).

26. *See* Solomon, *supra* note 20, at 1.

27. 709 N.E. 2d 374 (Ind. App. 1999).

28. Paul A. Leonard, Jr., *Family Law Case Update*, 43-JUL RES GESTAE 30, 34 (1999).

29. *See Pryor*, 709 N.E. 2d at 375.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* at 375-76.

Immediately after the Indiana hearing, the Kentucky court issued a custody order in favor of the wife.[35] Relying on Kentucky's ruling, the wife refused to give the child to the father.[36] Once the Indiana court held her in contempt, she then filed a "Motion for Relief from Orders and to Stay Proceedings" advising the Indiana court of the Kentucky custody order.[37] Despite her argument that the child had lived in Kentucky for almost one year prior to the husband's Indiana petition, the wife's motion was denied and the child was placed with the father.[38]

On appeal, the wife argued that the Indiana court "failed to uphold its affirmative duty to question its jurisdiction when it discovered that the custody dispute had an interstate dimension."[39] The Indiana Court of Appeals remanded the case for a hearing on whether Indiana or Kentucky had jurisdiction and also whether Kentucky had declined its jurisdiction.[40] The appeals court retained jurisdiction to verify the custody order if Indiana was found to have jurisdiction under the UCCJA.[41]

This case demonstrates the required procedures under the UCCJA for establishing which state has jurisdiction. By assuring that the litigation of parental issues occurs in the child's "home state" where the family has its closest connection, the UCCJA ensures that the state which can best decide the case in the interests of the child is the state that issues the custody order. Additionally, by encouraging custody decisions to be made where only one party may have that home base, the Act hopes to deter abductions to other states or re-litigation of custody decisions in other states.[42] A key benefit of the Act is the exchange of information between courts of each state, allowing the enforcement of custody decrees of sister states.[43]

One glaring shortcoming of the UCCJA, however, is that it does not provide a time limit in which jurisdiction petitions in

35. *See id.* at 376.
36. *See id.*
37. *See id.*
38. *See id.*
39. *Id.*
40. *See id.* at 378.
41. *See id.*
42. *See* Solomon, *supra* note 20, at 2.
43. *See id.*

child abduction cases must be processed. To truly be in the best interests of the child, a court should determine jurisdiction quickly to move the process to the proper state for custodial consideration. A six-week time limit would be appropriate for expeditious implementation of child abduction laws because this would correspond to the time period under the Hague Convention for implementing communication between nations.[44]

B. The Parental Kidnapping Prevention Act

The Parental Kidnapping Prevention Act of 1980 (PKPA)[45] provides the federal enforcement mechanism for ensuring that states honor the custody determinations of other states.[46] The key provision requires the courts of every state to enforce, rather than modify custody and visitation orders made by courts already exercising jurisdiction.[47]

This provision was maintained in *Thompson v. Thompson*,[48] where the Supreme Court held that there is no federal cause of action under the PKPA for determining which of two conflicting state custody decisions is valid.[49] In *Thompson*, a California court awarded custody of a child, pending an investigator's report, to the mother who planned to move to Louisiana.[50] Once in Louisiana, the mother obtained a Louisiana court order enforcing the California custody decree and awarding her sole custody.[51] After this order had been entered, the California court received the investigator's report and reversed its order granting temporary custody to the mother and awarded sole custody to the father.[52] Instead of attempting to enforce the California decree in Louisiana, the father filed a suit in federal district court to negate the Louisiana decree, to declare the California decree valid, and to enjoin the enforcement of the Louisiana decree.[53] The district court dismissed the complaint, and the court of

44. *See* Hague Convention, *supra* note 12, art. 11.
45. Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994).
46. *See* Solomon, *supra* note 20, at 8.
47. *See id.*; Parental Kidnapping Prevention Act of 1980, *supra* note 45, § 1738A(a).
48. 484 U.S. 174 (1988).
49. *See id.* at 176.
50. *See id.* at 174.
51. *See id.*
52. *See id.*
53. *See id.*

appeals affirmed on the ground that he had failed to state a claim upon which relief could be granted.[54] Thus, *Thompson* limited the power of the federal courts to intervene in a state jurisdiction issue concerning child custody cases.

As explained by the Supreme Court, "Once a state exercises jurisdiction consistent with the provisions of the [PKPA], no other State may exercise concurrent jurisdiction over the custody dispute, even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree."[55]

The PKPA flatly prohibits concurrent jurisdiction and protects the exclusive jurisdiction of the state that issued the decree. The PKPA protects the continuing jurisdiction of the decree state to modify the original custody decree as long as (1) the initial custody order was made consistent with the PKPA's jurisdictional hierarchy, (2) the state issuing the original decree continues to have a basis for exercising custody jurisdiction under state law (which need no longer be the "home state"), and (3) the state remains the residence of the child or of any custody contestant.[56]

Although the PKPA is primarily concerned with the enforcement of jurisdiction, the Act does take the child into consideration. "Under the Act, jurisdiction can turn on the child's 'best interests' or on the proof that the child has been abandoned or abused."[57] The effect of *Thompson* was not only to limit concurrent jurisdiction between the states, but also to keep the parties from bouncing from state to state and finally into federal court to delay the proceedings.

The PKPA differs from the UCCJA in that it does not require U.S. courts to give full faith and credit to foreign custody

54. *See id.*

55. *See id.* at 177 (citing Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(g) (1994)) (internal citations omitted).

56. *See* Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(a), (d) (1994).

57. *See Thompson*, 484 U.S. at 186 (citing Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(c)(2)(B), (C), (D) (1994)).

decrees.[58] It therefore provides no remedy in international child custody situations.[59]

In 1993, Congress enacted the International Parental Kidnapping Crime Act (IPKA),[60] making it a federal criminal offense for a parent to wrongfully remove or retain a child outside U.S. borders when the Hague Convention cannot be implemented.[61] Congress reasoned that the United States could request extradition of abducting parents from countries with which the United States has extradition treaties.[62] Once international parental child abduction becomes a federal criminal offense, presumably the federal government will become more active in pursuing the parent and seeking the aid of the foreign governments.[63]

Although IPKA is a step in the right direction, federal law is by its nature limited to the United States. When an U.S. parent and child are residing in a foreign state, that state is not required to comply with U.S. laws[64] unless another agreement exists between the United States and that foreign state. One such agreement designed to create a network of international child abduction laws is the Hague Convention.[65]

III. INTERNATIONAL LAW: THE HAGUE CONVENTION

A. Adaptation of the Hague Convention into United States Law

The Hague Convention on the Civil Aspects of International Child Abduction[66] (hereinafter Convention) became law in the

58. *See* Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief - Can Something More Be Done?* 8 N.Y. INT'L L. REV. 95, 99 (1995).

59. *See id.*

60. 18 U.S.C. § 1204 (1993).

61. *See id.* § 1204(a) ("Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.").

62. *See* Barone, *supra* note 58, at 99.

63. *See id.*

64. *See id.* at 99-100.

65. *See id.* at 99.

66. Hague Convention, *supra* note 12.

United States in July 1988. The Convention is not an extradition treaty, but a civil remedy for abduction.[67] The Convention does not provide authority for one state to require another foreign state to extradite a parent.[68] Also, a state is only bound if it enacts domestic law adopting the Convention, because the Convention is not self-executing.[69]

In 1988, Congress enacted the International Child Abduction Remedies Act (ICARA)[70] to implement and maintain "uniform international interpretation" of the Convention in the United States.[71] Subsequently, U.S. courts, when dealing with international claims of child abduction, have held that the Convention, as implemented by ICARA, preempts the UCCJA.[72] This legislation sets the legal parameters for the exercise of judicial discretion, such as reinstating the legal status quo that existed prior to the wrongful conduct.[73] The main purpose is to ensure that the abducted or wrongfully detained child is promptly returned to the country of habitual residence.[74]

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67. *See* Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 1005 (1986).

68. Barone, *supra* note 58, at 101.

69. *See id.* at 101-102.

70. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (1996).

71. *Id.* § 11601(b)(3)(B).

72. *See* Moshen v. Moshen, 715 F. Supp. 1063, 1065 (D. Wyo. 1989) (holding ICARA, itself, does not provide rights under Hague Convention, but courts are empowered to fashion provisional remedies under Hague Convention).

73. *See* Garbolino, *supra* note 3, at 9.

74. *See* Robert D. Arenstein, *The Hague Convention – Understanding and Litigating Under the Treaty* 87, 1992 (unpublished article on file with the *University of Miami Inter-American Law Review*).

In recommending the Convention to the U.S. Senate for ratification, President Ronald Reagan described its goals as follows:

> The Convention is designed promptly to restore the actual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody can be heard and settled. The Convention calls for the establishment of a Central Authority in every Contracting State to assist applicants in securing the return of their children or in exercising their custody or visitation rights, and to cooperate and coordinate with their counterparts in other countries toward these ends. Moreover, the Convention establishes a judicial remedy in wrongful removal or retention cases which permits an aggrieved parent to seek a court order for

The threshold issue under the Convention is not who will retain custody of the child, but what jurisdiction will make the custody determination. The Convention struck a delicate balance, protecting the factual situation altered by the wrongful removal or retention of a child under age sixteen[75] and guaranteeing respect for the legal relationships of the countries which may underlie such abductions.[76] The Convention developed rules for returning a child as quickly as possible to the pre-abduction status quo, where custody issues could be determined according to the laws of that forum.[77] The drafters recognized that international abductions could not be handled unilaterally by any one of the legal systems involved.[78] The goal of the Convention is to guarantee Cooperation among many nations, and ultimately all nations, to expeditiously return the child to the habitual residence for custodial consideration.

B. Requirements of the Hague Convention

The Convention requires that both the "home" state and the foreign state be signators of the Convention at the time of the abduction.[79] Thus, the Convention was not automatically triggered in the Elian Gonzalez case because, although the United States was a signator of the Convention, Cuba was not. In the absence of an international agreement, the United States turned to its own laws under the INA to determine Elian's rights.

> the prompt return of the child when voluntary agreement cannot be achieved. An aggrieved parent may pursue both of these courses of action or seek a judicial remedy directly without involving the Central Authority of the country where the child is located.

Letter of Transmittal from President Ronald Reagan (Oct. 30, 1985), 51 Fed. Reg. 10,495 (1986).

75. The Hague Convention states, "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." Hague Convention, *supra* note 12, art. 4.

76. *See* Elisa Pérez-Vera, *Explanatory Report*, *in* 3 ACTES ET DOCUMENTS DE LO QUATORZIEME SESSION 426, 428 (Permanent Bureau of the Hague Conference on Private International Law ed. 1980) [hereinafter Pérez-Vera Report].

77. *See id.* at 430.

78. *See id.*

79. *See* Hague Convention, *supra* note 12, art. 8 ("This convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.").

The INA does not require that proceedings be commenced against Elian.[80] In fact, Attorney General Janet Reno and the INS Commissioner Doris Meissner chose not to commence proceedings "in view of Elian's young age, in view of all that he has been through, and in view of the fact that his father has withdrawn his application for admission."[81] INA § 242(g) bars judicial review of "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute orders against any alien."[82] Both Meissner and Reno were confident of the father's very close relationship with Elian and agreed that the first responsibility of the government when dealing with an unaccompanied minor was to find the parent or legal guardian, even if the person was outside the United States.[83]

Immediately following the decision of the INS that Elian should be returned to Cuba, the political maneuvering began. Indiana Representative, Dan Burton, "issued a congressional subpoena designed to freeze Elian's repatriation, at least until his Miami relatives had a chance to appeal it in court."[84] The Miami relatives filed a petition in Miami-Dade Circuit Court and received emergency custody, which opened the door for them to petition for temporary custody in March 2000.[85] Reno indicated that this ruling carried no legal weight in an immigration dispute.[86]

"Senate Foreign Relations chairman Jesse Helms announced plans to make Elian a U.S. citizen when Congress reconvened on Jan. 24—a move that could stall repatriation procedures."[87] Further complicating matters, Elian's Miami relatives filed suit in federal court against Reno and Meissner seeking a political asylum hearing.[88] They hoped to speed up the timetable usually

80. *See* Defendant's Motion to Dismiss, *supra* note 9, at 34.

81. *Id.*

82. Immigration and Nationality Act, 8 U.S.C. § 1252(g) (1994).

83. *See* Defendant's Motion to Dismiss, *supra* note 9, at 30-31.

84. Joshua Cooper Ramo, *A Big Battle for a Little Boy*, TIME MAG., Jan. 17, 2000, at 61.

85. *See* Tony Doris, *Trying Reason in Elian's Custody Case*, MIAMI DAILY BUS. REV., Jan. 13, 2000, at A1.

86. *See id.*

87. Ramo, *supra* note 84, at 62.

88. *See* Motion for Preliminary and Permanent Injunction and Petition for Writ of Mandamus and Supporting Memorandum of Law, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F.

afforded Cuban exiles under the 1966 Adjustment Act which grants U.S. residency to all Cubans one year after their arrival in the United States—a special treatment accorded to Cuba's victims of "communist oppression."[89]

The emotional frenzy that developed between the Cuban exile community in Miami and the U.S. government added to the legal complexity. Street demonstrations hindered passage of non-involved citizens and pitted Americans against Cuban-Americans, turning the issue into a political hot potato.[90] An investigation was launched against the circuit court judge who issued the emergency custody order on the grounds of a potential violation of the Canons of Judicial Ethics for failing to disclose that the family's spokesperson had previously served as her political consultant for her election campaign.[91] In addition, a federal judge recused himself because the same consultant handled a judicial campaign for the judge's son.[92] The case became more complicated when the federal court hearing had to be reassigned three times because the judge suffered a stroke.[93] Finally, the case was heard before a newly appointed federal judge six weeks later.[94] The federal hearing took place on the same week as the state hearing for temporary custody.[95]

The turmoil exploded beyond the streets of Miami. Demonstrations occurred in Havana over the plight of Elian, demanding his return to Cuba. When Elian's grandmothers returned to Cuba after lobbying for Elian's release on Capitol Hill, they were heralded in a parade and interviewed by the media for days.[96]

Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206).

89. Ramo, *supra* note 84, at 67.

90. *See* Gail Epstein Nieves, *Police: Tear Gas Used as Protests Became Hostile*, MIAMI HERALD, Jan. 8, 2000, at 1B.

91. *See* Tim Padgett, *The Family Feuds*, TIME MAG., Jan. 24, 2000, at 32-33.

92. *See* Jay Weaver, *Judge Removes Self: Case Reassigned*, MIAMI HERALD, Jan. 22, 2000, at 1A.

93. *See* Marika Lynch, *Hoeveler, Judge in Elian Case, in Hospital*, MIAMI HERALD, Feb. 21, 2000, at 1B.

94. *See* Rick Bragg, *Federal Judge Fails to Rule on Fate of Cuban Youngster*, N.Y. TIMES, Mar. 10, 2000, at A12.

95. *See* Ana Acle, Alfonso Chardy et al., *Great-Uncle Given Temporary Custody: Ruling Sets up Legal Showdown*, MIAMI HERALD, Jan. 11, 2000, at 1B.

96. *See* John Rice, *Boy's Grandmothers Cheered as Heroines Back in Havana*, MIAMI HERALD, Jan. 31, 2000, at 1B.

As the smoke cleared, the real problem emerged: a lack of applicable regulations to deal with jurisdictional and custodial issues when countries fail to sign or comply with treaties such as the Hague Convention. At this point it was too late for the Cuban government to accede to the Convention because it applies "only to wrongful removal or retention *after* its entry into force."[97]

1. The Age Requirement

Article Four of the Convention provides, "The Convention shall cease to apply when the child attains the age of 16 years."[98] In the case of *In re Walter Polovchak*,[99] age was a critical factor because the child was only twelve when, having come to the United States with his parents from the Ukraine, the child chose to remain here when his parents decided to return home.[100] With the help of other family members, the child obtained an order from a juvenile court judge making him a ward of the state on the grounds that he was "beyond the control" of his parents.[101] Additionally, a federal court granted the child asylum without regard for the procedural and substantive rights of his parents in the Ukraine.[102]

In *Polovchak*, established law took a back seat to the political tension between the United States and the former Soviet Union. Initially, the INS supported the child's separation from his parents.[103] Ultimately, both the Illinois Supreme Court and the Seventh Circuit Court of Appeals found substantial error in this decision which led to a divided family.[104] "However, by the time the Seventh Circuit finally rendered its decision in 1985, Walter was weeks shy of his eighteenth birthday and his parents had long since returned to the Ukraine, rendering the award of

97. Hague Convention, *supra* note 12, art. 35 (emphasis added).

98. Hague Convention, *supra* note 12, art. 4.

99. 454 N.E. 2d 258 (Ill. 1983).

100. *See* Polovchak v. Meese, 774 F.2d 731, 733 (7th Cir. 1985).

101. *See* In re Walter Polovchak, 454 N.E. 2d 258 (Ill. 1983). Ultimately, the Illinois Supreme Court reversed this order. *See id.*

102. *See* Polovchak v. Meese, 774 F.2d at 735.

103. Memorandum of *Amici Curiae* in Support of Defendant's Motion to Dismiss or Alternative Motion for Summary Judgment at 14, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206).

104. *See* Polovchak v. Meese, 774 F.2d at 736.

any form of relief a practical impossibility."[105] Both the state and federal appellate courts were accomplices in the illegal destruction of a family because they failed to move expeditiously to reverse actions that were clearly without legal foundation.[106]

Unlike the child in *Polovchak*, who, at age twelve, was at least arguably competent to participate in a decision about where he wanted to live, this argument cannot be made with respect to six-year-old Elian.[107] The Seventh Circuit found that Walter at twelve was "near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents."[108] However, a credible authority on child development states,

> we do not believe that there are or can be circumstances which justify emancipating children to meet their own legal care needs in the child placement process. Indeed, it is the purpose of the process to secure or restore for every child an uninterrupted opportunity to be represented by "parents."[109]

2. The Wrongful Removal or Retention Requirement

For a left-behind parent to invoke the Convention, that parent must be acting under rights of custody and must prove wrongful removal or retention.[110] "The Hague Convention defines wrong removal or retention as a violation of a person's custody right, under the law of the abducted child's 'habitual residence' state, prior to the removal or retention."[111] "[I]t is therefore necessary to determine the right of custody and 'habitual residence' of the child."[112]

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105. Memorandum of *Amici Curiae*, *supra* note 103, at 15 (internal citation omitted).

106. *See id.*

107. *See id.*

108. *Id.* (quoting *Polovchak v. Meese*, 774 F.2d at 737).

109. JOSEPH GOLDSTEIN, ALBERT J. SOLNIT ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 147 (1996). *See also* Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); Pérez-Funez v. INS, 619 F. Supp. 656, 662 (C.D. Cal. 1985) (even minors over 14 have been found to be unable to comprehend voluntary removal process with sufficient clarity to avoid risk of coercion).

110. *See* Barone, *supra* note 58, at 105.

111. *Id.*

112. *Id.*

Had the Convention been applicable to the Elian case, the requirement that a child be returned to his or her habitual residence would surely mean that Elian should be returned to Cuba because this was his only home for the first five years of his life. Regardless of whether Cuba is a member of the Hague Convention, international law has a strong basis for returning Elian to his home in Cuba because his only surviving parent lives in Cuba.

C. Exceptions to The Hague Convention's Focus on the Best Interests of the Child

Once the requirements of wrongful removal and retention under the Hague Convention are proved by a preponderance of the evidence,[113] the abducting parent must return the child unless one of the Convention's exceptions applies. These exceptions are set forth in articles twelve, twenty, and thirteen of the Convention and are "designed to be interpreted narrowly because a broad construction would defeat the purpose of the Convention."[114]

1. Article Twelve

Article twelve allows the fact that a child abducted more than one year ago has now settled into a new environment to overcome the Convention's provisions.[115] The delegates added this one-year statute of limitations to the Convention because they felt that a failure by the left-behind parent to bring a swift application might indicate acquiescence in, or mixed emotions about the abduction.[116] They also feared that ordering a return at such a late date might cause additional confusion and psychological damage to the child.[117]

This one-year exception has been criticized because the abducting parent could delay the proceedings by concealing the

113. International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B) (1996).
114. Barone, *supra* note 58, at 109.
115. Hague Convention, *supra* note 12, art. 12.
116. *See* Todd, *supra* note 6.
117. *See id.*

whereabouts of the child for more than a year and then attempt to benefit from the use of Article Twelve.[118]

2. Article Twenty

Article Twenty contains the Convention's public policy exception. It states, "[t]he return of the child under the provisions of Article Twelve 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."[119] On its face, it appears that if Cuba were a signator of the Convention, the United States would have been able to use Article Twenty to keep Elian Gonzalez in this country. Ideologically, the United States believes that his human rights and fundamental freedoms would be restricted under a communist regime such as the Cuban government. However, this exception "was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed."[120] "In order to invoke the 'fundamental principles' exception, it must be demonstrated that the return of the child would violate an actual domestic law of that state."[121] In other words, the United States would have to have a law forbidding any child on our soil to be returned to a communist country. "It would not be enough for the state to say that the exception will violate its policy or custom."[122]

When countries have differing ideologies, children become political "footballs." This usually results in poor legal decisions and has detrimental psychological effects on the child. This was the case in *In re Walter Polovchak*,[123] where the political ideologies between the Soviet Union and the United States in 1980 encouraged the court to support twelve-year-old Walter's request to remain in the United States. Unfortunately, this led to the elimination of his family unit.

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118. *See id.*
119. Hague Convention, *supra* note 12, art. 20.
120. Todd, *supra* note 6, at 566.
121. Barone, *supra* note at 58, at 110.
122. *Id.*
123. 454 N.E. 2d 258 (Ill. 1983).

Political considerations have impacted the resolution of Elian's case as well. The political maneuvering has caused the INS, the Attorney General, and the courts to move abnormally slow in this case to the detriment of Elian and his family. If the political issues were removed, all legal rules are open to the best interests of the child. Most countries share the commitment to parenthood even though they may be politically at odds. By precluding political meddling, a court could rely on the customary ideology of keeping a child with a parent in the only home he has previously known. Unfortunately, the words "in the best interests of Elian" seem inappropriate as this charade is paraded before the media.

3. Article Thirteen

a. Article 13(a) – No Custodial Rights or Acquiescence at Time of Wrongful Removal or Retention

Under Article 13(a) of the Convention, a court may deny an application for the return of a child if the petitioner was (1) not actually exercising custody rights at the time of removal or retention, or (2) if the petitioner had acquiesced in the removal or retention. Although this rule appears clear-cut, judicial reading of the custody laws can vary depending upon the interpretation by the Requesting State. Thus, a court could exercise its bias against the petitioner or the petitioner's country through its interpretation of the custody law in the State of habitual residence.[124]

For example, in *David S. v Zamira S.*[125] the mother argued that, under a valid separation agreement, the father had only access rights (as opposed to custody rights) over their son, and therefore, was not entitled to the child under the Convention. Although the court recognized the validity of the mother's argument under Article 13(a), the court ordered the son returned to the father because the mother violated the separation agreement by removing the boy from the habitual residence area.[126] This harsh and narrow interpretation of what constitutes

124. *See* Todd, *supra* note 6, at 569.
125. 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991).
126. *See id.* at 432-33.

a right of custody stems from the court's intolerance for violations of Article Three of the Convention, which prohibits wrongful removal or retention of children.[127]

In *In re J.*,[128] the United Kingdom Court of Appeal's interpretation of custody rights under Australian law also evidences the manipulability of the law and the potential for bias. Under Australian law, custody and guardianship of a child are granted to the mother unless a court orders otherwise.[129] The father in this case successfully petitioned the court for custody after the mother left Australia with the child and moved to the United Kingdom.[130] The court, however, indicated that the removal or retention was not wrongful under the Convention because the father did not have custody rights before the mother removed the child.[131]

Denying an application for the return of a child on the ground that the petitioner acquiesced in the child's removal or retention is also sufficiently vague as to permit bias. In *Schroeder v. Vigil-Escalera Perez*[132] the wife, a citizen of Ohio, and the husband, a citizen of Spain, were married in Mexico. The couple had a child while in Mexico, making the child a citizen of the United States, Mexico, and Spain.[133]

The family lived together in Madrid, Spain, until November 1994, when the wife and the child returned to the Unites States for a temporary visit.[134] Because the marriage was in trouble, the wife chose to remain in the United States with the child at the encouragement of the husband.[135] The father never insisted that the child be returned.[136]

Ultimately, the couple filed for divorce.[137] The husband agreed that the wife should have custody of the child as long as they could work out visitation once the child was old enough to

127. *See id.*
128. 87 L. Soc'y Gazette , Oct. 3, 1990, at 39 (H.L. 1990)
129. *See id.*
130. *See id.*
131. *See id.*
132. 664 N.E.2d 627, 629 (Ct. of Common Pleas of Ohio 1995).
133. *See id.*
134. *See id.* at 630.
135. *See id.*
136. *See id.*
137. *See id.*

travel.[138] Six months later, however, the husband filed an action for wrongful removal or retention under the Hague Convention in U.S. federal district court.[139]

Under the Convention, the threshold question is the habitual residence of the child.[140] This child lived in Mexico for five months, in Spain for three months, and the United States for seven months of her young life.[141] Being that "[t]here is no actual definition of 'habitual residency' in the Hague Convention,"[142] the court determined that the key date was November 12, 1994, when the wife and child left Spain with the knowledge and consent of the husband because the father "clearly acquiesced in the removal and retention of the child in the United States."[143]

b. Article 13 (b) – Grave Risk of Harm

The Article 13(b) "grave risk of harm" exception is the most frequently litigated because it comes the closest to allowing the parties to argue the merits of the case instead of focusing on the jurisdiction issue.[144] This Article excuses the duty to return under "a grave risk that returning the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[145] This exception opens the door to an endless list of possible grievances presented to influence the court that the child will be better off remaining with the abducting parent. The Convention strictly maintains that any international analysis of the "merits of any custody issue" is specifically precluded.[146] Yet, litigants will often try to present evidence that will influence the judge's determination of "best interests of the child" under the "grave risk of harm" exception.

The abuse of this exception has led to accusations of not only physical dangers for the child but psychological harm as well. In

138. *See id.*
139. *See id.* at 631.
140. *See id.*
141. *See id.* at 632.
142. *Id.*
143. *Id.* at 633.
144. *See id.* at 570.
145. Hague Convention, *supra* note 12, art. 13(b).
146. *Id.* art. 5.

Tahan v. Duquette,[147] the father alleged that the child would suffer severe emotional harm if returned to the left-behind parent.[148] The New Jersey Court of Appeals remanded the case to the trial court, unaware that it would take seven months to readdress the issue.[149] The counsel for the plaintiff planned to call a myriad of witnesses to the proceeding to show "the grave risk of psychological harm to [the child] if the court disrupts his life now by compelling his return."[150] "[T]he trial court ruled that an Article 13(b) inquiry . . . was not intended to cover factual matter which was subject to being considered in a plenary custody hearing."[151] Hearing such testimony would usurp the jurisdiction "reserved by the Convention to the courts of Quebec."[152]

Article 13(b) inquiries are not intended to deal with issues or factual questions that belong in the custody hearing but instead should focus on the question "whether there exists in the place of habitual residence such 'internal strife' or unrest as to place the child at risk."[153] This narrow inquiry allows the court to focus exclusively on the jurisdictional issue and not upon the individuals.[154]

The Miami relatives of Elian Gonzalez stressed to the court that they believed Elian would suffer grave danger and loss of his rights if he was returned to Cuba. In a pleading filed in the Family Division of the Eleventh Judicial Circuit of Florida, the relatives outlined the "nature of the emergency and the reasons requiring immediate action by this Court to prevent imminent harm to the Minor child."[155] The petitioner suggested that a parent in Cuba did not have the ability to raise a child free of coercion, duress or threat of persecution, and was subject to

147. 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992).

148. *See id.* at 488.

149. *See id.*

150. *Id.* at 488. The witnesses included: a psychologist who prepared an evaluation of the parties and the child; the plaintiff and his present wife, who would attest to the child's "dreams and his desires, his nightmares and fears," as well as his family relationships; and the child's teacher. *Id.*

151. *Id.*

152. *Id.* at 489.

153. *Id.*

154. *See id.*

155. Verified Petition for Temporary Custody and Other Relief at 6-7, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206).

manipulation by the government.[156] The petitioner was prepared to provide testimony by psychologists as to the boy's "view of his life in Cuba and his genuine fear of returning to a world that can only be described as a living hell."[157]

On January 10, 2000, a judge in Family Division granted temporary custody to Elian's great-uncle Lazaro Gonzalez because the presentation of the evidence on the merits is appropriate in Family Court.[158] The INS and Attorney General failed to acknowledge the validity of the state court action[159] and on April 13, 2000, the Family Division entered a final order declaring that the matter of temporary custody of Elian by his great-uncle Lazaro was "federally pre-empted and that the court further lacks subject matter jurisdiction, and therefore dismisses this action and terminates the order of January 10, 2000."[160] The ruling stressed that Elian's ability to remain in the United States was not a custodial matter to be decided by a state court but rather was a federal immigration issue of whether he should stay in the United States or be sent back to Cuba.[161] Subsequently, Elian's Miami relatives spelled out these same fears of grave harm to Elian in a federal court Motion for Preliminary and Permanent Injunction and Writ of Mandamus, which was denied.[162]

c. *Article 13 – The Child's Objection Clause*

Article Thirteen concludes with the child's objection clause, allowing a court to deny a return petition if "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."[163] "This exception gives significant discretion to the court to determine what age and level of maturity is required to make a decision of

156. *See id.* at 8.

157. *Id.* at 11.

158. *See* Gonzalez v. Gonzalez-Quintana, Case No. 00-00479-FC-29 (Fl. Cir. Ct. Fam. Div. Jan. 10, 2000) *available in* 2000 WL 419688.

159. *See* Defendant's Motion to Dismiss, *supra* note 9, at 49-50.

160. *In re Lazaro Gonzalez*, Case No. 00-00479-FC-28, at 1 (Fla. Cir. Ct. Family Div. Apr. 13, 2000) *available in* 2000 WL 492102.

161. *See id.* at 8.

162. *See* Motion for Preliminary and Permanent Injunction and Petition for Writ of Mandamus and Supporting Memorandum of Law at 1, 4, 5, 1, 22, 23, n.23, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206).

163. Hague Convention, *supra* note 12, art.13.

this sort."[164] The problem arises when an abducting parent exerts pressure on the child to state the parent's view rather than his own. "However, consideration of the child's preference is not mandatory, and courts can attach little weight to the child's opinion if brainwashing by the abducting parent is suspected."[165]

IV. IS RECONCILIATION OF "BEST INTERESTS OF THE CHILD" AND JURISDICTIONAL CONCERNS POSSIBLE UNDER U.S. AND INTERNATIONAL LAW?

The common thread running through the UCCJA, the PKPA, and the Hague Convention is the threshold question of jurisdiction. Once it is decided whether the home state or habitual residence will have jurisdiction, that state will then make the custodial determination in the best interests of the child. Counselors and judges involved in UCCJA and Hague Convention cases are warned that they must be vigilant in stressing that these laws do not provide a forum for litigating the merits of a custody dispute.[166] The paramount issue is whether there was a wrongful removal or retention, not what is in the best interests of the child.[167] One attorney, known as an expert at handling Hague Convention trials, noted in his handbook the following warning: "Best Interests. Stay away from this, avoid it, do not let it come before the court. The Convention is not a best interests test. Do not let this come in, object over and over to any introduction of best interests."[168]

The Convention's silence on this point does not mean that the Convention ignores the necessity of considering the interests of children.[169] Although the purpose of the Convention is jurisdictional and not custodial, "the interests of the child are of paramount importance in matters relating to custody," and the problem emerges as one of perspective.[170] Any designation of jurisdiction should be subordinated to the interests of the child.[171]

164. Todd, *supra* note 6, at 573.
165. *Id.*
166. *See* Garbolino, *supra* note 3, at 23.
167. Pérez-Vera Report, *supra* note 76, at 431.
168. William M. Hilton, *Handling a Hague Trial*, 6 AM. J. FAM. L. 211 (1992).
169. *See* Pérez-Vera Report, *supra* note 76, at 430, 431.
170. *Id.*
171. *See id.*

Yet, the legal standard "the best interests of the child" is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture?[172] Would the interests be based on the immediate aftermath of the decision, or on the latter effects on the child in adolescence, young adulthood, maturity, or old age?[173]

This question is particularly applicable to the case of Elian. What is really in his best interest? He has lost his mother and has been separated from the only family he ever knew before November 1999. Perhaps Cuba would provide the most likely forum for emotional and psychological healing. According to University of Miami Psychiatrist Dr. Michael Hughes, when the reality of what happened out in the ocean comes crashing down on Elian, "he'll need to be with the father and grandparents who have reared him."[174] Yet, an unnamed U.S. official postured Elian's thoughts at age twenty-one, "I'm condemned to a life sitting on a seawall here in Havana with no job and under this repressive dictatorship, and I could be at the University of Miami right now."[175]

Frequently, internal jurisdictions have considered the best interests of the child, and have awarded the custody to the parent who wrongfully removed or retained the child.[176] Although such a decision may not be invariably wrong, it does enhance the risk that a court might be expressing particular social or cultural attitudes based on nationalistic and subjective values against the child's habitual residence.[177] It also reinforces the very message that the Convention and the corresponding state laws want to discourage, that a parent will be rewarded for abducting the child from the custodial parent. Focusing on the jurisdictional issue alone in the first instance allows the child custody issue to be adjudicated in the child's home state. In most instances, the familial resources for both parties located in the

172. *See id.* at 431.
173. *See id.*
174. Padgett, *supra* note 91.
175. Ramo, *supra* note 84, at 67.
176. *See* Pérez-Vera Report, *supra* note 76, at 431.
177. *See id.*

home state will help the court to come to a fair decision in the best interests of the child.

The return of the child to the habitual residence is one of only two concrete and objective premises of the Convention. The other is the age limit of sixteen years under Article Four.[178] The exceptions provided by the Convention open the discussion to overwhelming subjectivity. Most courts explicitly recognize the limitations of factoring in the child's best interests and only consider it as one of many factors in determining whether to return a child.[179] By concentrating on the habitual residence question, the court is able to remove itself from consideration of evidentiary material that is best presented at the custodial hearing in the child's home state.[180]

Even though the best interests of the child analysis is subjective, it is the motivation for implementing a timeliness requirement under the Convention. Several articles under the Convention implement an expeditious approach to resolving disputes. Article Nine specifically states that the Central Authority which receives an application for return of a child "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."[181] Article Ten instructs "[t]he 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."[182] This is reiterated in Article Eleven stating that when the application is received by the judicial or administrative authorities of the Contracting State, they should "act expeditiously, and must state reasons for any delay if a decision has not been received by the requesting State within six weeks."[183] Additionally, Article Twelve gives the authority requesting the return of the child the right to order that return "forthwith" from the Contracting State where the child is currently living.[184]

178. Hague Convention, *supra* note 12, art. 4.
179. *See* Garbolino, *supra* note 3, at 22.
180. *See* Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).
181. Hague Convention, *supra* note 12, art. 9.
182. *Id.* art. 10.
183. *Id.* art. 11.
184. *Id.* art. 12.

One of the principal weaknesses of the Convention and its ability to impact the UCCJA is the limited number of states that have ratified it.[185] To date, fifty-four nations, including the United States, have ratified the Hague Convention.[186] If more international support is not achieved, non-participating nations might well become notorious as havens for children snatchers.[187]

In the case of Elian, when only one country—the United States—is a signator, the Convention becomes useless as a tool for implementing the return of the child under a body of international law.[188] As an alternative to all countries acceding to the Hague Convention, governments should, wherever possible, consider ratifying other treaties or enter into bilateral agreements in order to obtain more protection for their citizens when children are abducted to foreign jurisdictions.[189]

Adoption of The Convention on the Rights of the Child[190] (Child's Rights Convention) would have the most significant impact.[191] Ninety-two countries, including several Middle East states such as Egypt and Jordan, have ratified the Child's Rights Convention.[192] The United States has been unwilling to ratify the Child's Rights Convention because it contains human rights implications that might conflict with national security concerns.[193] However, in the best interests of U.S. citizens and especially our children, such treaties would be beneficial for the

185. *See* Blynn, *supra* note 14, at 382.

186. *See* Jess T. Ford, Assoc. Dir. Int'l Relations and Trade Issues, U.S. General Accounting Office, Prepared Statement Before the House Committee on International Relations (Oct. 14, 1999), *available in* Fed. News Serv., Oct. 14, 1999.

187. *See* Blynn, *supra* note 14, at 382.

188. *See* Motion for Preliminary and Permanent Injunction and Petition for Writ of Mandamus and Supporting Memorandum of Law at 9 n.11, Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (No. 00-0206) ("Some commentators, however, have incorrectly assumed the Hague Convention on the Civil Aspects of International Child Abduction might apply to this case. . . . Cuba is not a signatory to the Convention . . . and Juan Miguel has no right under either the Convention or the Act.").

189. *See* Barone, *supra* note at 58, at 120.

190. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448.

191. *See* Barone, *supra* note 58, at 120. *See generally* Cara L. Finan, *Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction*, 34 SANTA CLARA L. REV. 1007 (1994) (stating that in the United States alone, there are up to 350,000 cases of domestic and international child abduction reported each year).

192. Barone, *supra* note at 58, at 120.

193. *See id.*

left-behind parent to support arguments that an abducted child should be returned.[194]

Regional treaties, such as the Inter-American Convention on the International Return of Children,[195] are harmonious with the Hague Convention since they share similar objectives.[196] This additional legal remedy closes one more loophole and creates one less opportunity for the abducting parent to find a refuge to avoid returning the child.[197] This is ultimately in the best interests of the child.

Unless the government enacts legislation and provides leadership in implementing that legislation, the problem of child abductions will continue to grow. In 1988, the number of national and international abductions was estimated at 350,000.[198] However, in her October 1999 report, Mary A. Ryan, Assistant Secretary for Consular Affairs for the State Department, reported that in the ten years that the United States has been party to the Convention, over 2,000 children have been returned.[199] Recognizing that the Convention is not perfect, she noted that it does not always facilitate cases as it should.[200] "The world has changed since the Convention was conceived nineteen years ago when the majority of the abducting parents were the fathers."[201] Today seventy percent of the abductors are mothers, and the courts in some countries are reluctant to compel children to return to their fathers.[202]

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194. *See id.* *See also* Finan, *supra* note 191, at 1030-32. *But see* Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991) ("In order to invoke the Hague Convention relief, petitioner must satisfy two threshold issues: (1) lawful rights of custody at the time of removal/retention; and (2) that such removal or retention is from the child's habitual residence.").

195. Inter-American Convention on the International Return of Children, July 15, 1989, 29 I.L.M. 66 (1990). The Organization of American States (OAS) implemented the Inter-American Convention to avoid the additional requirements set forth in Article 32 of the Hague Convention. Article 32 states, "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."

196. *See* Barone, *supra* note 58, at 121.

197. *See id.*

198. *See* Finan, *supra* note 191.

199. *See* Mary A. Ryan, Assistant Sec. For Consular Affairs, U.S. Dep't of State, Prepared Statement Before the House Committee on International Relations (Oct. 14, 1999) *available in* Fed. News Serv., Oct. 14, 1999.

200. *See id.* at 38.

201. *Id.*

202. *See id.*

Nevertheless, prior to the United States becoming a party to the Convention, the return of abducted children was approximately twenty percent.[203] Today, about seventy-two percent of the cases result in return or access.[204] "The rate of return from the United States to other countries is even higher, approximately ninety percent, including voluntary returns."[205]

However, the custody battle for Elian has created a tense situation for many American parents trying to have their children returned from spouses living abroad.[206] Most parents interviewed said they were fearful of other countries drawing parallels between their cases and Elian's with the argument that the child's life will be better in their country.[207] Some parents "have been told their child must stay in a foreign land because it's a superior place to raise a child. Although many nations routinely return children taken from the United States, and the United States reciprocates, decisions are sometimes influenced by nationalism, religion or mere caprice."[208] The world is watching how the United States responds in the case of Elian Gonzalez to determine how they in turn should treat similar situations.

By recognizing the various shortcomings of the three statutes, the federal government has taken the first step to address not only the jurisdictional issue but also to prioritize the best interests of the child. However, with or without a legal mechanism that works effectively and in a timely manner, the left-behind parent and the child often have little recourse once the jurisdiction is awarded to the home state or country of the abducting parent. Often the only step remaining is self-help, resulting in a re-kidnapping by the parent or a team of professionally trained rescuers.[209] Many cases have been resolved in this way with parents turning to private mercenary groups that perform dangerous and often illegal tasks to help bring the child home.[210] The families then live in fear waiting for the next

203. *See id.*
204. *See id.*
205. *Id.*
206. *See* Cindy Loose, *With Kids Abroad, They Fret Over Elian*, MIAMI HERALD, Feb. 13, 2000, at 1L.
207. *See id.*
208. *Id.*
209. *See* Barone, *supra* note 58, at 114.
210. *See id.*

round of retaliation from the spouse, unless they are fortunate to have the other parent arrested for kidnapping. The fear disappears but the child continues to live without the support and nurturing of one parent. Nobody wins.

In an interview, Juan Miguel Gonzalez, Elian's father, indicated his frustration with the delays in returning his son to Cuba.[211] He suggested "that his U.S. kin were 'unfeeling' accomplices to 'child abuse.' Then he mused that he might come to Miami 'with a rifle and do away with' the Cuban exiles there who are fighting to keep Elian in the U.S.'"[212]

Elian remains in limbo even though a federal judge dismissed the lawsuit brought by the Miami relatives on the grounds that the INS lacked the authority to reject the asylum applications.[213] The court was satisfied that it had subject matter jurisdiction to consider the complaint and that Elian had standing through his great-uncle, Lazaro Gonzalez, and was a real party in interest in this complaint.[214] In its analysis, the court denied the plaintiff's claim of violation of constitutional due process, indicating that under parole one does not receive protected status.[215] In addition, the court concluded that the Attorney General acted within her discretion to recognize only the father's right to apply or not to apply for his son's asylum.[216]

Elian's Miami relatives appealed this decision to the Eleventh Circuit Court of Appeals in Atlanta, Georgia.[217] Despite the pending appeal, the Attorney General and the INS indicated that if the father came to get his son, they would turn the boy over to him.[218] The father subsequently came to Washington, D.C., in the hope of being reunited with his young son.[219]

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211. *See* Padgett, *supra* note 91, at 32.

212. *Id.*

213. *See* Gonzalez *ex rel.* Gonzalez v. Reno, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (granting Defendant's Motion to Dismiss or Alternative Judgment for Summary Judgment).

214. *See id.* at 1180-81.

215. *See id.* at 1187.

216. *See id.* at 1193-94 (relying on Chevron, U.S.A., Inc. v. Natural Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

217. *See* Jay Weaver, Frank Davies et al., *Sides in Elian Case Talking*, MIAMI HERALD, Mar. 23, 2000, at 1B.

218. *See* Frank Davies, *Reno Shares Dade's Pain but Vows to Uphold Law*, MIAMI HERALD, Mar. 31, 2000, at 1B.

219. *See* Neil A. Lewis, *Cuban Boy's Father, in U.S., Waits as Talks Stall*, N.Y. TIMES, Apr. 7, 2000, at A1.

Negotiations to return the child to his father continued to stall.[220] The Attorney General set a deadline for the child to be delivered to her chartered air flight at 2:00 p.m. the next day to fly with her to Washington.[221] The deadline came and went with no response from the Miami relatives.[222]

A federal appeals judge in Atlanta ruled that Elian might be able to decide his future for himself and ordered Juan Miguel to remain in the United States until after the May 11th appellate hearing, even if Elian was turned over to him.[223] Meanwhile, Reno met with President Clinton, who was growing impatient with Reno's inaction, and laid out the plan for immediate rescue of Elian.[224]

Finally, after a frantic thirty-six hour negotiation involving President Tad Foote of the University of Miami and a prominent Miami attorney, Aaron Podhurst, the moment long dreaded arrived.[225] Federal marshals dressed in riot gear invaded the Little Havana home of Lazaro Gonzalez at 5:00 a.m. on April 22, 2000, and seized the boy.[226] He was reunited with his father that morning in Washington, D.C.[227]

V. CONCLUSION

The Elian Gonzalez case underscores the need for the United States to enforce its laws expeditiously. When dealing with children who have been taken from their habitual residence or home state to another state or county without the consent of the left-behind parent, time is of the essence. Although the Hague Convention, the Uniform Child Custody Jurisdiction Act, and the Parental Kidnapping Prevention Act are designed to return the wrongfully removed or retained child to his home state for a custodial hearing, these legal mechanisms have failed to expedite

220. *See id.*

221. *See* Andres Viglucci, Jay Weaver et al., *Reno Wants Elian Today*, MIAMI HERALD, Apr. 13, 2000, at 1B.

222. *See id.*

223. *See* Gonzalez *ex rel.* Gonzalez v. Reno, No. 00-11424-D, 2000 WL 381901 (11th Cir. 2000).

224. *See* Karen Branch, Frank Davies et al., *Reno Prepared to Use Law Enforcement*, MIAMI HERALD, Apr. 21, 2000, at 1A.

225. *See* Nancy Gibbs & Michael Duffy, *The Elian Grab*, TIME MAG., May 1, 2000, at 29.

226. *See id.*

227. *See id.*

the system in a manner that is truly beneficial to the child. The child's expeditious return is essential for his well being, and that well being is compromised when various branches of government and government agencies cannot determine proper legal procedures or implement them.

Child custody disputes continue to occur regardless of state, national or international laws. However, the United States has taken a giant step in facilitating the return of many children to their habitual residence and their custodial parents. It is imperative that more countries become party to the Hague Convention or a similar agreement with specific requirements to return the child to his home state. In the meantime, the fact that a parent's claim does not fall within the Hague Convention, as with Cuba's non-signatory status, should not preclude the availability of legal aid for the left-behind parent. Allowing a jurisdictional question to turn into an international human rights or political issue merely clouds the situation, making the child a conduit for other agendas.

The case of Elian Gonzalez is testimony to the importance of a government's need to have clearly defined rules and regulations to eliminate confusion in child custody cases. The uncertainty for the child and his family for an indefinite time period defeats the urgency set down in Articles Nine, Ten and Eleven of the Convention. The United States must adopt a time requirement into the UCCJA to add more bite to that provision. Only then will the "best interests of the child" become a stronger consideration in this arduous process of jurisdictional and custodial resolution.

Elian was fortunate that he was found alive and rescued from the sea. However, U.S. immigration officials failed to use good judgment when they turned Elian over to his Miami relatives. The first consideration should have been to speak to Elian's father in Cuba. If Juan Miguel Gonzalez had made the decision to turn Elian over to his Miami relatives, the government would have conducted its normal investigation and then chosen its course of action. If the father decided to have the boy returned to Cuba, the INS would have expedited his request immediately. This would have resolved the situation according to the laws established by the INS. However, these procedures were not followed.

Although the Eleventh Circuit has heard the oral arguments from all parties, it has not ruled on whether a six-year-old child can request asylum. Whatever the outcome of the hearing, only one thing is certain: Elian's voyage should come to an end. He should not have to continue floating aimlessly through U.S. and international legal systems to place his feet on dry land at home.

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