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Global Business & Development Law Journal

Volume 13 | Issue 2 Article 7

1-1-2000

The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity

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I. INTRODUCTION

Technological advances in the last century simplified travel, enhanced communication between countries, and allowed the people of each country to become part of a global community with common interests and problems.[1] As a result, cross-cultural marriages are increasing, providing a social mechanism with the potential to foster understanding and tolerance among the many cultures of the world.[2] However, when these marriages dissolve and children are involved, the subsequent custody battles become global, and the incidence of international child abduction multiplies.[3] With the adoption of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention),[4] cases of international child abduction among signatory nations[5] are handled by the prompt

1. *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791, 791 (1998).

2. *See id.*

3. *See id.* Approximately 35 children are abducted out of the United States each month and 15 to 40 children are abducted into the United States each year. *See* Eric S. Horstmeyer, *The Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Tahan and Viragh and Their Impact on its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 125 (1995).

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49 [hereinafter Hague Convention]. The Hague Convention is an international treaty with the single purpose of returning children to their country of habitual residence. *See infra* notes 72-320 and accompanying text (discussing the Hague Convention).

5. Signatory nations are those nations that have signed and become a party to a treaty. BLACK'S LAW DICTIONARY 1387 (7th ed. 1999). A nation becomes a party to a treaty by ratification or by accession. Ratification of a treaty by a nation is the establishment of final approval by parties to a treaty and consent to be bound by it. *See*

return of the children to the country of their habitual residence,[6] where disputes can be resolved by the tribunals of that country.[7]

Together with a greater incidence of child abduction, another worldwide social problem—domestic violence—is also gaining prevalence.[8] Child abductions are often associated with domestic violence,[9] and prompt return of these children can result in their re-victimization.[10] Consequently, in international child abduction cases that involve domestic violence, the Hague Convention's primary interest in comity may conflict with the best interests of the children.[11]

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id. at 1268-69. The accession to a treaty by a nation is the entrance into agreement with an existing treaty that has already been agreed upon by other nations. *See id.* at 13. Signatory countries, also called Contracting Countries, are those countries that have approved the Convention either by ratification or by accession. The Hague Convention is in full force as a result of ratification or accession in the following countries: Argentina, Australia, Austria, Belgium, Bosnia-Herzegovina, Canada, Chile, China (Hong Kong and Macau Special Administrative Regions only), Croatia, Cyprus, the Czech Republic, Denmark (except the Faroe Islands and Greenland), Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, Ireland, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland (including the Isle of Man, the Cayman Islands, the Falkland Islands, Montserrat, and Bermuda), the United States, and Venezuela. *See Hague Conference on Private International Law, Status Sheet Convention #28* (visited Mar. 26, 2000) <http://www.hcch.net/e/status/abdshte.html> (copy on file with *The Transnational Lawyer*). The following countries conditionally approved the Hague Convention as a result of accession: the Bahamas, Belarus, Belize, Brazil, Burkina Faso, Chile, Columbia, Costa Rica, Cyprus, Ecuador, Fiji, Georgia, Honduras, Hungary, Iceland, Malta, Mauritius, Mexico, the Republic of Moldova, Monaco, New Zealand, Panama, Paraguay, Poland, Romania, Saint Kitts and Nevis, Slovenia, South Africa, Turkmenistan, Uruguay, Uzbekistan, and Zimbabwe. *See id.*

6. "Habitual residence" is purposefully not defined in the Hague Convention or in the federal statute that implements the Hague Convention in the United States. *See* 42 U.S.C. §§ 11601-11610 (West 1999); *see also* Regan Fordice Grilli, *Domestic Violence: Is It Being Sanctioned by the Hague Convention?*, 4 SW. J. L. & TRADE IN AM. 71, 74 (1997) (reporting that the framers of the Hague Convention intended for the concept of "habitual residence" to be fact-based rather than rigidly rule-based in an effort to promote consistency among the rulings of various countries). Therefore, the definitions of habitual residence are derived from the various court decisions of the signatory nations of the Hague Convention. *See also In re* Bates No. CA 122/89, Fam. Div Ct., (Eng. 1989) (explaining that there must be a "degree of settled purpose" and continuity to the place where the child lives for it to be considered the "habitual residence"); *see also* Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) (defining "habitual residence" as a "place where [the child] 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"); *see also* Friedrich v. Friedrich, 983 F.2d 1396, 1396 (6th Cir. 1993) (concluding that "habitual residence" is the "customary residence prior to the removal").

7. *See* Hague Convention, *supra* note 4, art. 1.

8. *See* Lori Heise et al., *Ending Violence Against Women*, POPULATION REPORTS (visited Dec. 1999) <http://www.jhuccp.org/pr/111/111creds.stm> (copy on file with *The Transnational Lawyer*) [hereinafter *Ending Violence Against Women*].

9. *See generally* Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 796 (1997).

10. *See id.* at 798 (emphasizing that when the role that domestic violence plays in parental kidnaping is not recognized, the "prompt return" provision of the Hague Convention could assist an abuser in retrieving the child in order to punish or exert control over the abused parent or child).

11. *See* Elisa Perez-Vera, *Explanatory Report on the Convention on the Civil Aspects of International Child Abduction adopted by the Fourteenth Session*, ¶¶ 21, 25 (visited Feb. 26, 2000) <http://www.hiltonhouse.com/articles/Perez_rpt.txt> (copy on file with *The Transnational Lawyer*) [hereinafter Perez Report] (explaining that the drafters of the Hague Conference wished to avoid the use of "the best interest of the child" as a legal standard and therefore avoided using the term in the language of the Treaty). However, the examples provided in the Treaty are

The Hague Convention successfully facilitated the return of many abducted children to the countries of its signatory nations.[12] The Hague Convention prevents an abducting parent from seeking a more favorable custody decision in another country by requiring the return of an abducted child to the jurisdiction of his or her home country.[13] However, at the time the Hague Convention was drafted, domestic violence had not yet been clearly exposed as a social problem.[14] Therefore, domestic violence, though now viewed as a worldwide social problem,[15] was not specifically considered when the Hague Convention was drafted. The current impact of domestic violence on child abduction challenges the traditional manner with which child abduction is dealt internationally.

This Comment discusses the implications for the protection of children when domestic violence and child abuse are involved in cases of international child abduction to or from signatory nations of the Hague Convention. It focuses on the potential inadequacies of the Hague Convention to protect these abducted children. Part II provides background information regarding the incidence and characteristics of domestic violence, child abuse, and parental child abduction.[16] Part III examines the provisions of the Hague Convention and its narrowly applied exceptions.[17] Part IV reviews select cases of international child abduction involving domestic violence and child abuse that are defended under the "grave risk of harm" exception.[18] Part IV also emphasizes an exemplary case of first impression involving children abducted from France to the United States, in which the court found clear and convincing evidence of domestic violence.[19] Part V considers changes in the application of the Hague Convention that will better protect children in cases where

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"concrete illustrations" of a "best interests of the child" standard. *See id.* Because the best interests of the child are at the heart of a custody decision, determination of such interests are, in fact, custody determinations. *See id.* ¶ 22 (remarking that "internal jurisdictions" award custody primarily based on the best interests of the child). The drafters of the Treaty believed that the "best interests of the child" are served by protecting the child from wrongful removal or retention. *See id.* Some courts reason that the best interests of the child are most appropriately determined by the tribunal of the child's habitual residence, where facts essential to such determinations are most readily available to that tribunal. *See* Robinson v. Robinson, 983 F. Supp. 1339, 1344 (D. Colo. 1997); *see also* Turner v. Froweln, 752 S.2d 955, 971 (1999); *see also Gunsburg v. Greenwald (1993) (Israel), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/gunsbur2.isr> (copy on file with *The Transnational Lawyer*) [hereinafter *Gunsburg*].

12. *See* Jacqueline D. Golub, *The International Parental Kidnaping Crime Act of 1993: The United States' Attempt to Get Our Children Back—How Is It Working?*, 24 BROOK. J. INT'L L. 797, 797 (1999).

13. *See* Grilli, *supra* note 6, at 73.

14. *See* Carol S. Bruch, *The Hague Child Abduction Convention: Past-Accomplishments, Future Challenges*, 1 EUR. J. L. REFORM 97, 105 (1998/1999).

15. *See* Armatta, *supra* note 9, at 775 (describing violence against women in intimate relationships as "a worldwide phenomenon").

16. *See infra* notes 21-71 and accompanying text.

17. *See infra* notes 72-320 and accompanying text.

18. *See infra* notes 321-516 and accompanying text.

19. *See infra* notes 414-83 and accompanying text (discussing the case of Blondin v. Dubois).

clear and convincing evidence of the risk of grave harm to children by the non-abducting parent is evident.[20]

II. BACKGROUND

Many victims of domestic violence flee their homes to protect themselves and their children from their abusers.[21] Perhaps because domestic violence most often occurs within the privacy of the home[22] and is so pervasively linked to the abuser's culture,[23] data regarding its mere existence lacks precision.[24] Nevertheless, the existence of a nexus between international child abduction and domestic violence is demonstrated by a number of cases.[25] Accordingly, a basic understanding of the characteristics of domestic violence, child abuse, and international child abduction is important to the discussion of any case brought under the Hague Convention involving these issues.

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20. *See infra* notes 517-50 and accompanying text.

21. *See* AMERICAN BAR ASS'N, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE A.B.A. 1, 14 (1994) [hereinafter IMPACT OF DOMESTIC VIOLENCE].

22. *See* PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 1, 73 (Jana L. Jasinski & Linda M. Williams eds., 1998) [hereinafter PARTNER VIOLENCE].

23. *See* Armatta, *supra* note 9, at 776-86 (detailing the insidious manner in which domestic violence is woven into one's culture through women's accounts of domestic violence among different cultures followed by a discussion of the history of "legal complicity" among the legal systems of the world); *see also id.* at 782 (describing the "duty of chastisement" in England and North America whereby husbands were encouraged to physically discipline their wives, and a 1990 decree in Iraq allowing men to kill their wives for adultery).

24. *See id.* at 775 (admitting that "[t]he actual extent of violence in the home may never be accurately known," but asserting that domestic violence is part of many families around the world involving all classes and cultures of people).

25. *See, e.g.*, Blondin v. Dubois, 78 F. Supp. 2d 283, 285 (S.D.N.Y. 2000) (finding clear and convincing evidence of domestic violence and child abuse, and therefore the children were not returned); *see also* Nunex-Escudero v. Tice-Menley, 58 F.3d 374, 374 (8th Cir. 1995) (finding insufficient evidence of child abuse and therefore requiring the return of the child); *see also* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 456 (D. Md. 1999) (refusing father's petition for the return of the child due to child abuse and domestic violence); *see also* Turner v. Frowein, 752 A.2d 955, 955 (Conn. 2000) (remanding for exploration of whether the child might be repatriated without being in the custody of abusing father); *see also Wright v. Gueriel (1993) (Fr.), available in* William M. Hilton, *Hilton House* (visited Sept. 7, 2000) <http://www.hiltonhouse.com/cases/Wright_france.txt> (copy on file with *The Transnational Lawyer*) (denying return of child due to evidence of violent threats) [hereinafter *Wright*].

A. Domestic Violence and Child Abuse

Domestic violence and child abuse are encompassed by the term "family violence."[26] Domestic violence or "battering"[27] is defined as the use, or threat of use, of physical force against a partner that results in fear or injury.[28] Although instances do occur when women batter men, most domestic violence is perpetrated by men upon women.[29] Child abuse refers to the infliction of injuries upon children by parents and other adult caretakers.[30]

Domestic violence is recognized as a serious worldwide problem.[31] In the past decade, the United Nations took a stand opposing violence against women[32] and child abuse,[33] and participated in the development of strategies for the global elimination of violence against women.[34] A recent study reveals that at least one out of every three women around the world is "beaten, coerced into sex, or otherwise abused in her lifetime."[35] Unfortunately, between forty and sixty percent of men that abuse women also abuse children.[36] Moreover, twenty percent of women that abduct a child do so to escape family violence.[37]

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26. *See* Armatta, *supra* note 9, at 775.

27. IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 1. The term "domestic violence" is used in this Comment because it is the more commonly recognized term; however, the term "partner violence" is synonymous with "domestic violence." *See* PARTNER VIOLENCE, *supra* note 22, at 73. The term "partner violence" emphasizes that violence can occur between male partners or female partners, as well as, male and female partners. *See id.*

28. *See* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 1. When partners are married, such abuse is termed "spousal abuse." *See id.* However, because many partners never marry or marriages end in divorce, the broader term, domestic violence, is used to include all partners living together. *See id.*

29. *See id.* at 1. (reporting that of all U.S. spousal violence, 91% involved women victimized by husbands or ex-husbands).

30. *See id.* (describing child abuse, sibling abuse, and elder abuse as types of violence that occur under the broader umbrella of domestic violence). Child abuse is also defined as "[a]n intentional or neglectful physical or emotional injury imposed on a child, including sexual molestation." BLACK'S LAW DICTIONARY 10 (7th edition 1999).

31. *See* Armatta, *supra* note 9, at 844.

32. *See Declaration on the Elimination of Violence against Women*, U.N. GAOR, 48th Sess., art. 4, U.N. Doc. A/RES/48/104 (1993) (declaring that "[s]tates should condemn violence against women and should not invoke any custom, tradition, or religious consideration to avoid the obligations with respect to its elimination").

33. *See Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., at art. 1-54, U.N. Doc. 44/25 (1989) (recognizing rights and needs of children internationally).

34. *See International Centre for Criminal Law Reform and Criminal Justice Policy, Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice: Resource Manual 1* (1999) (visited Feb. 12, 2000) <http://137.82.153.100/reports/vawmanua.pdf> (copy on file with *The Transnational Lawyer*).

35. *Ending Violence Against Women*, *supra* note 8 (reporting the findings of the first worldwide study of domestic violence, including 2,000 domestic violence studies in at least 20 countries).

36. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGY ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 80 (1996).

37. *See* Grilli, *supra* note 6, at 85. Conversely, batterers may retaliate against their former partners by abducting a child produced by the relationship. *See* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 14. *See* Turner v. Frowein, 752 A.2d 955, 962 (Conn. 2000) (detailing the facts of a case in which the abusing father took a child from the mother without informing her of the whereabouts of the child as a means of retaliation against the mother).

Children that do not experience actual physical abuse but are exposed to domestic violence can suffer the same enduring effects as children that are physically abused.[38] Children see and hear more violence than their parents realize.[39] Violence in family relationships profoundly effects the development of children. It also increases the likelihood that, as adults, these children will exhibit aggressive behavior and violence against their own partners and children, commit violent crimes, or view violence among intimates as normal, or at least, expected behavior.[40]

Flight from the abusing parent and displacement to a shelter creates a stressful situation for the child involved.[41] Children often exhibit more signs of depression, anxiety, and lower self-esteem living in a shelter than living in the violent home from which they came.[42] The victims of domestic abuse who do not have financial resources face a complex dilemma — either find shelter in a setting that is traumatic for their children or stay with their abuser, placing themselves and their children at risk of further physical and psychological harm.[43]

Perhaps due to the perception of domestic violence as a familial problem that can be remedied by mediation or non-legal interventions such as counseling,[44] women often stay or return to their abusers.[45] Regrettably, arrests, prosecutions, restraining orders, batterer rehabilitative treatment, and other non-legal interventions prove ineffective in deterring repeated abuse.[46] As violence increases, women are compelled to leave abusive relationships. They realize that "he" will not change and the children are being harmed.[47]

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38. *See Ending Violence Against Women*, *supra* note 8.

39. *See* PARTNER VIOLENCE, *supra* note 22, at 78; *see also* L. A. McCloskey et. al., *The Effects of Systematic Family Violence on Children's Mental Health*, 66 CHILD DEV. 1239, 1239-61 (1995) (finding that half of the children from violent families witness potentially lethal violence, such as choking). Children hear screaming, pleading, and sobbing as fists hit bodies, property is shattered, and people are thrown against walls. *See id.* They may also see blood, bruises, and other manifestations of physical injury. *See also* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 1 (estimating that 87% of children in homes with domestic violence witness the battering).

40. *See* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 1. The use, rationale, and acceptance of violence are learned as a result of witnessing and experiencing violence. *See* RICHARD J. GELLES, THE VIOLENT HOME 189 (1972).

41. *See* PARTNER VIOLENCE, *supra* note 22, at 93.

42. *See id.*

43. *See* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 17.

44. *See* JEFFERY FAGAN, A Presentation at the Annual Conference on Research and Evaluation of the National Institute of Justice, The Bureau of Justice Assistance, and The Office of Juvenile Justice and Delinquency Prevention on the Subject of "What To Do About Crime" (JULY 10, 1995), *reprinted in* NIJ RES. REP.: THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 1, at 8 (citation omitted) [hereinafter CRIMINALIZATION OF DOMESTIC VIOLENCE].

45. *See Ending Violence Against Women*, *supra* note 8, pt. 2.3 (listing the following reasons that women world-wide remain in abusive relationship: fear of retribution, lack of independent financial resources, concern for the children, emotional dependence, non-supportive family and friends, the social stigma of being single, and "an abiding hope that 'he will change'").

46. *See* CRIMINALIZATION OF DOMESTIC VIOLENCE, *supra* note 44, at 1.

47. *See Ending Violence Against Women*, *supra* note 8, pt. 2.3.

Escape from the abuser itself is dangerous because once the parents physically separate, the violence often escalates.[48] Abused women are at the highest risk of being killed by their batterers during the time following separation.[49] Considering these aspects of domestic violence, the decision to abduct children from their country of habitual residence is a reasonable course of action. Indeed, for those abused, international child abduction may be viewed as necessary for survival.

B. *International Child Abduction*

International child abduction or kidnaping[50] generally refers to the wrongful removal or retention of a child by the child's parent or guardian to another country. The abductions are most often associated with custody disputes between the parents.[51] The United States reported 6,774 cases of parental child abduction between 1976 and 1996.[52] Since the ratification of the Hague Convention, the return rate of abducted children to the United States increased from twenty percent to seventy-two percent.[53] About ninety percent of those children abducted from the United States have been returned.[54] Twenty years ago, the majority of abducting parents were fathers.[55] Today, seventy percent are mothers.[56] Despite the strides made in returning children, the number of children abducted continues to rise,

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48. *See* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 11.

49. *See id*; *see* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 461-62 (D. Md. 1999) (acknowledging that the very proceedings of the case "increased exponentially" the risk to the wife and children of a plaintiff found to be abusive).

50. *See* Perez Report, *supra* note 11, ¶ 55 (explaining that the use of the term "abduction" in the title of the Hague Convention is used to "attract attention" despite the term's legal precision). Conversely, the United States uses the term "kidnapping" in its International Parental Kidnapping Crime Act of 1993 (IPKCA), which makes it a federal crime for a parent to wrongfully remove or retain a child anywhere outside the United States. *See* 18 U.S.C. § 1204 (1995); *see also infra* note 118 (discussing the IPKCA).

51. *See* Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 11 (1994); *see also supra* note 37 and accompanying text (inferring that the other 89% of women who abduct a child do so for reasons other than to escape family violence).

52. *See* Golub, *supra* note 12, at pt. II.B. Annual statistical data regarding the prevalence of international child abduction in the United States is not available; however, last year the State Department reported to Congress plans for a comprehensive tracking system that allows for accurate statistics on child abductions to and from the United States. *See* Mary A. Ryan, Statement Before the Committee on International Relations of the U.S. House of Representatives Concerning the Implementation of the Hague Convention on the Civil Aspects of Int'l Child Abduction (Oct. 14, 1999), *reprinted in Statement of Assistant Secretary for Consular Affairs of the U.S. Department of State* (visited Feb. 13, 2000) <http://travel.state.gov/101499mar.html> (copy on file with *The Transnational Lawyer*) [hereinafter *State Dep't Report to Congress*]. The United Kingdom reports an annual increase from 16 cases in 1986 to 191 cases in 1991. GERALDINE VAN BUEREN, THE BRITISH INST. OF HUMAN RIGHTS, THE BEST INTEREST OF THE CHILD-INTERNATIONAL CO-OPERATION ON CHILD ABDUCTION 10 (1993).

53. *See State Dep't Report to Congress*, *supra* note 52, ¶ 7.

54. *See id.*

55. *See id.*

56. *See id.*

speculatively due to the greater number of multi-cultural marriages and divorces and the ease of international travel.[57]

Wrongful removal occurs "when one parent wrongfully leaves the country with the child"; whereas, wrongful retention is triggered "at the point in time when the wronged parent asks for the return of the child, and the other parent refuses."[58] Abductions often arise from one parent's desire to obtain or retain custody of a child, either for love of the child or in retaliation against the other parent.[59] The abducting parent may experience a complex mixture of emotions, including love, hate, fear, jealousy, and deprivation.[60] Eighty percent of the left-behind parents reported that prior to the abduction, the abducting parent stated that the left-behind parent would never see his or her children again.[61] Many left-behind parents also reported that the abductor threatened their lives, the lives of their children, or the lives of others.[62] In addition to a desire to obtain or retain custody of a child, other motives for abduction include hope for the family to ultimately reunite or concern that the best interests of the child require a different religious and social culture.[63]

Regardless of the motives, children suffer conflicting emotional turmoil as they are forced to choose between parents. The aggrieved, left-behind parent experiences great pain.[64] One study shows that more than half of the children abducted exhibit

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57. *See* VAN BUEREN, *supra* note 52, at 5.

58. Starr, *supra* note 1, at 795-96. "Innocent parent," "[l]eft-behind parent," "deprived parent," "wronged parent" and "aggrieved parent" are synonymous terms for the parent from whom the child is taken. *See* Monica Marie Copertino, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Its Efficacy*, 6 CONN. J. INT'L L. 715, 742 (1991) (depicting the parent from whom the child is taken as the "innocent parent"); *see also* Linda Girdner et al., *Profile of the Abductors Most Likely to Succeed* (visited Jan. 5, 2000) <http://www.hiltonhouse.com/articles/Profile-abductor.txt> (copy on file with *The Transnational Lawyer*) (referring to the parent from whom the child is taken as same parent as the "left-behind" parent); *see also* Rania Nanos, *The Views of A Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOK. J. INT'L L. 437, 447 (1996) (using the term "aggrieved parent"); *see also* Starr, *supra* note 1, at 796 (referring to the parent without the child as the "wronged parent"); *see also* VAN BUEREN, *supra* note 52, at 5 (identifying the same parent as the "deprived parent").

59. *See* Tom Harper, *The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-Abduction*, 9 EMORY INT'L L. REV. 257, 257 (1995).

60. *See* VAN BUEREN, *supra* note 52, at 5.

61. *See* Girdner et al., *supra* note 58.

62. *See id.* (reporting that 60% of wronged parents reported that the abducting parent threatened the life of the left-behind parent, 20% reported that same threat made against the children's lives, and 40% reported similar threats to others); *see also supra* note 37 (highlighting that not all abductions involving domestic violence involve the flight of the abused; sometimes the abuser becomes the abductor of the children and the abduction is itself another form of violence against the partner).

63. *See* VAN BUEREN, *supra* note 52, at 5 (characterizing some abductions as "last ditch attempt[s] to pull back together a broken family"). *But cf. id.* (noting that in some cases, however, the abduction is motivated by the abuse of the dowry tradition for the benefit of the abducting parent rather than the child). *See id.* A dowry, a brideprice, or a lobola are words used from Portugal and Spain to India, Africa, or the Middle East, meaning the payment made to the husband's family upon marriage and has been linked to murders committed in efforts to obtain material wealth. *See* Armatta, *supra* note 9, at 787-88.

64. *See* Horstmeyer, *supra* note 3, at 125.

a decline in their ability to function from the time taken to the time returned.[65] In addition to the conflicting emotions and feelings of guilt that children may experience after being abducted by one parent, children that are taken to another country must deal with the additional stress of adapting to a foreign culture with language barriers and the isolation from established supportive relationships.[66]

Wronged parents of international child abduction not only suffer the pain of loss and the fear of not knowing the condition of their children, but they are also disadvantaged in finding a remedy.[67] First, the parent must find the child, which is not easy in a foreign country even with governmental assistance.[68] In some countries that are parties to the Hague Convention, locating the child is hindered by a lack of interagency coordination and resources.[69] However, the deterring effects of the Hague Convention are evidenced by the fact that, since the creation of the Convention, the number of children abducted to non-Hague Convention countries has grown, while the number abducted to Hague Convention countries has declined.[70] Despite its imperfections, the Hague Convention provides a "vast improvement over the lack of any international mechanism whatsoever" and is well worth the continued work to improve its implementation.[71]

III. THE HAGUE CONVENTION

A. *Ratification and Accession By Party Countries*

The Hague Convention on Private International Law convenes every four years to evaluate conventions devised by specialized groups.[72] In October 1980, the

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65. *See* Geoffrey L. Greif, *Impact on Children of International Abduction* (visited Feb. 13, 2000) <http://www.hiltonhouse.com/articles/Impact.txt> (copy on file with *The Transnational Lawyer*) (summarizing a study of the effects the crossing of international borders during a parental abduction had on children, drawn from a sample of 371 searching parents).

66. *See id.*

67. *See* VAN BUEREN, *supra* note 52, at 5.

68. *Compare id.* (describing generally the disadvantages of the deprived parent in locating a child in "unfamiliar foreign terrain" and then trying to assert custodial rights), *with* Harper, *supra* note 59, at 264-67 (exploring the difficulties encountered when a child is abducted to "safe harbors," meaning nations that are not parties to the Hague Convention, where custody is determined by the internal laws of that nation and often favor the father regardless of the circumstances). A full discussion of international child abduction involving non-Hague Convention countries is beyond the scope of this Comment.

69. *See State Dep't Report to Congress*, *supra* note 52; *see also* Bruch, *supra* note 14, at 106 (depicting an increased membership in the Hague Convention by countries that are not equipped to carry out the necessary obligations of the Convention and noting that in 1997, a study of Central Authority operations revealed that three member countries could not be reached at the facsimile numbers that they had provided to the Permanent Bureau and an additional country replied to an inquiry by requesting a copy of the Convention).

70. *See* Golub, *supra* note 12, at 797 (noting that the United States passed of the IPKCA of 1993 out of frustration over the inability to deter the growing incidence of child abduction to nonsignatory countries). Three-fourths of the world's countries are not signatories to the Hague Convention. *See* Starr, *supra* note 1, at 793.

71. *State Dep't Report to Congress*, *supra* note 52, at 2.

72. *See* Copertino, *supra* note 58, at 720.

Convention explored the increased prevalence of parental kidnaping.[73] Convention members unanimously approved the Hague Convention,[74] and the first countries to sign the resulting Treaty were Canada, France, Greece, and Switzerland.[75] Since the Convention was opened for ratification by the member nations, fifty-three countries,[76] including the United States,[77] became Party Countries either through ratification or accession.[78]

B. Purpose and Philosophy

Article 1 of the Hague Convention clearly states the purposes of the Treaty. The Treaty seeks (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State."[79] The Hague Convention requires a "respectful reciprocity and extremely close cooperation" among its signatory countries.[80] The Convention's goal of preventing international child abduction rests upon the unanimous refusal of member countries to recognize wrongful parental kidnaping by promptly returning abducted children to their habitual residences.[81] In practice, this requires that each Contracting State acknowledge that the authorities of the child's habitual residence are in the best position to decide questions of custody and visitation.[82]

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73. *See id.*

74. *See id.* at 720 n.38 (noting that 29 countries adopting the Hague Convention included: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, the Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Norway, the Netherlands, Portugal, Spain, Sweden, Switzerland, Surinam, Turkey, the United Kingdom, the United States, Venezuela, and Yugoslavia).

75. *See id.* at 720 (stating that the United States signed the convention on December 23, 1981).

76. *See* Office of Children's Issues, the U.S. Central Authority, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Party Countries and Effective Dates with U.S.*, (visited Feb. 27, 2000) <http://travel.state.gov/hague_list.html> (copy on file with *The Transnational Lawyer*) (reporting the following countries as Party Countries with the United States: Argentina, Australia, Austria, the Bahamas, Belize, Bosnia and Herzogovina, Burkino Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), Colombia, Croatia, the Czech Republic, Cyprus, Denmark, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, the Former Yugoslav Republic of Macedonia, Mauritius, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Macau, Romania, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, the United Kingdom, Bermuda, the Cayman Islands, the Falkland Islands, the Isle of Man, Montserrat, Venezuela, and Zimbabwe).

77. The U.S. Senate unanimously ratified the Hague Convention on October 9, 1986. *See* Copertino, *supra* note 58, at 721. The United States codified the Treaty in the International Child Abduction Remedies Act of 1988. *See* 42 U.S.C.A. §§ 11601-11610 (West 1995).

78. *See generally supra* note 5 (defining ratification and accession).

79. Hague Convention, *supra* note 4, art. 1.

80. Jan Rewers McMillan, *Getting Them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. AM. ACAD. MATRIM. LAW. 99, 100 (1997). Indeed, commentators predicted that the effectiveness of the Convention would depend upon "the concept of reciprocity." Perez Report, *supra* note 11, ¶ 37; *see also* Levesque v. Levesque, 816 F. Supp. 662, 664 (D. Kan. 1993).

81. *See* Perez Report, *supra* note 11, ¶ 34.

82. *See* McMillan, *supra* note 80, at 102.

While the preamble of the Hague Convention declares "the interest[s] of children are of paramount importance in matters relating to their custody,"[83] the Treaty is not concerned with the determination of which parent gets custody of the child or the enforcement of decisions regarding custody.[84] The simple and limited objective of the Hague Convention is to cause the prompt return of an abducted child to his or her habitual residence so that a court of that country can resolve issues of custody and visitation.[85] The Treaty is based upon the recognition that the "true victim" of child abduction is the child who suffers the uprooting from his or her environment, the traumatic loss of contact with a parent who has participated in his or her care, and the insecurity involved in adapting to a strange language and culture.[86]

The Hague Convention "unequivocally" supports the concept that "access rights are the natural counterpart of custody rights" and must be recognized as belonging to the non-custodial parent.[87] Although the Treaty does not define "access rights," it does characterize "the right to take a child for a limited period of time to a place other than the child's habitual residence" as a right included in the rights of access.[88] The Convention has no mandatory provision for the effectuation of access rights similar to its provisions for breaches of custody rights, but it seeks to promote the exercise of access rights through goodwill measures extended by the Central Authority of the Contracting State involved.[89]

C. *Provisions*

1. *The Child's Prompt Return to Habitual Residence*

The Hague Convention does not deal with any criminal aspect of child abduction or extradition,[90] but instead provides a civil remedy[91]—the mandatory and prompt return of the child to his or her habitual residence.[92] Contracting States are required under the Hague Convention to use "the most expeditious procedures available" to achieve the return of the child to his or her "habitual residence."[93] Although the term "habitual residence" is not defined by the Treaty, its meaning can

83. Hague Convention, *supra* note 4, preamble.
84. *See* Copertino, *supra* note 58, at 722.
85. *See id.*
86. *See* Perez Report, *supra* note 11, ¶ 24.
87. *Id.* ¶ 26.
88. Hague Convention, *supra* note 4, art. 5(b).
89. *See* A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 554-55 (1981). Mr. Anton was the chairman of the committee that drafted the Hague Convention. *See id.* at 556 n.1; *see also supra* notes 97-112 and accompanying text (discussing the purpose and duties of the Central Authority).
90. *See* Copertino, *supra* note 58, at 722.
91. *See* Golub, *supra* note 12, at 798.
92. *See* Hague Convention, *supra* note 4, art. 1.
93. *Id.* art. 2.

be gleaned from a number of Hague Convention cases.[94] A comprehensive definition of "habitual residence" is the place where a child was "physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."[95] The Convention fosters expeditious action on the part of the Contracting States by bestowing upon the applicant the right to request a statement explaining the reason for a delay of more than six weeks from the initiation of proceedings to the decision regarding the return of the child.[96]

2. *Central Authorities*

The success or failure of the Hague Convention to effectuate the return of a child is dependent upon a system of "Central Authorities."[97] Each Contracting State must specify a Central Authority to carry out the duties imposed by the Convention.[98] The designation of a Central Authority is intended to streamline the process of returning a child to his or her habitual residence by bypassing diplomatic channels and proceeding directly to the administrative body that typically handles custody and care of children.[99] Yet, an application to a Central Authority is not required under the Hague Convention, and a wronged parent may instead go directly to the judicial entities of the Contracting State to bring an action under the Convention.[100] However, perhaps due to knowledge gained through experience, Central Authorities can expedite the process of finding and returning an abducted child.[101]

The language of the Hague Convention allows the role of the Central Authorities to vary from state to state.[102] Nevertheless, the role of the Central Authorities generally involves both judicial remedies and the coordination of various non-judicial tasks to mediate the return of abducted children.[103] The duties of Central Authorities include the following: (1) locating abducted children,[104] (2)

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94. *See generally supra* note 6 (reviewing several cases that define habitual residence).

95. Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995); *see also supra* note 6.

96. *See* Hague Convention, *supra* note 4, art. 11.

97. *See id.* arts. 6-7.

98. *See id.* art. 6. For example, the Office of Children's Issues of the U.S. Department of State is the designated Central Authority for children abducted *from* the United States, and the National Center for Missing and Exploited Children is the Central Authority for children abducted *to* the United States. *See* Hague Conference on Private International Law, *Central Authorities #28* (last modified June 5, 2000) <http://www.hcch.net/e/authorities/caabduct.html> (copy on file with *The Transnational Lawyer*) (identifying the Central Authorities of Contracting Countries to the Hague Convention and providing addresses, e-mail addresses, and telephone numbers for each of those Central Authorities).

99. *See* Anton, *supra* note 89, at 547.

100. *See* Silberman, *supra* note 51, at 13.

101. *See id.* (noting the importance of the Central Authorities in the process of returning abducted children).

102. *See* Hague Convention, *supra* note 4, arts. 6-7; *see also* Anton, *supra* note 89, at 547.

103. *See* Silberman, *supra* note 51, at 12.

104. *See* Hague Convention, *supra* note 4, art. 7(a).

assisting in all possible ways to amicably resolve the abduction event,[105] (3) taking steps to prevent further harm to the child and ensuring unbiased treatment of the interested parties,[106] (4) providing information about the laws of their states and the background of a child involved with an application,[107] (5) instituting proceedings for the return of children,[108] (6) planning and implementing the safe return of abducted children,[109] (7) providing or facilitating the provision of legal assistance and counsel,[110] and (8) in some cases, arranging the effective exercise of rights of access.[111] These duties may be carried out directly by the Central Authority or by other public or private agencies at the direction of the Central Authority.[112]

3. *Costs and Expenses*

The Central Authority of each Contracting State is responsible for its own costs arising from implementation of the Hague Convention.[113] Unless a Contracting State specifically makes a "reservation,"[114] the State may not impose a charge for applications submitted to its Central Authority under the Convention or for costs of proceedings or legal counsel.[115] Additionally, Contracting States are obligated to ensure that the same legal aid services that are provided to the nationals of its own State are provided to persons from other Contracting States.[116] Applicants may be required to pay for the expenses involved in the return of the child, or a court may

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105. *See id.* art. 7(c).
106. *See id.* art. 7(b).
107. *See id.* art. 7(d)-(e).
108. *See id.* art. 7(f).
109. *See id.* art. 7(h).
110. *See id.* art. 7(g).
111. *See id.* art. 7(f).
112. *See id.* art. 7; *see also* Anton, *supra* note 89, at 547.
113. *See* Hague Convention, *supra* note 4, art. 26.
114. *See id.* art. 42 (providing that each Contracting State, at the time of ratification, acceptance, approval, or accession of the Convention, has the option to declare "reservations" to assuming the legal fees which are not covered by its legal aid program); *see also id.* arts. 24, 42 (permitting only two reservations upon becoming a Contracting State: (1) a Contracting State may opt not to be responsible for the court and legal costs that exceed the amount covered by its own legal aid system and (2) a Contracting State may object to providing applications and related documents in either French or English, but not both). A reservation is "a nation's formal declaration, upon signing or ratifying a treaty, that its willingness to become a party to the treaty is conditioned on certain additional terms that will limit the effect of the treaty in some way." BLACK'S LAW DICTIONARY 1309 (7th ed. 1999).
115. *See* Hague Convention, *supra* note 4, art. 26; *see also* Silberman, *supra* note 51, at 14 (reporting that other Contracting States have sharply criticized the United States for making a reservation limiting its obligation to cover legal costs beyond that provided by its own system of legal aid). The U.S. reservation to the Hague Convention is mitigated somewhat by its codification of the Treaty. *See* International Child Abduction Remedies Act, 42 U.S.C.A. § 11607(b)(1)(3) (West 1995) (requiring a court ordering the return of a child to order the abductor to pay legal fees as "clearly inappropriate"). The U. S. State Department also seeks to provide attorney services by attempting to enlist private attorneys on a pro bono or reduced-fee basis. *See* Silberman, *supra* note 51, at 14. In California, local prosecutors may act on behalf of applicants bringing actions under the Hague Convention. *See* CAL. FAM. CODE §§ 3130-3133 (West 1994).
116. *See* Hague Convention, *supra* note 4, art. 25.

direct the abductor to pay the applicant's necessary expenses incurred in searching for the child and in returning the child, including legal and travel costs.[117]

4. Non-Exclusivity Provision

The Hague Convention does not preclude action taken simultaneously under alternate laws of a Contracting State.[118] The non-exclusivity feature of the Hague Convention is demonstrated in the following three ways: (1) the court or administrative authority of any Contracting State may order the return of the child at its discretion,[119] regardless of the applicable exceptions,[120] (2) the Convention does not restrict the right to bring an action directly to the judicial or administrative authorities of a Contracting State, whether it is or is not based upon the Hague Convention,[121] and (3) the Hague Convention only takes precedence over the Hague Convention of October 5, 1961 regarding the protection of minors, and otherwise does not limit the application of any other treaty or law of the Contracting State governing the return of an abducted child.[122] The non-exclusive nature of the Hague Convention is supported by the fact that the Convention does not speak to the merits

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117. *See id.* art. 26; *see also* Anton, *supra* note 89, at 554.

118. *See* William M. Hilton, *The Non-Exclusivity Feature of the Convention on the Civil Aspects of International Child Abduction*, 9 AM. J. FAM. L. 69 (1995), *available at* <http://www.hiltonhouse.com/articles/Nonexclu.art> (copy on file with *The Transnational Lawyer*). A discussion of alternative law is beyond the scope of this Comment, but the reader is advised that there are several avenues available to address international child abduction under the laws of the United States and other Contracting States of the Hague Convention. In the United States, in lieu of or in addition to an action brought under the Hague Convention, a left-behind parent may also bring an action in the U.S. courts under the Uniform Child Custody Jurisdiction Act of 1980 (UCCJA). *See* National Conference of Commissioners on Uniform State Laws, *Uniform Child Cusody Jurisdiction Act* (1968) (visited June 29, 2000) <http://www.hiltonhouse.com/codes/Uccja.txt> (copy on file with *The Transnational Lawyer*). The purpose of the UCCJA is to provide a mechanism to prevent conflicting custody decrees by requiring all those who enact the Act to grant full faith and credit to the "home" jurisdiction of the child. *See id.* The UCCJA provides the following advantages for a left-behind parent: (1) the Act is effective for the return of any child under 18 years of age rather than 16 and (2) the exceptions to return that apply under the Hague Convention do not apply under UCCJA. *See* Hilton, *supra*. However, six U.S. states have not adopted the international application of UCCJA, including the following: Missouri, Ohio, Oregon, New Mexico, South Dakota, and Indiana. *See* Starr, *supra* note 1, at 802-03. The reader is cautioned to "[c]heck the specific law of each state under the UCCJA." Hilton, *supra*. Another U.S. law involving international child abduction is the IPKCA of 1993. *See* 18 U.S.C.A. § 1204 (1993). This Act makes "international parental kidnapping a federal crime." Golub, *supra* note 12, at 797. The IPKCA is intended for use when non-signatory nations are involved in the parental abduction of a child. *See id.* In fact, President Clinton emphasized Congress' intent that the Hague Convention is the preferred law governing international child abduction and that the IPKCA should only be used when the Hague Convention cannot be used. *See id.* Another alternative to the Hague Convention, in both Israel and the United States, is a habeas corpus petition. *See* In Re Petition for Writ of Habeas Corpus for Coffield, 644 N.E.2d 662 (Ohio 1994); *A v. B (1992) (Isr.), available in* William H. Hilton, *Hilton House* (visited Jan. 5, 2000) <http://www.hiltonhouse.com/cases/Avb.isr> (copy on file with *The Transnational Lawyer*).

119. *See* Hague Convention, *supra* note 4, art. 18.

120. *See infra* notes 151-245 and accompanying text (discussing the exceptions to return of a child under the Hague Convention).

121. *See* Hague Convention, *supra* note 4, art. 29.

122. *See id.* art. 34.

of a custody determination, whereas actions under alternative laws generally determine which parent has custody based upon the merits of the case.[123]

D. Requirements for Application

A case brought under the Hague Convention must meet several simple requirements. As indicated by the title, preamble, and structure of the Treaty, the Convention applies only to international situations of child abduction.[124] The Hague Convention does not apply to any child who has reached sixteen years of age,[125] even if the child reaches age sixteen after proceedings have begun.[126] The removal or retention of a child must be wrongful to qualify for governance under the Treaty, that is, the removal or retention of the child must also breach the other parent's rights of custody.[127] Furthermore, the non-abducting parent must have exercised custody over the child prior to the abduction.[128] Custody rights may arise by operation of the law, by judicial or administrative decision, or by an agreement that has legal effect.[129]

The Hague Convention differentiates the "right of custody" from the "right of access." The right of custody includes "the right to determine the child's place of residence," and the breach of that right triggers application of the Treaty.[130] The recognition of the right of access—the right to take a child to a place other than the child's habitual residence for a period of time upon which the parents have mutually agreed[131]–is encouraged by the Convention.[132] However, the Convention has no mandatory provision by which a parent may secure access rights.[133]

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123. *See* Hilton, *supra* note 118; *see* Perez Report, *supra* note 11, ¶¶ 39, 40, 112, 139 (supporting the interpretation of the Hague Convention as a non-exclusive Treaty); *see also* Anton, *supra* note 89, at 555 (concluding that the Hague Convention plainly designs its provisions to be non-exclusive).

124. *See* Anton, *supra* note 89, at 544.

125. *See* Hague Convention, *supra* note 4, art. 4.

126. *See* Copertino, *supra* note 58, at 731.

127. *See* Hague Convention, *supra* note 4, art. 3.

128. *See id.* art. 3(b); *see also* Perez Report, *supra* note 11, ¶ 71 (recognizing custody rights as including the right to consent, regardless of the form of custody, physical or otherwise). Therefore, the requirement that the non-abducting parent exercise custody rights prior to the abduction does not necessarily mean that the parent had to have physical custody of the child for the abduction for the removal or retention to be wrongful; however, lack of consent by the non-abducting parent does make the removal or retention wrongful. *See id.*

129. *See* Hague Convention, *supra* note 4, art. 3; *see also* Perez Report, *supra* note 11, ¶¶ 67, 68, 69, 70 (describing the Convention's intent to broadly interpret custody rights to include not only formal legal rights, but also informal private agreements between parties regarding the custody of their children); *see also* Australian Family Law Act, 1975, § 63F, *available at* <http://www.hiltonhouse.com/articles/Cusrht.aus> (copy on file with *The Transnational Lawyer*) (providing Australian law whereby in the absence of a custody order, both parents have equal rights of custody).

130. Hague Convention, *supra* note 4, art. 5.

131. *See id.*

132. *See id.* art. 21 (binding Central Authorities to promote access rights by removing "as far as possible" interference with those rights).

133. *See* Anton, *supra* note 89, at 555.

Any person or institution having a claim of child abduction may apply to the Central Authority of any Contracting State for relief; however, direct application to the Central Authority of the child's habitual residence is usually more convenient.[134] Application to a Central Authority is not mandatory when bringing an action under the Hague Convention because an action can be brought directly to the courts.[135] Nevertheless, application to a Central Authority has an important advantage—a channel of communication between the Contracting State of the child's habitual residence and the Contracting State of the child's abduction at no cost to the applicant.[136]

The application to a Central Authority *must* include the following information: (1) the identification of the child and the abducting parent,[137] (2) the date of birth of the child,[138] (3) the grounds upon which the applicant bases the claim,[139] and (4) any information regarding the location of the child and the abducting person.[140] The application *may* also be supplemented with the following documents: (1) a copy of a court or administrative decision or legal agreement,[141](2) a certificate or affidavit from a competent authority of the state of the child's habitual residence explaining the relevant domestic law,[142] and (3) "any other relevant document."[143] Therefore, the applicant's burden of proof is to establish wrongful removal or retention.[144] The applicant does not necessarily need a court decision regarding custody to meet that burden.[145] Rather, the applicant need only show by a preponderance of evidence that custody rights have been breached.[146] In a Hague Convention action, the court may take judicial notice of the relevant custody law of the state of the child's habitual residence.[147]

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134. *See* Anton, *supra* note 89, at 547-48 (remarking that a person seeking the return of a child is likely to find it more convenient to apply to the Central Authority of the country of the child's habitual residence, thus avoiding the difficulties of long distance communication and travel).

135. *See* Hague Convention, *supra* note 4, art. 29; *see also* Anton, *supra* note 89, at 545.

136. *See* Anton, *supra* note 89, at 547.

137. *See* Hague Convention, *supra* note 4, art. 8(a).

138. *See id.* art. 8(b).

139. *See id.* art. 8(c).

140. *See id.* art. 8(d).

141. *See id.* art. 8(e).

142. *See id.* art. 8(f).

143. *Id.* art. 8(g).

144. *See* Anton, *supra* note 89, at 552 (describing both the applicant's and the defendant abductor's burden of proof in a Hague Convention action).

145. *See id.*

146. *See* 42 U.S.C.A. § 11603(e)(1)(A) (West 1988) (requiring the Petitioner to show wrongful removal or retention based on a breach of custody rights "by a preponderance of the evidence"). This is a section of the United States' codification of the Hague Convention. The Convention is enacted into the law in England as the Child Abduction and Custody Act of 1985. *See* Child Abduction and Custody Act, 1985 (Eng.). In New Zealand, the Convention is enacted under the Guardianship Amendment Act of 1991. *See* Guardianship Amendment Act, 1991 (N.Z.). Australia enacted the Treaty under the Family Law Amendment Act of 1983. *See*1983 Amendments to Family Law Act, 1975(Austl.).

147. *See* Hague Convention, *supra* note 4, art. 14.

The Convention recommended the use of a model application form to the original Contracting States, and though its use is not mandatory, the completion of the model form ensures that all the required information is provided, accelerating the processing of the application.[148] A Central Authority may require that an application be accompanied by "a written authorization empowering it to act on the behalf of the applicant, or to designate a representative to so act."[149] Unless all requirements are met, the Central Authority is not bound to accept an application, but refusal to accept an application and the reasons for refusal must be communicated to the applicant or the requesting Contracting State.[150]

E. Exceptions to the Mandatory Return of the Internationally Abducted Child

Perhaps realizing the inflexibility of a rule that denies judges any discretion in ordering the return of a child to the state of his or her habitual residence,[151] the drafters of the Hague Convention created several exceptions converting the mandatory return provision into a discretionary one.[152] The exceptions to the mandatory return of a child enumerated in the Hague Convention are sometimes referred to as the "discretionary exceptions" because proof of the existence of any of these exceptions does not mandate the return of the child, but rather "allows a judge to avoid the compulsory return of an abducted child . . . ."[153] These enumerated exceptions include the following: (1) the "grave risk of harm" exception,[154] (2) the "consent" or "acquiescence" exception,[155] (3) the "child's objection" exception,[156] (4) the "settled in new environment after one year"

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148. *See* Anton, *supra* note 89, at 548 (describing the optional model application form prepared by a subcommittee of the Hague Convention but not fully reviewed at the Convention).

149. Hague Convention, *supra* note 4, art. 28.

150. *See id.* art. 27.

151. *See* Horstmeyer, *supra* note 3, at 128 (remarking that the drafters of the Hague Convention realized the impracticality of denying judges any discretion in ordering the return of a child).

152. William M. Hilton, *The Limitations on Art. 13(b) of the Convention on the Civil Aspects of International Child Abduction*, 11 AM. J. FAM. L.139 (1997), *available at* <http://www.hiltonhouse.com/articles/Art_13(b)_limit.txt> (copy on file with *The Transnational Lawyer*).

153. Harper, *supra* note 59, at 259. *But see* James D. Garbolino, *Analyzing the "Grave Risk" Defense*, *in* SELECTED GOOD PRACTICES IN INTERNATIONAL FAMILY ABDUCTION CASES (Linda K. Girdner & Patricia M. Hoff eds., 1998) (visited June 29, 2000) <http://www.hiltonhouse.com/articles/Grave_risk_defense.txt> (copy on file with *The Transnational Lawyer*) (characterizing the "grave risk" exception as a "defense"). The interchangeable use of exceptions and defenses is appropriate because the only defenses available to an abducting parent are the discretionary exceptions.

154. *See* Hague Convention, *supra* note 4, art. 13(b) (providing that the judicial or administrative body of the Contracting State is not bound to order the return of the child if such a return would expose the child to a "grave risk" of "physical or psychological harm or otherwise place the child in an intolerable situation").

155. *See id.* art. 13(a) (declaring that the court of the Contracting State is not required to return the child if the aggrieved parent "had consented to or subsequently acquiesced in the removal or retention").

156. *See id.* art 13, ¶ 3 (retaining judicial discretion to return the child if the court "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 [the child's] views").

exception,[157] and (5) the "human rights and fundamental freedoms" exception.[158] The descriptive term "discretionary" is also appropriate because it differentiates these exceptions from the other, inherently non-discretionary exceptions based upon whether the child has reached the age of sixteen,[159] or whether the left-behind parent actually exercised his or her custody rights at the time the abducting parent removed the child from the habitual residence.[160]

While the parent petitioning for the return of the child must prove by a preponderance of evidence that the removal or retention of the child is wrongful, the abducting parent, hoping for a denial of that return, must also prove the "consent" or "acquiescence" exception, the "settled in new environment after one year" exception, or the "child's objection" exception by a preponderance of evidence.[161] However, when an abducting parent claims a "grave risk of harm" or a "human rights and fundamental freedoms" exception, the proof must be clear and convincing.[162] Although each of the discretionary exceptions are discussed briefly, the "grave risk of harm" exception applies to the focus of this Comment—domestic violence and child abuse. Accordingly, the "grave risk of harm" exception, as well as its application in international cases is discussed in greater detail.[163]

1. The Grave Risk of Harm Exception

The exception that involves the most judicial discretion[164] and litigation[165] is commonly known as the "Article 13(b)" or "grave risk of harm" exception.[166] Article 13(b) of the Hague Convention states:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the

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157. *See id.* art. 12 (mandating that the judicial or administrative authority of the Contracting State return the wrongfully removed or retained child "unless it is demonstrated that the child is now settled in its new environment").

158. *Id.* art 20 (allowing for the refusal to return the child if such a return "would not be permitted by the fundamental principles" of the Contracting State "relating to the protection of human rights and fundamental freedoms").

159. *See id.* art 4.

160. *See id.* art. 3(b).

161. *See* Copertino, *supra* note 58, at 728.

162. *See* 42 U.S.C. § 11603(d)(2)(A)-(B) (1988) (providing that the burden of proof is placed on an abducting parent under the International Child Abduction Remedies Act, the United States's codification of the Hague Convention). The United Kingdom requires "clear and compelling" evidence of a "grave risk of harm" exception under its codification of the Hague Convention, the Child Abduction and Custody Act of 1985. *See In re M and J (1999) (U.K.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hilton house.com/cases/Re_M&J_UK.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *M and J*].

163. *See infra* notes 321-516 and accompanying text (discussing of international child abduction case law involving the "grave risk of harm" exception).

164. *See* Harper, *supra* note 59, at 259.

165. *See* Horstmeyer, *supra* note 3, at 127.

166. *See* Hague Convention, *supra* note 4, art. 13(b).

> return of the child if the person, institution or other body which opposes its return establishes that . . . (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[167]

Unfortunately, the Treaty does not define "grave risk of harm."[168] A plain reading could mean that all that is required for the application of the exception is a possibility of harm, or that the risk, rather than the harm itself, is substantial.[169] This interpretation of the exception presents a danger of broad application by exceeding its intended scope to include "transient or reparable harm."[170] In other words, a broad interpretation allows an abducting parent to defend his or her action based on the existence of *any* condition in the child's habitual residence with *any* potential of placing the child in danger of harm.[171] The drafters of the Hague Convention instead advocated that the exception be narrowly construed to avoid the exception from swallowing the Treaty's primary goal, which is to return children to their habitual residence.[172] Under the Convention, the "grave risk of harm" exception is intended to allow for the protection of the child from only serious irreparable harm or the danger of such harm, not harm to the child's economic or educational prospects.[173]

Whether viewed positively or negatively, each Contracting State has the liberty to construct its own interpretation of the "grave risk of harm" exception.[174] What constitutes an "intolerable situation" for the child is subject to interpretation.[175] For example, the judicial authority of Ireland found that a father's irresponsible management of the family's financial affairs allowed for the denial of the return of the children under Article 13(b).[176] In another case, a French court denied the return of a child based upon the characterization of Los Angeles pollution as an

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167. *Id.*

168. *See* Harper, *supra* note 59, at 260.

169. *See id.* (interpreting the "grave risk of harm" exception as only requiring the possibility of harm to the child be great and not requiring the harm to be severe).

170. *See* Garbolino, *supra note* 153 (presenting a case in which the risk of the disruption of a three-year-old child's bonding with his mother was found to meet the "grave risk" exception and thus thwarted the father's attempt to have the child returned under the Hague Convention). The author characterized the holding of this decision as being based on too broad of an interpretation of the "grave risk" exception. *See id.*

171. *See id.*

172. *See* Perez Report, *supra* note 11, ¶ 34 (reporting the intention of the Hague Convention was that Article 13(b) exceptions be applied "only so far as they go and no further," to prevent the Convention from becoming "a dead letter").

173. *See id.* ¶ 116.

174. *See* Harper, *supra* note 59, at 260.

175. *See id.*

176. *See id.* at 261 (detailing a case heard in Ireland, PF v. MF, 1992 IR. [1992] I.R. 390, in which a father's poor management of money forced the family to move at least nine times either because of eviction or to avoid eviction).

"intolerable situation" under Article 13(b).[177] Although these examples are aberrant cases of international child abduction,[178] they demonstrate the controversial nature of some denials under the Hague Convention and perhaps the reason why such denials may negatively impact the reciprocity and cooperation desired among the Contracting States of the Convention.

Despite the variations in defining the "grave risk of harm" exception among Contracting States, international decisions are based, for the most part, on a narrow interpretation of the exception.[179] Although the precise terms used by the various Contracting States of the Convention may be different, each state seems to capture the intent of the Convention by narrowly applying the Article 13(b) exception. For example, a U.S. federal circuit court found the "grave risk of harm" exception to be applicable in only two situations: (1) "where [the] return of [a] child puts [the] child in imminent danger prior to [the] resolution of [a] custody dispute, for example, returning [the] child to [a] zone of war, famine or disease" or (2) where the court of the child's habitual residence is "incapable or unwilling to give the child adequate protection" in instances of "serious abuse or neglect, or extraordinary emotional dependence."[180] In another U.S. case, the determination of the "grave risk of harm" exception began by focusing on the child's habitual residence rather than upon the individuals in that environment.[181] The test for the existence of the "grave risk of harm" is whether the place of habitual residence has an atmosphere of "'internal strife' or unrest as to place the child at risk."[182]

In England, the harm is characterized as "an intolerable situation," and the fact that the petitioning parent is a drug user, homeless, or on welfare is not a sufficient basis to deny the child's return.[183] An English court also found a "grave risk of harm" must "be more than an ordinary risk" of psychological harm anticipated when a child is taken by one parent from the other.[184] Furthermore, even a past history of child neglect is not enough to prevent a return order by some English courts.[185]

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177. *See generally Court Awards $12.5 Million in Damages in International Child Abduction Case: Largest U.S. Verdict on Record*, BUS. WIRE (July 6, 1993), *available in* WESTLAW, BWIREPLUS (describing a U.S. court's award of $12.5 million in general and punitive damages to compensate for the injury to a father's health and for other legal costs involved in contesting the mother's wrongful removal and subsequent denial of return by a French court).

178. *See* Harper, *supra* note 59, at 261-62 (acknowledging that these cases "are anomalies" and describing the "grave risk of harm" exception as "an ethnocentrical judge's tool" by which judges can make determinations based upon their own cultures and bias); Silberman, *supra* note 51, at 32 (discussing varying ideas of "family values" and pointing out that return decisions could be easily biased depending upon the Contracting State's view of, for instance, homosexuality or of the status of women as compared to men).

179. *See* Hilton, *supra* note 152.

180. Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

181. *See* Tahan v. Duquette, 613 A.2d 486, 489 (N.J. 1992).

182. *Id.*

183. *See Gunsburg*, *supra* note 11, at ¶ 14.

184. *In re A (a minor) (1987) (U.K.)*, *available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse. com/cases/Inrea_uk.txt> (copy on file with *The Transnational Lawyer*).

185. *See id.*

Similarly, in Australia, not only must the situation be "intolerable" to qualify under the Article 13(b) exception, but the harm must be more than just "the grave risk of *any* physical or psychological harm."[186] The potential harm, whether physical or psychological, must be of "*a substantial nature.*"[187] Australian courts ruled that the best place for determining whether there is a "grave risk of harm" is in the state of the child's habitual residence.[188]

However, a distinction is made in Australia between returning the child to the Contracting State of the child's habitual residence and returning the child to the wronged parent in the habitual residence.[189] This distinction is made operable by the means of an "undertaking."[190] A child returned to his or her habitual residence does not necessarily need to be returned to the petitioning parent, particularly if doing so would place the child at risk; the child can be returned in the custody of the abducting parent or a third party, with the left-behind parent providing for the

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186. *Ottens v. Ottens (1988) (Austl.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Ottens_aus.txt> (emphasis added) (copy on file with *The Transnational Lawyer*).

187. *Id.* (empahsis added).

188. *See Murray (1993)(Austl.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Murray_aus.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *Murray*] (providing a copy of an Australian judgment against a mother who wrongfully removed her three children from New Zealand to Australia). This case involves accusations of domestic violence and is further discussed *at infra* notes 345-360 and accompanying text.

189. *See id.* (pointing out that the children are proposed to be returned to New Zealand, the children's habitual residence, but not to the custody of the father who is alleged to be a violent gang member).

190. An undertaking is a concept borrowed from the law of contracts which means "a promise unsupported by consideration" given by the petitioning parent to make the return of children easier and to provide for the "necessities, such as a roof over their head [sic] and adequate maintenance." Letter from Catherine W. Brown, Assistant Legal Adviser, *Consular Affairs of U.S. Dep't of State*, to Michael Nicholls, *Lord Chancellor's Department Child Abduction Unit* (Aug. 10, 1995), *available in* William M. Hilton, *Hilton House* <http://www.hiltonhouse.com/articles/Undertaking_Rpt.txt> (copy on file with *The Transnational Lawyer*) [hereinafter Letter from U.S. Central Authority to England's Central Authority]. Undertakings have been used by the courts of the United Kingdom, Australia, and New Zealand in cases brought under the Hague Convention. *See id.* The scope of undertakings has been a controversial issue between the United States and England. *See* LORD CHANCELLOR'S CHILD ABDUCTION UNIT, CENTRAL AUTHORITY FOR ENGLAND & WALES, REPORT OF HAGUE CONVENTION OPERATIONS (Nov. 1995), *available in* William M. Hilton, *Hilton House* <http://www.hiltonhouse.com/article/Undertaking_Rpt.txt> (copy on file with *The Transnational Lawyer*) [hereinafter ENGLISH UNDERTAKINGS REPORT] (providing results of observations by Michael Nicholls on the behalf of England's Child Abduction Unit in relation to the enforcement of undertakings by U.S. courts). In the United States, undertakings are called "stipulations." *See id*, at n.2. The U.S. Department of State may not require state and federal courts to recognize undertakings, but the Department of State can encourage the enforcement of limited undertakings. *See* Letter from U.S. Central Authority to England's Central Authority, *supra*. The United States considers examples of limited undertakings to be a provision for return airfare or a requirement that the child be returned in the custody of the abducting parent. *See id.* The United States found the provisions of an automobile, school expenses, weekly maintenance payments, and medical and dental insurance expenses to exceed the scope of an undertaking, the purpose of which is to provide necessities until the courts of the habitual residence make a custody decision. *See id.*

necessities of the child.[191] Moreover, an Australian court found that to conclude that a mother and her children could not be protected in any one of the Contracting States of the Hague Convention "would be presumptuous and offensive in the extreme."[192]

In a like manner, Israeli courts define a "grave risk of harm" as a "substantial harm of a nature that would be more serious than the harm caused as a result of severing the tie with the custodial parent."[193] These courts consider issues such as the "best interests" of the child to be independent of a "grave risk of harm" in its determination.[194] Under Israeli law, absent an exception enumerated by the Convention, the child's "best interests" are addressed by the courts of the child's habitual residence when the petitioned court orders the return of the child to that country.[195] The rationale is that the "best interests of the child" are better determined in the country of the child's habitual residence where courts have ready access to evidence that demonstrates the nature of the child's environment prior to the abduction.[196]

The relatively recent decisions in international child abduction cases regarding if or when domestic violence and/or child abuse meets the "grave risk of harm" exception are significant to the focus of this Comment.[197] Perhaps the unrealized prevalence or notoriety of domestic violence and child abuse at the time of the drafting of the Hague Convention[198] explains why these issues are not mentioned in the Treaty itself or in the reports of the Convention. However, follow-up meetings by the Permanent Bureau of the Hague Convention[199] reveal that questions are at least raised regarding the return of children to homes where domestic violence and

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191. *See* ENGLISH UNDERTAKINGS REPORT, *supra note* 190. Undertakings are used in cases involving an Article 13(b) defense as a means of mitigating a "grave risk of harm" to the child if the order to return were unconditional. *See id.* Undertakings in these situations appropriately include temporary provision providing necessities for the child and either the abducting parent or a third-party custodian until the court of the habitual residence can make a custody decision. *See id.* The U.S. position is that once the grave risk of harm is proved by clear and convincing evidence, extensive undertakings are less appropriate than simply denying the petition for return. *See id. But see* Blondin v. Blondin, 189 F.3d 240, 248-50 (2d Cir. 1999) (requiring that the District Court "consider the availability of temporary arrangements that would honor the Convention's mandate" to return children to their habitual residence while still protecting them from the grave risk of harm); *see also* Turner v. Frowein, 752 A.2d 955, 961 (Conn. 2000) (ordering the trial court to fully evaluate the "placement options and legal safeguards" available if the child was returned to the habitual residence).

192. *See Murray, supra* note 188.

193. *See Gunsburg, supra* note 11, ¶ 16.

194. *See id.* ¶ 17.

195. *See id.*

196. *See* Robinson v. Robinson, 983 F. Supp. 1339, 1344 (D. Colo. 1997).

197. See *infra* notes 321-516 and accompanying text (discussing international child abduction case law involving domestic violence and child abuse).

198. *See* Bruch, *supra* note 14, at 105.

199. The Permanent Bureau of the Conference is not mentioned in the Hague Conference itself. However, the Perez Report, the recognized official reporter of the Hague Convention, states that the Permanent Bureau functions "to furnish to interested persons any information desired concerning the work of the Conference." *See* Perez Report, *supra* note 11, ¶ 5.

child abuse are proven to have occurred.[200] Indeed, the question raised is whether such an atmosphere of violence and abuse constitutes a "grave risk of harm," and therefore should be recognized as an exception to the Hague Convention's mandatory return of the child.[201]

2. *The "Consent" or "Acquiescence" Exception*

If a parent consents to his or her child moving to another country before the relocation, or acquiesces to removal of the child after an abduction, the removal is not considered to be wrongful, and the judge has the discretion to grant or deny the return of the child.[202] The difference between "consent" and "acquiescence" is a matter of timing.[203] Consent means that the left-behind parent agreed to the removal *before* the removal of the child occurred, and acquiescence indicates acceptance, either "active" or "passive,"[204] *after* the removal of the child has occurred. Unless the left-behind parent knew that removal or retention of the child was unlawful and knew generally of his or her rights against the other parent, acquiescence is not recognized.[205] Some courts advocate that, in the absence of unusual circumstances,

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200. *See* MEETING REPORTS OF THE DAILY SESSIONS OF THE SECOND SPECIAL COMMISSION MEETING TO STUDY THE OPERATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, *available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/articles/Meeting_rpt_jan93.txt> (copy on file with *The Transnational Lawyer*) [hereinafter MEETING REPORTS ON HAGUE CONVENTION EFFICACY] (reporting a question raised by one expert at the meeting asking whether the Article 13(b) exception might be used in cases where the child has been a victim of sexual abuse). Ireland mentions a case in which one of its courts ordered the return the children on the basis that "any domestic violence would pose a severe psychological risk to the children." *Id.* at 12. Although the question of whether domestic violence and/or child abuse should be considered under the "grave risk of harm" exception is not answered definitively, many experts shun the use of the exception to protect a child from a particular parent, instead suggesting that the more appropriate question is whether the child is placed at grave risk simply by returning the child to the habitual residence and not necessarily the left-behind parent. *See id.*

201. *Id.* at 11-12.

202. *See* Hague Convention, *supra* note 4, art. 13(a) (providing that the judicial or authoritative authority is not bound to order the return of the child if the left-behind parent "ha[s] consented to or subsequently acquiesced in the removal or retention").

203. *In re A and Another (1992) (C.A.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hilton house.com/cases/Inrea2_uk.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *In re A and Another*].

204. Active acquiescence is demonstrated "either by express words or by conduct." *Id.* Moreover, either the abducting party must have believed that the left-behind parent accepted removal, or the left-behind parent acted inconsistently with an intention to insist on legal rights. *See id.* Passive acquiescence is inferred "from silence and inactivity for a sufficient period [of time] in circumstances where different conduct was to be expected on the part of the aggrieved parent." *Id.* A letter from a husband to his wife, who abducted their children from Israel to California, provides an example of express acquiescence:

> I would never take Esther from you—from her mother. I am willing to sign whatever you ask me to, so that you know you both would not be hindered from leaving the country . . . If you want your freedom, I do not want to stand in the way of your happiness.

District Attorney v. Officer (1996) (Cal.), available in William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Officer_Ca.txt> (copy on file with *The Transnational Lawyer*).

205. *See In re A and Another, supra* note 203, at 2.

only active acquiescence be allowed in the first one-year period from the time of abduction, but that active or passive acquiescence be presumed after one year, unless the affected parent shows extraordinary circumstances that prove non-acceptance.[206] When acquiescence is raised in defense by the abducting party, litigation focuses on the totality of the circumstances either pointing to acceptance of the removal or showing opposition to the removal of the child.[207]

3. The "Child's Objection" Exception

The second paragraph of Article 13(b) of the Hague Convention provides the "child's objection" exception as follows: "[t]he 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 [the child's] views."[208] Although the drafters of the Hague Convention were unable to agree on a specific age of maturity, all agreed that consideration of the views of the child is "absolutely necessary" and, in fact, "may be conclusive."[209] Indeed, the views of children that are victims of domestic violence and subsequent child abduction may provide the court with valuable information that could prove to be conclusive in determining whether the child is at "grave risk" if returned to the left-behind parent.

Conversely, opponents of this exception claim that it (1) allows the requested court to determine issues of custody rather than following the mandates of the Hague Convention by returning the child to his or her habitual residence where those determinations are to be made; (2) gives the child, rather than the judge, the discretion to determine whether he or she wants to return; (3) involves the views of a child, which are subject to greater parental influence than the views of an adult; (4) opens the door for broad interpretation by judges, and therefore subjects the exception to "judicial abuse"; and (5) places the child at the center of a dilemma by asking the child to, in effect, choose between the abducting parent and the left-behind parent.[210] Children may be interviewed by a child counselor, by the judge in

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206. *See H v. H (1996) (U.K.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Hvh.uk> (copy on file with *The Transnational Lawyer*) [hereinafter *H v. H*]

207. The following cases center upon the "acquiescence" exception: *In re A and Another, supra* note 203; *H v. H, supra* note 206; *Hemard v. Hemard (1995) (N.D. Tex.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) http://www.hiltonhouse.com/cases/Hemard_fed.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *Hemard*]; and *Leibovitz v. Leibovitz (1993)(Isr.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Leibovitz_Israel.txt> (copy on file with *The Transnational Lawyer*).

208. Hague Convention, *supra* note 4, art. 13(b).

209. Perez Report, *supra* note 11, ¶ 31.

210. *See* Nanos, *supra* note 58, at 446-47 (discussing criticisms of the child's objection defense). *See generally id.* (focusing on the "child's objection" exception and providing a thorough analysis).

camera, or both in order to provide objective evidence without the influence of either parent.[211]

4. *The "Settled in New Environment After One Year" Exception*

The presiding judge in an international child abduction case brought under the Hague Convention may opt to deny the return of the child if both of the following conditions are met: (1) more than one year has passed since a wrongful removal or retention of a child, and (2) the abducting parent can prove by a preponderance of evidence[212] that the child is "now settled in the new environment."[213] The Convention places a one-year time limit for the initiation of an action for the return of the child because the drafters felt that the failure to bring an action within the one-year time frame indicates that the aggrieved parent "had acquiesced."[214] Furthermore, the drafters concluded that after the passage of one year, the child is likely to have "assimilated into his or her new surroundings,"[215] and uprooting the child would be detrimental.[216] The "settled" exception is a compromise that softens the inflexible one-year time limit for bringing an action for the return of a child, but still allows for the protection of a child from another uprooting if the child proves to be settled in a new environment.[217]

Once a child becomes settled in the new environment, a decision to return the child to his or her habitual residence cannot be made without exploring the merits of the custody rights.[218] This does not mean that a determination of custody is made under the Hague Convention; it means that a determination is made regarding which country has the jurisdiction to make a custody decision.[219] Thus, resolving custody

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211. *See* Robinson v. Robinson, 983 F. Supp. 1339, 1343 (D. Colo. 1997) (considering the child's views, including (1) a letter to the presiding judge from the child at the suggestion of a counselor and (2) a conversation in chambers without counsel or family present).

212. In the United States, the burden of proof in asserting a "settled in the new environment after one year" exception is by a preponderance of the evidence. *See* 42 U.S.C.A. § 11603(e)(2)(B) (West 1988). Similarly, another court describes the burden of proof as "substantial." Zuker v. Andrews, 2 F. Supp. 2d 134, 141 (D. Mass. 1998).

213. Hague Convention, *supra* note 4, art. 12 (mandating that "[t]he 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.").

214. Copertino, *supra* note 58, at 729-30.

215. *Id.*

216. *See Robinson*, 983 F. Supp. at 1345.

217. *See* Perez Report, *supra* note 11, ¶ 109. The Perez Report "is recognized as the official commentary to the Convention." Silberman, *supra* note 51, at 11 n.8.

218. *See id.* at ¶ 107 (explaining that "after a child has become settled in [the] new environment, [the child's] return should take place only after an examination of the merits of the custody rights . . . something which is outside the scope of the Convention.").

219. *See* Wojcik v. Wojcik, 959 F. Supp. 413, 421 (E.D. Mich. 1997) (finding that a five-year old child and an eight-year old child were "settled in their new environment," but emphasizing that "[t]he [c]ourt's decision [was] not a decision on who should have custody of the children. . . [but] that the custody decision should be made in the United States [the country to which the children were abducted].").

issues in the place that is most closely connected to the evidence of the child's care is the goal justifying both the prompt return of the abducted child to his or her habitual residence and the denial of return once the child is "settled in [a] new environment."[220]

Although the Hague Convention itself does not detail the criteria by which the child's settlement can be proved,[221] indicators of the child's settlement can be identified in international child abduction case law.[222] For a child to be settled in a new environment requires "nothing less than substantial evidence of the child's significant connections to the new country."[223] Significant connections are moderated by both the passage of time and the age of the child involved.[224] Alone, time does not determine whether a child is settled in the environment, but time is required to develop the type of meaningful ties required for tribunals to find that a child is settled in a new environment.[225] Time is necessary for the formation of friendships and the participation in church, school, and community programs–factors that are considered significant in determining whether a child is settled.[226] In addition, the age of the child affects the degree to which the child can

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220. *See Robinson*, 983 F. Supp. at 1344 (discussing that the purpose of having custody matters decided in the jurisdiction where the child is "settled" is to have ready access to evidence of the child's care, training, and relationships).

221. *See* Perez Report, *supra* note 11, ¶ 109.

222. For examples of how various Hague Convention countries determine whether the child is "well settled," see *In re Collopy*, *available in* William M. Hilton, *Hilton House* (visited Jan. 5, 2000) <http://www.hilton house.com/cases/Callopy_colorado.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *Collopy*]; *Fjeldheim v Fjeldheim (1995) (W. D. Mich)*, *available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Fjeldheim_fed_dist_npl.txt> (copy of file with *The Transnational Lawyer*) [hereinafter *Fjeldheim*]; *Meredith v. Basdaras (1996) (Greece)*, *available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Meredith_grc.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *Meredith*]; Robinson v. Robinson, 983 F. Supp. 1339 (D. Colo. 1997); Wojcik v. Wojcik, 959 F. Supp. 413 (E.D. Mich. 1997); Zuker v. Andrews, 2 F. Supp. 2d 134 (D. Mass. 1998).

223. *Robinson*, 983 F. Supp. at 1344.

224. *See id.* at 1345.

225. *See id.* (declaring that "it is not the mere passage of time which determines [settlement in the new environment] or the Convention would have so provided.").

226. *See Collopy*, *supra* note 222 (denying the return of a 20-month old child based on the "settled in the new environment" exception, supported by evidence that the child "bonded with the extended family," was baptized in the new location, and formed associations with other children that her mother provided care for as a nanny); *Meredith*, *supra* note 222 (describing "settled in the new environment" factors such as the fact that two children, age seven and age nine, spoke fluent Greek, attended a full year of school, and formed warm social and familial ties, but also stressing the fact that the mother did not file a Hague Convention action for the return of the children until two years after their removal as important to the decision of the court not to return the children to the United States); *see also Robinson*, 983 F. Supp. at 1345 (supporting that the formation of meaningful friendships and involvement in school, extra-curricular, community, religious, and social activities are important factors for a determination of "settled in the new environment"); *see also Wojcik*, 959 F. Supp. at 416 (determining that because the mother rented her own house, the children attended the same school and church, and had formed close bonds with friends and relatives that the children were "settled"); *see also Zuker*, 2 F. Supp. 2d at 141 (finding that a four-year old child who attended a day care center, went to playmates' houses and birthday parties, and formed close relationships with teachers and grandmother was settled).

interact with the community to form the ties that constitute being "settled."[227] The child must be old enough to form meaningful friendships and connections to the new environment.[228] The left-behind parent who wishes to refute evidence of friendships and social ties to the community of the new environment must offer significant evidence that the child is still substantially connected to the country from which he or she was taken.[229] The time period for a Hague Convention action based on this exception is potentially longer than most other Hague Convention proceedings because of the type of evidence required to prove that a child is "settled in [the] new environment."[230]

Controversy involving the "settled in the new environment" exception centers not only on what constitutes "settled," but also on when the one-year time period begins to run.[231] Although the Treaty states that the one year time lapse begins on "the date of the wrongful removal or retention,"[232] most courts and experts in the field of international child abduction advocate that the time period be tolled, pending the location of the child, in order to prevent abducting parents from defeating a Hague Convention action by hiding the child for the first year following the child's removal or retention.[233] Strictly limiting the permissibility of bringing a Hague Convention action to one year from the removal or retention of the child seems unfair if the aggrieved parent does not know the location of the child and is therefore unable to determine the appropriate jurisdiction in which to bring an action.[234]

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227. *See Robinson*, 983 F. Supp. at 1345.

228. *See id.*

229. *See Zuker*, 2 F. Supp. 2d at 141 (determining that a four-year old was "settled in his new environment" based on "both substantial and persuasive" evidence including day care attendance, friendships with playmates, and frequent visits with his grandmother and stressing that the aggrieved parent did not offer any contrary evidence).

230. Perez Report, *supra* note 11, ¶ 109.

231. *See* Copertino, *supra* note 58, at 729-30 (discussing the "one year statute of limitation[s]" as a "weakness of the Hague Convention" if such a limitation would allow the abducting parent to "conceal the location of the child for long periods of time in the hope of foiling the petitioner's opportunities" for acquiring the return of the child).

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

233. *See Hemand*, *supra* note 207 (concluding that "[t]he time for commencing proceedings before the judicial authority was tolled pending the location of the child"); *see also* Wojcik v. Wojcik, 959 F. Supp. 413, 420 (E.D. Mich. 1997) (agreeing with the *Hemand* decision that the one year period be "'tolled pending the location of the child,'" and therefore, despite the passage of over one year, "the clock may have run less than a year"); *see* Copertino, *supra* note 58, at 731 (advocating that "the statute of limitations begin to run only when the petitioner has concrete knowledge as to the whereabouts of the child and the abductor"); *cf.* Robinson v. Robinson, 983 F. Supp. 1339, 1344 n.4 (D. Colo. 1997) (favoring the position that negotiations also should be tolled from the one-year period).

234. *See Wojcik*, 959 F. Supp. at 415 n.3.

5. The "Human Rights and Fundamental Freedoms" Exception

The "human rights and fundamental freedoms" exception[235] provides that "[t]he 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."[236] If the exception is interpreted broadly, rather than narrowly as the drafters of the Convention intended, the exercise of the exception could undermine the very goal of promptly returning internationally abducted children to their habitual residence.[237] However, no cases are reported in which the court of a Contracting State has refused to return a child based on this exception.[238] Thus, the exception is "somewhat of a paper tiger."[239]

Nevertheless, the U.S. State Department explains that "the Convention might never have been adopted without [the human rights and fundamental freedoms exception]."[240] Characterized simply, this exception is merely a "safety valve" that allows the requested Contracting State to refuse to return a child if that return violates the laws of that Contracting State.[241] Even the staunch supporters of the Article 20 exception believe that it should be used only in "extreme circumstances" in which "the return of a child would utterly shock the conscience of the court or offend all notions of due process."[242] Experts of the Hague Convention agree that courts should rely on the "human rights and fundamental freedoms" exception only when the return of the child "violate[s] an actual law of the requested country rather

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235. The "human rights and fundamental freedoms" exception is also described as the "public policy exception." *See* Dana R. Rivers, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 TRANSNAT'L LAW. 589, 627 (1989).

236. Hague Convention, *supra* note 4, art. 20.

237. *See* Lara Cardin, *The Hague Convention on the Civil Aspects of International Child Abduction As Applied to Non-Signatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 153 (1997). In fact, this "public policy clause" of Article 20 was the subject of debate and adopted only after its language was amended. *See* Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 FED. REG. 10 510 (1986) [hereinafter Legal Analysis of the Hague Convention]. Initially, the provision stated that "Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed." *Id.*

238. *See* Silberman, *supra* note 51, at 29 (asserting that unsurprisingly "no reported cases have refused return under Article 20"); *see also* Caro v. Sher, 687 A.2d 354, 361 (N.J. 1996) (denying an Article 20 exception to returning a child to Spain, reasoning that delay in court proceedings does not mean that the court is "unwilling to address" the problem, and concluding that Spanish courts did not deny procedural due process); *see also Parsons v. Styger, (1989) (Can.), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hilton house.com/cases/Parsons.cdn> (copy on file with *The Transnational Lawyer*) (denying an Article 20 exception involving an alleged violation of sections 6(1) and 7 of the Canadian Charter of Rights and Freedoms by which "every citizen of Canada has the right to enter, remain in, and leave Canada" by reasoning that "a Canadian citizen has no more right to remain in Canada in defiance of the Hague Convention than a citizen to defeat a Canadian court's extradition order to a treaty co-signatory member.").

239. Cardin, *supra* note 237, at 153.

240. Legal Analysis of the Hague Convention, *supra* note 237, at 10510.

241. *See* Cardin, *supra* note 237, at 152.

242. Legal Analysis of the Hague Convention, *supra* note 237, at 10510.

than merely [being] incompatible with the country's policies or culture."[243] Furthermore, the exception should not be "used any more frequently than it does in its own domestic judicial decisions."[244] Otherwise, the provision would be "discriminatory in itself" and therefore a violation of the fundamental principles of the laws of most Contracting States.[245]

F. Criticism of the Hague Convention

As the Hague Convention grows into adulthood as an international treaty and more Hague Convention actions are brought under its governance, signs of both its efficacies and deficiencies are surfacing.[246] Criticism of the Convention includes (1) the minority status of the Convention's geographical reach,[247] (2) non-compliance among Contracting States,[248] (3) the inconsistencies in the implementation of the Convention among Contracting States,[249] (4) the narrowness of the focus of the

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243. Dorothy Carol Daigle, *Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and Its Exceptions*, 26 VAND. J. TRANSNAT'L L. 865, 879 (1993). *See also* Perez Report, *supra* note 11, ¶ 118 (explaining that even manifest incompatibility with the requested state's principles is not enough to allow denial of return under the human rights and fundamental freedom exception, but rather "that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it"); Legal Analysis of the Hague Convention, *supra* note 237, at 10510 (advising that Article 20 not be invoked "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").

244. Daigle, *supra* note 243, at 879.

245. *See* Perez Report, *supra* note 11, ¶ 118.

246. *See* Bruch, *supra* note 14, at 102 (describing the Convention as a "teenager," and, "as that analogy implies," discussing the new problems arising at this stage of its growth).

247. *See* Copertino, *supra* note 58, at 732 (acknowledging that only 15 of the 171 countries of the world are party to the Convention, and thus "the number of 'haven states'" for international child abductors is far greater than the number of Contracting States to the Hague Convention); *see also* Starr, *supra* note 1, at 793 (determining that "[r]oughly three-fourths of the world's countries are not signatories to the Hague Convention").

248. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No 105-277, § 2803, 112 Stat. 2681, 2681-846 (1998) (mandating that "[b]eginning 6 months after the date of the enactment of this Act and every 12 months thereafter during the period ending September 30, 1999, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the [Hague] Convention"); *see also Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (visited Feb. 13, 2000) <http://travel.state.gov/compliance.html> (copy on file with *The Transnational Lawyer*) [hereinafter *Congressional Report on Compliance with the Hague Convention*] (responding to the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998 and reporting to the U. S. Congress "on compliance by signatory countries with the Hague Convention"). This report identifies Austria, Honduras, Mauritius, Mexico, and Sweden as "those countries that the [State] Department has found to be in violation of their obligations under the Convention." *Id.* Mauritius, for example, refused to return a child to her habitual residence because "[t]hough Mauritius has acceded to that convention, the provisions of the whole or part of that convention have not been implemented in our national laws." *Pierce v. Pierce (1998) (Mauritius), available in* William M. Hilton, *Hilton House* (visited July 6, 2000) <http://www.hiltonhouse.com/cases/Pierce_Mauritius.txt> (copy on file with *The Transnational Lawyer*) [hereinafter *Pierce*].

249. These inconsistencies include the following: (1) inconsistencies in the degree of proof required before considering the denial of a child based on a discretionary exception to the Convention. *See* H. Wayne Elliott, *Beyond Reach? International Abduction Remedies*, 4 S.C. LAW 18, 21 (1992), (2) inconsistencies in the designation of who bears the cost of a Hague Convention proceeding. *See* Silberman, *supra* note 51, at 14, and (3) the

Convention,[250] and (5) the inability to enforce a civil decision based on the Convention in another Contracting State.[251] The following discussion of each of these criticisms of the Hague Convention reveals general agreement in the identification of the problems with the implementation of the Convention, but also reveals diversity in opinions of how to correct these problems.

1. The Minority Status of the Convention's Geographical Reach

Only one quarter of the world's countries are party to the Hague Convention.[252] The efficacy of the Convention in deterring international child abduction depends on increasing the number of countries participating in the prompt return of abducted children to their habitual residence. It also depends on the concomitant decrease in the number of non-Hague Convention countries, which may serve as "safe havens" for child abductors since they do not have the governance of the Hague Convention.[253] The minority status of countries participating in the Hague Convention may be a result of the diverse legal and social systems of the world's nations, some of which are unsympathetic to the goals of the Convention.[254] Moreover, some of the world's countries may not participate in the Hague Convention because they are unable to fund such an enterprise or simply because they do not know about the Convention.[255]

Ironically, problems associated with the drive to increase the number of Contracting States to the Convention are also emerging. As the number of countries acceding to the Convention increases, so do the number of countries ill-prepared to implement the Convention's obligations.[256] The degree of insufficient preparation by some of the countries that recently ratified or acceded to the Convention is somewhat shocking. For example, some of these countries failed to designate a Central Authority as required by Article 6.[257] More disconcerting are the reports that

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interpretation of the discretionary exceptions of the Hague Convention. *See* Copertino, *supra* note 58, at 735.

250. *See* Starr, *supra* note 1, at 829 (characterizing the "extremely narrow" interpretation of the Hague Convention as "jurisdictional" because that interpretation "addresses only the quarrel between parents" and "hardly considers the child's point of view").

251. *See* McMillan, *supra* note 80, at 105 (focusing on the civil nature of the Convention, which makes enforcement of a judicial order "limited to the remedies available under the jurisprudential system of the country into which the child was abducted").

252. *See supra* note 247 (contrasting countries that are party to the Hague Convention with those that are not).

253. *See* Copertino, *supra* note 58, at 732.

254. *See id.* (reasoning that "legal systems and divergent social norms of many nations may alienate them from the Convention").

255. *See id.*

256. *See* Bruch, *supra* note 14, at 106.

257. *See id.* at 106-07 (voicing the suspicion that the trend for ill-prepared participation in the Hague Convention by some countries is "prompted by the UN Convention on the Rights of the Child"). Unlike the Hague Convention, the UN Convention does not require its participants to immediately implement their obligations. *See id.* Accession to the Hague Convention satisfies Article 11 of the UN Convention. *See Convention on the Rights of the Child*, *supra* note 33, art. 11 (calling for international agreements to combat child abduction). Therefore, many

some countries cannot be reached at the telephone numbers provided to the Permanent Bureau when acceding to the Convention, or that one country answered the Permanent Bureau with refreshing frankness—a request for a copy of the Convention.[258] Therefore, the drive for an increase in countries participating in the Hague Convention should be tempered with the requirement that the obligations of the Treaty be implemented immediately.[259]

2. *Noncompliance Among Contracting States*

Reasons for noncompliance among Contracting States of the Hague Convention vary.[260] Policy reasons and politics may inhibit the enforcement of orders for return,[261] and some signatory countries refuse to extradite their own citizens when the abductor is a family member rather than a non-related criminal.[262] In one case involving a child abducted from the United States to Mauritius, the Mauritian court refused to return the child because the Treaty was not enacted into the laws of Maritius, although Mauritius had acceded to the Convention.[263] Similar cases of noncompliance are reported involving Austria, Honduras, Mexico, and Sweden.[264]

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nations are acceding to the Convention without taking the steps to implement it. *See* Bruch, *supra* note 14, at 107.

258. *See* Bruch, *supra* note 14, at 107.

259. *See id.*

260. *See supra* note 248 and accompanying text (providing sources that address non-compliance with the Hague Treaty); McMillan, *supra* note 80, at 106-07 n.28 (asserting that the goal to return children can be thwarted by the refusal of "many countries signatory to the Convention . . . to extradite their own citizens to the United States based on a reading . . . [of] treaties, entered into more than 50 years ago, which distinguish family members from other criminals who will be extradited for kidnaping"); *see also id.* at 107 (illustrating some countries, such as Austria and Switzerland, that "demonstrate a complete disregard of the notion of the Convention's reciprocity in that they repeatedly accept from the United States the return of their children wrongfully removed without overseeing the return to the United States of those children ordered returned by their own courts").

261. *See* McMillan, *supra* note 80, at 106.

262. *See id.* at 107 n.28 (basing the refusal on the interpretation of an old treaty that differentiates family members from other criminals in matters of kidnaping).

263. *See Pierce*, *supra* note 248 (providing an exemplary case of noncompliance with the Convention); *Congressional Report on Compliance with the Hague Convention*, *supra* note 248 (describing a letter from the U.S. government requesting that the Central Authority of Mauritius "take all appropriate steps to ensure the proper operation of the Convention" and the response to that letter explaining that the "State Law Office had originally briefed the court with incorrect information and has made subsequent 'interventions' to advise the court that the Convention is in force for Mauritius").

264. The United States found Austria to be noncompliant due to confusion on the part of the Austrian judiciary system about the goals of the Convention. *See Congressional Report on Compliance with the Hague Convention*, *supra* note 248. Honduras, although a party to the Convention since June 1, 1994, never enacted the provisions of the Convention into Honduran law. *See id.* Mexico has a large number of cases that remain unresolved because the Mexican Central Authority is unable to locate many of the children abducted from the United States. *See id.* Sweden's noncompliance is based on the failure of its Central Authorities to locate the abducted children, its legal system's refusal to recognize a U.S. custody order, and its refusal to allow appropriate access to and visitation of a child by the left-behind parent. *See id.*

Any remedy for noncompliance must be handled delicately if comity is to be fostered among the Contracting States of the Hague Convention.[265] The U.S. Congress ordered that a report on compliance with the Convention be submitted to its Committee on International Relations,[266] and the U.S. State Department invited "judges and Hague Central Authorities from a number of common law countries to a conference in Washington this fall to discuss how to improve consistency of decisions and better implementation of the Convention."[267] More globally, the Second Special Commission to Study the Operation of the Hague Convention[268] seeks to remedy problems associated with the Convention by involving representatives of the Contracting States in face-to-face discussions.[269]

3. *The Inconsistencies in the Implementation of the Convention Among Its Contracting States*

The Hague Convention and perhaps more specifically individual Contracting States are criticized for the inconsistencies in the implementation of the provisions of the Hague Convention, particularly with respect to the following: (1) the standards of proof required to allow the discretionary exceptions,[270] (2) the designation of who bears the costs of a Hague Convention action,[271] and (3) the interpretations of some of the discretionary exceptions,[272] especially the "grave risk of harm" exception.[273] Although a majority may be in agreement that these inconsistencies create serious problems to the implementation of the Hague

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265. *See generally, State Dep't Report to Congress, supra* note 52 (addressing issues of noncompliance with respect to applications for the return of children to the United States).

266. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No 105-277, § 2803, 112 Stat. 2681, 2681-846 (1998).

267. *See State Dep't Report to Congress, supra* note 52, at 2-3.

268. *See* Peter H. Pfund, *The Developing Jurisprudence of the Rights of the Child-Contributions of the Hague Conference on Private International* Law, 3 ILSA J. INT'L & COMP. L 665, 668 (noting "sessions of a special commission" that bring together the officials of Central Authorities of Contracting States to discuss the problems associated with the Convention and develop solutions while meeting "face to face . . . to develop a level of confidence in each others' motivations to make the Convention work as well as possible in their respective countries"). *See generally* MEETING REPORTS ON HAGUE CONVENTION EFFICACY, *supra* note 200 (providing daily reports of meeting called by the Permanent Bureau of the Hague Convention).

269. *See supra*, note 268 and accompanying text.

270. *See* Elliott, *supra* note 249, at 21 (observing that "a court should require a high degree of proof before finding that a grave risk of harm to the child exists").

271. *See* Silberman, *supra* note 51, at 13-14 (discussing the costs and expenses involved in a Hague Convention proceeding and the option allowed each Contracting State under Article 42 of the Convention to make a reservation to the clause imposing these cost upon the requested Contracting State).

272. *See* Copertino, *supra* note 58, at 729-31 (characterizing the one-year statute of limitations of Article 12 of the Hague Convention as it relates to the establishment of a "settled in the new environment" exception as one of the "weaknesses of the Hague Convention").

273. *See supra* notes 164-201 and accompanying text (discussing the "grave risk of harm" exception and some of its various interpretations when applied to international case law).

Convention, diverse opinions surface with respect to possible solutions to these problems.

Clear and convincing evidence must be submitted in a U.S. court before the consideration of a denial of return of the child based on a "grave risk of harm" or a "human rights and fundamental freedoms" exception.[274] Conversely, a lesser burden of proof, a preponderance of the evidence, is required for the consideration of a "consent" or "acquiescence" exception, a "child's objection" exception, or a "settled in the new environment" exception.[275] Most Contracting States adhere to a higher burden of proof for the Article 13(b) and Article 20 exceptions.[276] Although experts in the field of international child abduction claim the drafters' intended these exceptions be interpreted narrowly, the provisions themselves do not specify the burden of proof required for a finding that these exceptions are applicable.[277] The addition of this specification to Article 13(b) and Article 20 could result in a more consistently narrow application of the exceptions.

The majority at the Second Special Commission To Study the Operation of the Hague Convention described the difficulties that evolve from "different cost-bearing systems in different countries."[278] The Central Authorities of some Contracting States bear all the cost of a Convention proceeding, whereas those of others provide only access to that country's domestic legal aid system.[279] Some Contracting States of the Convention sharply criticize the United States for opting to make a reservation under Article 42 of the Convention[280] and thereby avoiding the costs of a Hague Convention action that exceed the amount covered by the U.S. legal aid system.[281] Perhaps in response to this criticism, the United States now requires the abducting parent to pay the costs, including attorney fees, unless "clearly inappropriate."[282] Alternatively, one author cautions the parent seeking the return of the child to expect to pay the cost of return and equates the "willingness to pay" with "a willingness to provide for the child."[283]

Although some inconsistencies exist in the outcomes of Hague Convention proceedings among the various Contracting States with respect to the discretionary exceptions,[284] the most inconsistencies are by far found in the interpretation of the

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274. *See* 42 U.S.C.A. § 11603(e)(2)(A) (West 1995).

275. *See id.* § 11603(e)(2)(B).

276. *See* Hilton, *supra* note 152.

277. *See supra* notes 167-68 and accompanying text.

278. MEETING REPORTS ON HAGUE CONVENTION EFFICACY, *supra* note 200, Part III (Jan. 18, 1993).

279. *See id.*

280. Silberman, *supra* note 51, at 14.

281. *See supra* note 114 and accompanying text (defining and explaining the "reservation" provision of Article 42 of the Hague Convention).

282. 42 U.S.C.A. § 11607 (b)(1)-(3) (West 1995).

283. Elliott, *supra* note 249, at 21.

284. *See supra* notes 151-320 and accompanying text (discussing each of the five discretionary exceptions provided by the Hague Convention).

"grave risk of harm" exception.[285] The interpretations of this exception range from those that conclude that the "grave risk of harm exception" should almost never be used to protect the best interests of the child[286] to those opinions that view the exception as an important mechanism to protect the best interests of the child.[287] Views opposing the use of the "grave risk of harm" exception in all but rare circumstances insist that the best interests of the child are served by returning the child to his or her habitual residence and by allowing the tribunals of that country to determine what is in the best interest of the child.[288]

Another exception, the "settled in the new environment" exception, is criticized for its one-year statute of limitations and for the inconsistencies in the interpretation of "settled."[289] Despite the passage of one year since the time of removal or retention, a number of courts nevertheless order the child returned, finding that the abductor cannot create his or her own defense by hiding the child for the first year and then claiming that the child is now settled in the new environment.[290] Some courts require that the child to be substantially connected both to the surrounding community and to the "immediate household of the abducting parent."[291] Still other courts consider the child to be "settled" when the child "has lived almost exclusively within [the] 'new' family," particularly when the child is very young.[292]

Several solutions suggested to correct the problems evolving from the one-year statute of limitations are as follows: (1) the creation of an international clearinghouse for applications so that such applications are available in any Contracting State, (2) the requirement that the amount of time needed to locate the child be tolled until the child is located rather than dismissing the action altogether when the child cannot be located, (3) the deletion of the one-year time limit all

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285. *See supra* notes 164-201 and accompanying text (analyzing the Article 13(b) "grave risk of harm" exception).

286. *See* Silberman, *supra* note 51, at 32-33 (declaring that the best interest of children is addressed by the Convention's purpose—by the prevention of abductions and the prompt return of children to their habitual residence).

287. *See* Starr, *supra* note 1, at 829 (declaring the exceptions provided by the Hague Convention are its "major impact towards the child's interests").

288. *See A v A (1996) (N.Z.), available in* William M. Hilton, *Hilton House* (visited Sept. 24, 2000) <http://www.hiltonhouse.com/cases/Ava_nz.txt> (copy on file with *The Transnational Lawyer*); *see also Gunsburg, supra* note 11.

289. *See* Copertino, *supra* note 58, at 729-30.

290. *See De Arrendondo v. Salto (1997) (Cal.), available in* William M. Hilton, *Hilton House* (visited Sept. 24, 2000) <http://www.hiltonhouse. com/cases/Martinez_california.txt> (copy on file with *The Transnational Lawyer*) (reporting a case where the court tolled the time limitation of one year for bringing action and subsequently ordered the return of the children to Mexico from California); *see also* Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998) (detailing a case in which the petitioner, with the assistance of state, national, and international agencies, searched for two years for her children who were abducted by their father from Germany to the United States). The court ordered the return of the children on the grounds that the children were not yet "well-settled," and noted that the one-year time limit may be equitably tolled when the wrongdoer conceals the whereabouts of the children. *See id.*

291. *See* MEETING REPORTS ON HAGUE CONVENTION EFFICACY, *supra* note 200.

292. *Id.*

together, and (4) the tolling of the statue of limitations until after the child is located.[293] The suggestion that an international clearinghouse be created solves other problems associated with the Hague Convention.[294] A clearinghouse would allow the maintenance of more accurate, centralized records of abducted children, which in turn would enable further study of the problems associated with the Convention.[295] Unfortunately, this solution also creates an additional problem—the funding of such an endeavor.[296]

Few solutions are available to address the problems associated with the inconsistencies in outcomes, perhaps due to the discretionary nature of the exceptions.[297] Nonetheless, the unpredictability of discretionary judicial decisions, created by the tension between traditionally narrow interpretations of the law and the expansion of the law to cover newly identified circumstance, "humanize[s] the law even as [it] distorts" the law.[298] The question is whether humanization is a healthy evolution of the law. Generally, experts agree that the education of the lawyers and the judiciary systems of each Contracting State would help to ameliorate the problem of inconsistency in the outcomes of Hague Convention actions. Few agree, however, on a single, feasible method to accomplish that education.[299]

4. *The Narrow Focus of the Hague Convention*

The Hague Convention, with its few exceptions, is criticized as being too narrow and inflexible because it predominately addresses only the jurisdictional

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293. *See* Copertino, *supra* note 58, at 731 (delineating possible solutions for the potential for unfairness that may arise when the statute of limitation runs while the child is being hidden by the abducting parent).

294. *See id.*

295. *See id.*

296. *See* MEETING REPORTS ON HAGUE CONVENTION EFFICACY, *supra* note 200 (elaborating on "the financial limit for Permanent Bureau's activities of collecting and distributing information," a limit that "was reached quite some time ago").

297. *See generally* Robert J. Levy, *Memoir of an Academic Lawyer: Hague Convention Theory Confronts Practice*, 29 FAM. L.Q. 171, 185-86 (1995) (suggesting that whether interpreted strictly or broadly and regardless of which jurisdiction makes the decisions regarding custody, all are subject to "the good sense and moderation of judges").

298. *Id.* at 186 (discussing the tensions between academic or legislative reform and the goals and responsibilities of practicing lawyers, implying that such a tension is healthy).

299. Some courts advocate the direct communication between judges of the two Contracting States involved. *See M and J*, *supra* note 162, ¶¶ 033, 034, 036, 046, 049 (describing the advantages of judicial collaboration in one case involving England and the United States). The Permanent Bureau of Hague Convention proposed that cooperation and consistency in outcomes of Hague Convention proceedings can be improved by the enhanced awareness of judges and lawyers of Contracting States of "the particularities of the Convention." *See* MEETING REPORTS ON HAGUE CONVENTION EFFICACY, *supra* note 200. Recently, a delegation of judges representing six Contracting States met to discuss the best way to deal with Hague Convention cases and pledged to "endeavor to inform their colleagues in their respective jurisdictions" about their findings regarding the practical operation of Hague Convention proceedings. *International Child Custody; A Common Law Judicial Conference on September 21, 2000, Best Practices* (1)(c) (visited Nov. 3, 2000) <http://www.hiltonhouse.co/articles/Best-Practices.txt. (copy on file with *The Transnational Lawyer*).

aspect of international child abduction.[300] Some commentators object to the fact that the Convention only addresses "the narrow aspect of the quarrel between the parents" in determining the appropriate jurisdiction and does not "act on behalf of a child" or "address the civil and human rights of a child."[301] The more recent interest of the international community in children's rights supports this criticism.[302] A current international treaty addressing jurisdiction states that "the best interests of the child are to be a primary consideration" in all international disputes involving children.[303] Despite the Hague Convention's proclamation that "children are of paramount importance in matters relating to their custody,"[304] the Treaty has been found to be "retrograde" or outdated in its failure to "act on behalf of a child."[305]

The commentators who caution against "well-intentioned child savers" that "frustrate the objectives of the Convention" oppose this criticism.[306] They are concerned that "under the guise of best interests," the commonplace use of exceptions such as the "grave risk of harm" exception will convert the procedural nature of the Hague Convention into one of substance.[307] In other words, these commentators are worried that use of a best interests of the child standard will convert the Hague Convention into a treaty used to determine the custody of the child and perhaps promote forum shopping as a means of procuring a favorable custody decision. According to this view, the best interest of the child is served when custody decisions are made within the jurisdiction of the child's habitual residence.[308] Absent from both of these views is the assurance that the child's interests are best served by either returning or denying the return of the child to his or her habitual residence.

5. *Inability To Enforce Civil Decisions Based on the Hague Convention in Another Contracting State*

The Hague Convention is criticized for its inability to enforce the decision of a requested Contracting State, particularly if the decision involves conditions to be

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300. *See* Starr, *supra* note 1, at 830.

301. *Id.*

302. *See id.; see also Convention on the Rights of the Child, supra* note 33. *But see Murray, supra* note 188 (finding that the Hague Convention does not conflict with the United Nations Convention because the Hague Convention considers that "the rights of the child are best protected by having issues as to custody and access determined by the Courts of the country of the child's habitual residence.").

303. Hague Conference on Private International Law: Final Act of the Eighteenth Session with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, Oct. 19, 1996, 35 I.L.M. 1391, 1396.

304. Hague Convention, *supra* note 4, preamble.

305. Starr, *supra* note 1, at 830.

306. *See* Silberman, *supra* note 51, at 32-33.

307. *See id.* at 33.

308. *See id.*

observed in the habitual residence once the child is returned.[309] One mechanism courts employ to satisfy the required return under the Hague Convention and yet consider the best interest of the child is to order specific conditions or "undertakings."[310] Commentators supporting the view that "undertakings" ought to accompany the return of the child to the habitual residence base the success of the Convention upon the "fair-minded[ness] and impartial decision making" of the authorities in the state of the child's habitual residence.[311] The Convention is further criticized for a lack of systematic follow-up regarding the status of the child after the return.[312] Unfortunately, the Second Special Commission To Study the Operation of the Hague Convention vetoed a proposal requiring follow-up by the Central Authority of the requesting state in situations where the child is returned to "the conflict situation which led to the abduction."[313] Experts attending the Commission agreed that "the duties of the Central Authorities are terminated once the child is returned" and dealing with any problems is "within the exclusive competence of the State of habitual residence."[314]

In addition, whether an order to return the child is enforced by the country into which the child was abducted depends entirely upon the judicial system of that country.[315] In the United States, the courts have the contempt powers for violations of return orders.[316] Moreover, in the United States, under the International Parental Kidnaping Act, the issuance of a warrant for arrest of the abducting parent allows the Department of Justice and Interpol to become involved in efforts to return the child.[317] Other Contracting States that do not have similar mechanisms for enforcing the orders of its tribunals and whose court orders are not followed are characterized as noncompliant with the provisions of the Hague Convention.[318] Thus, although the drafters of the Hague Convention sought to create uniformity in dealing with international child abduction, many individual Contracting States are not equipped

309. *See* McMillan, *supra* note 80, at 105 (explaining the problems with enforcing orders of one Contracting State in another Contracting State).

310. *See supra* notes 190-91 and accompanying text; *see also* Hilton, *supra* note 152 (defining an "undertaking" as "an agreement/stipulation between the parties on the specific issue of the logistics of returning a child to his or her 'habitual residence'").

311. *See* Silberman, *supra* note 51, at 34.

312. *See id.*

313. *See* MEETING REPORTS ON HAGUE CONVENTION EFFICACY, *supra* note 200.

314. *Id.*

315. *See* McMillan, *supra* note 80, at 105.

316. *See id.*

317. *See* 18 U.S.C.A. § 1204 (West 1997) (declaring international child abduction to be a federal crime). Interpol is the International Criminal Police Organization, a coordinating group for international law enforcement. BLACK'S LAW DICTIONARY 821 (7th ed. 1999).

318. *See supra* notes 260-69 and accompanying text.

to uniformly enforce the Treaty.[319] The lack of uniformity among the various tribunals of Contracting States is demonstrated in international case law.[320]

IV. SELECT INTERNATIONAL CHILD ABDUCTION CASE LAW INVOLVING DOMESTIC VIOLENCE AND/OR CHILD ABUSE

Real cases of domestic violence and child abuse are surfacing in international child abduction cases.[321] Most parents that abduct their children to escape the violence ultimately defend the abduction and under that Article 13(b) "grave risk of harm" exception.[322] Even though the courts of almost all Contracting States adhere to a narrow interpretation of the "grave risk of harm" exception, the outcomes vary and involve the discretion of the presiding court.[323] Although individual tribunals are "not bound by the decisions of courts of other states or by the manner in which a treaty has been interpreted in other nations[,]"[324] reciprocity and "respectful attention"[325] to the views of the various tribunals of Contracting States are important to the success of the Hague Convention in deterring international child abduction.[326] The following select cases are reviewed, keeping in mind the tension created between the duty of courts to act according to their independent discretion and the primary goal of comity set forth by the Hague Convention.[327]

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319. *See supra* notes 257-59 and accompanying text.

320. *See supra* notes 270-99 (criticizing the inconsistencies in the implementation of the Convention among Contracting States).

321. *See infra* notes 345-60 and accompanying text (detailing an Australia-New Zealand case involving allegations of severe domestic violence); *see also infra* notes 375-413 and accompanying text (describing a Venezuela-United States case involving both domestic violence and child abuse); *see also infra* notes 414-483 (reporting the *Blondin* case, including the initial District Court decision, the Second Circuit review of first impression, and the decision of the District Court on remand); *see also infra* notes 484-516 and accompanying text (adopting the *Blondin* approach to international child abduction in a case that presented clear and convincing evidence of child abuse).

322. *Compare* Grilli, *supra* note 6, at 79 (reporting in 1997 that few cases have analyzed situations involving domestic violence), *with* Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999) (involving domestic violence and child abuse), Turner v. Frowein, 752 A.2d 955 (Conn. 2000) (analyzing a case of domestic violence and child sexual abuse), and Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 462 (D. Md. 1999) (applying the "grave risk of harm" exception to a case of domestic violence and child abuse).

323. *See supra* notes 165–201 and accompanying text (discussing the "grave risk of harm" exception).

324. Tahan v. Duquette, 613 A.2d 486, 489 (N.J. 1992), *citing* Ex Parte Charlton, 185 F. 880, 886 (D.N.J. 1911) (maintaining that courts have "the duty of acting independently, . . . to accept full responsibility in determining the construction that is to be given to the treaties[,]" and declaring that "the construction placed upon some of [a treaty's] provisions by the departments of the foreign country with whom the Treaty is made, executive, legislative, or judicial, is not controlling").

325. *Tahan*, 613 A.2d at 489 (calling for a uniform approach in addressing the Hague Convention with "respectful attention" of the views of other courts).

326. *See supra* note 80-82 and accompanying text.

327. *Compare* Perez Report, *supra* note 11, ¶ 37, *with Ex Parte Charlton*, 185 F. at 886 (declaring a court's duty to act independently).

A. Wright v. Gueriel *(1993 France)*

On January 22, 1993, Ms. Gueriel brought her three children to France from the United States.[328] Mr. Wright, Ms. Gueriel's husband and father of the children, brought a Hague Convention action on August 6, 1993, seeking return of the children to the United States.[329] Ms. Gueriel raised a "grave risk of harm" defense, based on her husband's alleged violent and aggressive behavior.[330] To prove these allegations, Ms. Gueriel offered the testimony of three witnesses.[331] First, Mr. Mulhern, a U.S. postal service officer and work colleague of Ms. Gueriel during four years of her marriage to Mr. Wright, testified that Mr. Wright experienced severe depression, was out of work for a year, and forced his wife to work overtime to support the family.[332] More significantly, he testified that on two occasions, Mr. Wright pushed his wife, that he saw the marks from the blows, and that he accompanied Ms. Gueriel to the police station to report the incident, but Mr. Wright destroyed receipt of that report.[333] Mr. Mulhern also reported that Ms. Gueriel confided in him that she was afraid to ask for a divorce in the United States because she feared for her life .[334]

Second, Mrs. Lormier, a French citizen who lived with the Wright couple during eight months of their marriage, testified that Mr. Wright had an aggressive and violent personality and that he was extremely possessive of Ms. Gueriel, whom he did not permit to go out except to go to work.[335] She further reported that Mr. Wright degraded Ms. Gueriel in front of their children and that the "shouting and arguments" disturbed the children.[336]

Finally, Erik Gueriel, Ms. Gueriel's brother, testified that on two different visits to his sister's home he observed Mr. Wright both physically and verbally violent toward his three children.[337] He also testified to the possessive nature of Mr. Wright and characterized his sister as being "effectively imprisoned" by her husband.[338] Perhaps most persuasive to the court, Mr. Gueriel told the court that he heard Mr. Wright threaten to "destroy" the three children if Ms. Gueriel did not return immediately from a two week visit with her family in France.[339]

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328. *See Wright, supra* note 25, at 3. Alain Cornec, a French attorney assisting the legal firm that represented Mr. Wright, contributed this case to Mr. Hilton's website.

329. *See id.*

330. *See id.*

331. *See id.*

332. *See id.*

333. *See id.*

334. *See id.*

335. *See id.*

336. *Id.*

337. *See id.*

338. *See id.*

339. *See id.*

To support his position, Mr. Wright introduced statements from neighbors, clergy, and the family doctor that described Mr. Wright as "an affectionate, attentive father who spent a great deal of time with his children."[340] Moreover, in a separate interview, the two oldest children corroborated this characterization by describing their father as "'gentil' (kind)."[341] For reasons not clearly presented in the report of this case, the French court found the evidence produced by Ms. Gueriel to be more probative.[342] In the opinion of the court, the situation for the children appeared to be one in which "the children became hostages in the 'death crisis' of the couple," and "the risk, albeit statistically minimal," is that Mr. Wright, "overwhelmed by a sudden and destructive suicidal impulse, would at any particular time, put his threats into effect."[343] The court determined this risk to be an Article 13(b) "grave risk of harm" and consequently denied the return of the children to the United States.[344]

B. Murray *(1993 Australia)*

In the *Murray* case,[345] the mother abducted her three children from New Zealand to Australia, where she immediately petitioned the Australian court for custody of the children, personal protection, and a restraining order against her husband.[346] Two months later, but before the Australian custody hearing, the father applied under the Hague Convention for the return of his children.[347] Admonishing the wife's attorneys for failure to inform the Australian court of the father's Hague Convention action, the court found the removal of the children from New Zealand to be wrongful[348] and vacated the earlier Australian custody ruling that granted custody to the mother.[349]

In her defense, the mother asserted a "grave risk of harm" exception, claiming that her husband inflicted "numerous acts of violence" and "made death threats to her."[350] In her affidavit, the mother stated that her husband made "violent attacks over some days in April 1993, which included head butting, punching, kneeing her at the base of the spine and death threats."[351] To corroborate her affidavit, she presented photographs which were taken the day before leaving New Zealand and

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340. *Id.* at 4.
341. *Id.* The youngest child was not old enough to express himself. *See id.*
342. *See id.*
343. *Id.*
344. *See id.*
345. *Murray*, *supra* note 188.
346. *See id.* at 1.
347. *See id.*
348. *See id.*
349. *See id.* at 10, 13-14 (discussing how allowing an abducting parent to seek a custody order in another country, that would be honored in the country of habitual residence, would undermine the very purpose of the Hague Convention).
350. *Id.* at 1.
351. *Id.* at 4.

which showed "considerable physical damage and bruising to her."[352] She also claimed that her husband was a member of the gang, "Mongrel Mob," and that her husband was likely to influence other gang members to act with violence against her if she stayed in New Zealand.[353] She reported that her husband kept an assortment of weapons "including un-licensed firearms, 'Nunchukas,' knives, chains and meat cleavers in his home."[354] She told the court that she left New Zealand, not to gain an advantage in custody proceedings, but to remove herself and her children from "a situation of violence, fear, and terror."[355] She claimed to have no safe place with friends or relatives in New Zealand, but she said that she had her father and other family members in Australia on whom she could call for help.[356]

The Australian court found "no evidence to suggest that *the children* would come to any harm if they were to be returned and that the New Zealand Courts . . . would act swiftly to protect the wife should the need arise."[357] Furthermore, the court found that to conclude that the wife and children could not be protected by the courts of New Zealand would be "presumptuous and offensive in the extreme."[358] The court suggested that the mother did not have to return to the same location as the father.[359] The court held that because the children were New Zealand citizens, "their future" should be determined under the jurisdiction of the courts of New Zealand.[360]

C. Nunez-Escudero v. Tice-Menley *(1994 United States)*

Enrique Nunez-Escuder married Stephanie Tice-Menley in Mexico, and one year later they had a son.[361] When the child was two months old, Ms. Tice-Menley abducted the child from Mexico and returned to her parents' home in Minnesota.[362] Mr. Nunez-Escuder filed an action for wrongful removal under the Hague Convention.[363] The district court denied the claim based on the "grave risk of harm" exception, but without determining that Mexico was the child's habitual residence.[364] Mr. Nunez-Escuder appealed.[365]

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352. *Id.*
353. *See id.*
354. *Id.*
355. *Id.*
356. *See id.*
357. *Id* at 7 (emphasis added).
358. *Id.* at 19.
359. *See id.*
360. *See id.* at 20.
361. *See* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 375 (8th Cir. 1994).
362. *See id.*
363. *See id.*
364. *See id.* at 374.
365. *See id.* at 375.

Ms. Tice-Menley claimed that "an infant's habitual residence follows that of his mother" and that Mexico was her "coerced residence."[366] Supported by her own affidavit and the affidavits of her parents and a psychologist, Ms. Tice-Menley suggested that "the baby *could* be subject to a grave risk of physical or psychological harm or be placed in an intolerable situation in Mexico."[367] She claimed that she was "physically, sexually, and verbally abused by her husband."[368] Her husband and father-in-law did not permit her to leave the family home.[369] She feared for her baby's safety and reported that the family criticized her breast-feeding the baby and refused to obtain a baby safety seat for the car. She told of her father-in-law's verbal abuse and of having "seen [him] hit his youngest son with a wooden plunger."[370]

The court found Ms. Tice-Menley's evidence to be insufficient to satisfy a "grave risk of harm" exception.[371] The court suggested that it would consider the social background of the child and the evaluation of the people and circumstances awaiting the child upon return, and further stated that psychological evaluations are not be "per se irrelevant."[372] However, in remanding the case, the court instructed that in order to find a grave risk of harm or harm that would otherwise place the child in an intolerable situation, Ms. Tice-Menley must present clear and convincing evidence that such harm exists in Mexico.[373] The court also instructed the lower court to determine the habitual residence of the child.[374]

D. Rodriguez v. Rodriguez *(1999 United States)*

On May 29, 1998, Mrs. Rodriguez left the childhood home of her father in Venezuela, where she lived with her husband and three children, and took her three children with her.[375] She moved the children to the United States to live with her mother in Maryland.[376] Seven months later, Mr. Rodriguez filed an action under the Hague Convention for the return of his children.[377] Mrs. Rodriguez argued that return of her children to Venezuela would expose them to a "grave risk of physical

366. *Id.* at 379.
367. *Id.* at 376 (emphasis added).
368. *Id.*
369. *See id.*
370. *Id.*
371. *See id.*
372. *See id.* at 377-78.
373. *See id.* at 378.
374. *See id.*
375. *See* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 457 (D. Md. 1999).
376. *See id.*
377. *See id.* at 458. A Warrant in Lieu of Writ of Habeas Corpus is a warrant used by authorities to "bring a person before a court . . . to ensure that the party's imprisonment or detention is not illegal." BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

or psychological harm or otherwise place the children in an intolerable situation."[378] To support her argument, Mrs. Rodriguez offered the testimony of herself;[379] her oldest son, Jorge;[380] her oldest daughter, Alejandra; her sister and mother;[381] and her psychiatrist, Dr. Killene.[382]

The court interviewed Jorge, age thirteen, outside of the presence of both parents.[383] Tragically, he testified that his father "first began to hit him when he was six years old."[384] He described one incident when he was beat with a one inch belt about his legs, back, and buttocks, causing welts and bruises, and forcing him to miss one week of school.[385] The beating occurred because he "had been told three times to leave a friend's house where he was playing."[386] Another time, when Jorge was in third grade and lost a watch his father had given him for graduation, his father "kicked him at least twice in the back and hit him with his fists" while at school.[387] His father told him that he must not tell anyone if he sustained bruises.[388] He testified that his father physically assaulted him about twice a month and "demeaned him and called him by 'bad words'" daily.[389]

Jorge also described frequent episodes when his father hit and choked his mother, and one episode when his father "pushed [his mother] down the stairs when she was pregnant."[390] He talked about his fear of and the unpredictability of his father's temper.[391] The court found Jorge to be "uniquely mature and articulate," with his judgment unaffected by his lifestyle in the United States.[392] He did not seem to have been coached and stated, "He is my father, I have to love him, but he does bad things."[393]

Mrs. Rodriguez's testimony was consistent with that of Jorge. She described Jorge's condition after his first beating as "naked, with blows all over his body from his head to his toes."[394] She reported her husband's abuse to the police, but she dropped the complaint after he "promised it would never happen again."[395] She also told about how a teacher observed the beating that occurred over the watch and

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378. *Rodriguez*, 33 F. Supp. 2d at 459; *see also* Hague Convention, *supra* note 4, art. 13(b).
379. *See id.* at 460.
380. *See id.* at 459-60.
381. *See id.* at 460-61.
382. *See id.* at 461.
383. *See id.* at 458.
384. *Id.* at 459.
385. *See id.*
386. *Id.*
387. *Id.* at 459-60.
388. *See id.* at 460.
389. *Id.*
390. *Id.*
391. *See id.*
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*

about how the school psychologist requested to speak with her husband about the abuse of Jorge.[396] She described how her husband and her father kept loaded guns in the house and how they fired them in the house when they were drinking.[397]

Alejandra, the middle child, said that her father never hit her, but she was afraid of misbehaving.[398] She also corroborated the abuse of Jorge and her mother.[399] Mrs. Rodriguez's mother and sister recounted that following a particular incident of abuse, they accompanied Mrs. Rodriguez to several different police stations, and that each station refused to become involved in a domestic dispute.[400] The sister stated that Mr. Rodriguez called her after her sister abducted the children and told her, "I will find you and I will kill you–don't forget you have a daughter."[401]

Dr. Killene testified that Mrs. Rodriguez, Jorge, and Alejandra suffer from Post Traumatic Stress Disorder as a result of Mr. Rodriguez's abuse.[402] According to Dr. Killene, even though Alejandra was not directly physically abused, witnessing abuse can be more traumatic than actual physical abuse.[403] Both the children have nightmares attributed to the stress, and Dr. Killene's "only hope of recovery" for the children was that they remain in "a safe and secure environment."[404]

Mr. Rodriguez did not present his own expert witness.[405] In fact, the court found his testimony to be the most persuasive in its determination that the children should not be returned to Venezuela.[406] The court found him "evasive," "argumentative," and "self-contradictory."[407] He firmly denied ever hitting or using "corporal punishment on Jorge."[408] He expressed contempt for the profession of psychology and denied any fault in his family's crisis.[409] Not unsurprisingly, the court found his testimony to lack credibility and to demonstrate an unlikelihood that Mr. Rodriguez would change his behavior.[410] The court also suggested that the risk to Mrs. Rodriguez and her children "increased exponentially as a result of these proceedings."[411] The court found this case to closely match the type of situation that is "clearly within the grave risk" exception and denied the father's petition for the

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396. *See id.* at 461 n.5 (noting two documents from Venezuela, (1) a report from the psychologist at Jorge's school detailing the watch incident and (2) a statement from a neighbor describing observations of Jorge's abuse, but declining to give either documents weight because of evidentiary concerns).
397. *See id.*
398. *See id.*
399. *See id.*
400. *See id.* at 460-61.
401. *Id.* at 461.
402. *See id.*
403. *See id.*
404. *Id.*
405. *See id.*
406. *See id.*
407. *Id.*
408. *See id.*
409. *See id.*
410. *See id.*
411. *Id.*

return of the children.[412] This case was later criticized for not "exploring the prospect of arranging an alternative placement for the [children], or the home jurisdiction's capacity to enforce such an arrangement."[413]

E. Blondin v. Dubois *(2000 United States)*

Mr. Blondin and Ms. Dubois, both French citizens, never married, but they had two children together and lived together, off and on, for approximately seven years.[414] Ms. Dubois also had a son Crispin by a prior relationship, who was sixteen years old when Mr. Blondin's first child, Marie-Eline, was born.[415] Within the first year of the relationship, Mr. Blondin began to beat Ms. Dubois, even as she held their child.[416] In camera, Marie-Eline corroborated that her father hit her and her mother with a belt, and "he spit on my mommy too."[417] In 1992, Mr. Blondin choked Marie-Eline, then one year old, by wrapping a piece of electrical cord around her neck and threatened to kill both the child and her mother.[418] The following day, Ms. Dubois took her daughter and older son to a shelter for battered women, but after two weeks, Mr. Blondin came and took them home with him.[419]

In 1993, Ms. Dubois again sought escape from her husband in a women's shelter and eventually moved to another shelter, where she and her two children stayed for eight to nine months.[420] During that year, Mr. Blondin petitioned the French courts for custody of Marie-Eline; however, the couple reconciled and Ms. Dubois became pregnant with Mr. Blondin's second child, Francois.[421] According to Ms. Dubois' affidavit, the beatings and threats continued even during the pregnancy.[422]

In March of 1995, a doctor reported that Ms. Dubois had headaches and a localized swelling of the lower jaw, and complained that her husband hit her.[423] In June 1995, another doctor found an injury under her right eye and hematomas on her left arm and both breasts caused by her husband.[424] In August 1995, Francois was born.[425] After Francois' birth, the beatings continued with Mr. Blondin often

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412. *See id.* at 462.

413. Turner v. Frowein, 752 A.2d 955, 973 n.16 (Conn. 1999).

414. *See* Blondin v. Dubois, 19 F. Supp. 2d 123, 124 (S.D.N.Y. 1998) [hereinafter Blondin I].

415. *See id.*

416. *See id.*

417. *Id.*

418. *See id.*

419. *See id.*

420. *See id.* at 125. Ms. Dubois' older son, Crispin, had to stay in a different shelter for young adults "[b]ecause of his age." *Id.*

421. *See id.*

422. *See id.*

423. *See id.*

424. *See id.*; *see also* Blondin v. Dubois, 78 F. Supp. 2d 283, 286 n.1 (S.D.N.Y. 2000) [hereinafter Blondin III] (reporting this same case on remand from the Second Circuit and its finding that Mr. Blondin abused Ms. Dubois not only upon the testimonies of Ms. Dubois and Marie-Eline, but also upon medical records).

425. *See* Blondin I, 19 F. Supp. 2d at 125.

threatening to "kill everyone" and threatening "to throw Francois out the window."[426] In August 1997, Ms. Dubois abducted the children and went to the United States to live with her brother and other family members.[427]

Mr. Blondin then petitioned the District Court for the return of his children to France under the Hague Convention.[428] Ms. Dubois, represented by counsel appointed by the court through the Legal Aid Society,[429] defended her abduction of the children under the Article 13(b) exception of the Hague Convention.[430] The issue before the trial court in *Blondin v. Dubois*[431] was whether the return of Marie-Eline and Francois to France would place them at "grave risk of harm" in accordance with Article 13(b) of the Hague Convention.[432] Based on the testimonies of Ms. Dubois, Mr. Blondin, and Marie-Eline, who was interviewed outside the presence of her parents and their attorneys, the court concluded that the evidence presented established by clear and convincing proof that the return of the children to France would present a "grave risk of harm" to the children and dismissed Mr. Blondin's petition for return.[433]

The court based its conclusion largely on the repetitive nature of Mr. Blondin's abuse of his children and Ms. Dubois and noted that "[t]he situation deteriorated to the point again in 1997 when Ms. Dubois felt she had no choice but to leave France altogether."[434] Moreover, the court was "firmly convinced that [Blondin] was not telling the truth."[435] Particularly unconvincing was Mr. Blondin's testimony that Ms. Dubois claimed to be a battered spouse in 1993 in order to live in a center for battered women.[436] Mr. Blondin's testimony regarding whether or not he ever hit his children or Ms. Dubois was also inconsistent and self-contradicting.[437] Finally, he gave misleading facts regarding the 1993 French court's custody order.[438]

The court considered the current situation of the children in the United States and the fact that Ms. Dubois and the children were now being supported by family and found that returning the children to France with Ms. Dubois without financial resources of their own would be "extremely disruptive."[439] The court rejected the

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426. *Id.*

427. *See id.*

428. *See id.* at 124. Mr. Blondin's petition in the United States was brought under section 2(b)(4) of the International Child Abduction Remedies Act. *See* 42 U.S.C.A. §11601(b)(4) (codifying of the Hague Convention).

429. *See* Blondin I, 19 F. Supp. 2d. at 126.

430. *See id.* at 126.

431. *See id.* at 124.

432. *See id.* at 127.

433. *See id.* at 127, 129.

434. *Id.* at 127-28.

435. *Id.* at 128. The court characterized Mr. Blondin's testimony as "incredible." *See id.*

436. *See id.*

437. *See id.* Mr. Blondin's testimony regarding abuse vacillated between total denial to "very rarely" spanking and maintained that he never hit Ms. Dubois "in the presence of the children." *See id.*

438. *See id.* Mr. Blondin implied that the French court had given the couple joint custody despite the protest of Ms. Dubois when in fact she had told the French court that "she wanted to live with Blondin again." *See id.*

439. *See id.*

idea of Ms. Dubois and the children being financially dependent on Mr. Blondin, finding the possibility of Mr. Blondin supporting their separate housing to be infeasible because of Mr. Blondin's testimony that he could not even afford the price of an airline ticket to return to the United States.[440] Finally, the court found Marie-Eline's objection to returning to France, while not dispositive, was a supporting factor in its decision to deny Mr. Blondin's petition.[441]

Mr. Blondin appealed the District Court's decision and presented the Second Circuit with "issues of first impression regarding the application of the Hague Convention."[442] The Second Circuit did not disturb the District Court's conclusion that the evidence was clear and convincing that the children had been physically abused and would be placed at risk of physical abuse if returned to Mr. Blondin's custody.[443] Nevertheless, the court vacated the denial of Mr. Blondin's petition for return and remanded the case back to the District Court for further consideration of the range of remedies that might allow both return of the children to their home country and their protection from harm, pending a custody award by a French court with proper jurisdiction.[444]

On remand and in light of the Second Circuit's "clarified standard,"[445] the District Court created a thorough record depicting the facts that led the court to determine that Marie-Eline and Francois would be at "grave risk of harm" not only if they were to be returned to Mr. Blondin, but also if they returned to France.[446] Judge Chin solicited and received responses from the French Central Authority, other French officials, and the U.S. Department of State.[447] In addition, the court heard the testimonies of a French lawyer specializing in family and international law, an expert in child psychiatry and psychology, Ms. Dubois, Marie-Eline, and Francois.[448]

While maintaining the children would not be returned to the custody of Mr. Blondin, the court explored the possibility of "an undertaking," which would allow Ms. Dubois to return with the children to France for a custody hearing.[449] Based on

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440. *See id.*

441. *See id.*

442. Blondin v. Dubois, 189 F.3d 240, 241 (2d Cir. 1999) [hereinafter Blondin II].

443. *See id.* at 242.

444. *See id.* at 250.

445. *Id.* at 242 (providing the "clarified standard" that "the Hague Convention requires a more complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they were (concededly) wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody"). The court further directed future courts considering Hague Convention cases "to make every effort" to simultaneously honor the Convention's purposes (1) to return wrongfully abducted children to their habitual residence for custody decisions by the courts of that country and (2) to protect the children from "grave risk of harm." *See id.*

446. *See* Blondin III, 78 F. Supp. 2d 283, 284 (S.D.N.Y. 2000) (presenting the District Court's decision on remand from the Second Circuit).

447. *See id.*

448. *See id.* at 285.

449. *See id.*

the testimony of the government's expert witness, Veronique Chauveau, the court determined what specific social services and legal protections were likely to be available for Ms. Dubois and the children.[450] Although Ms. Dubois had a court order pending in France giving joint custody to Mr. Blondin and Ms. Dubois, Ms. Dubois could seek a modification of that order to give her temporary custody pending the outcome of a new custody hearing.[451] At the same time, the French court could appoint a child psychiatrist and social worker to evaluate Ms. Dubois and the children.[452] The expert estimated that the process of obtaining a French custody decision could take from one to three months, depending on the efforts of Ms. Dubois's attorney, the social workers involved, and the "willingness" of the parties to cooperate.[453]

Through his attorney, Mr. Blondin offered the "undertaking"[454] or stipulation that he would pay for the airfare to France for Ms. Dubois and the children, and for a three week stay in a "one-star hotel," so that Ms. Dubois would have shelter while she applied for government assistance.[455] The French expert testified that the French courts would probably enforce the undertakings that Mr. Blondin offered so long as they do not conflict with the public policy of France.[456] Ms. Dubois could immediately receive free legal assistance if authorized by the presiding judge.[457] She would be eligible for a minimal support allotment each month, depending on how much Mr. Blondin contributed for their support, or "she could apply for residence in a shelter."[458]

The Office of the Public Prosecutor provided a statement declaring that Ms. Dubois would not be prosecuted for the abduction of the children or the forgery of Mr. Blondin's signature on the children's passports if she returned to France.[459] Conversely, in a letter to the U.S. Department of State, the French Ministry of Justice, the Central Authority of France, threatened to extradite Ms. Dubois from the United States for criminal prosecution of abduction and forgery if she did not willingly return to France with the children.[460]

The District Court also considered the findings from a repeat interview with the children, along with the findings of Dr. Albert Solnit, Sterling Professor Emeritus of Pediatrics and Psychiatry at Yale University Child Study Center, who examined

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450. *See id.* at 288.
451. *See id.*
452. *See id.*
453. *Id.*
454. *See supra* notes 190-91 and accompanying text (discussing "undertakings").
455. *See* Blondin III, 78 F. Supp. 2d 283, 289 (S.D.N.Y. 2000).
456. *See id.* The case does not expound on French public policy in these kinds of situations.
457. *See id.*
458. *See id.*
459. *See id.*
460. *See id.* at 289-90.

both Marie-Eline and Francois.[461] In Dr. Solnit's opinion, the children suffered from a traumatic stress disorder from which they were now recovering due to the "secure environment of their home and extended family" in the United States.[462] The doctor further opined that a return to France would create a "traumatizing uncertainty" in the minds of the children regarding their future, to the risking reversal of any recovery that they have so far achieved in their present safe environment.[463] He further concluded that placement of the children with a third party, even without any contact from Mr. Blondin, would return them to the conditions of their primary trauma, and that *any* return to France would "almost certainly" trigger recurrence of the stress disorder and result in "long-term or even permanent harm" to their development.[464] Finally, the judge considered Marie-Eline's objection to returning to France, particularly the her statement that she "never want[s] to go back to [her] daddy," even for a visit, or to visit Paris for more than one day.[465]

The court concluded that the return of the children to France, *under any arrangement*, would expose the children to a "grave risk" of "physical or psychological harm."[466] The reasons for this conclusion are as follows: (1) removing the children from their present secure environment would set back the recovery the children have achieved,[467] (2) returning to France, the site of their past trauma, and having to endure the uncertainties and pressures of custody proceedings, would cause the children further psychological harm,[468] and (3) recognition that Marie-Eline objected to being returned to France.[469]

Finally, the court addressed the following three arguments raised by Mr. Blondin, France, and the United States: (1) removal of the children from their home creates a common adjustment problem that other courts declined to find consistent with the Article 13(b) exception,[470] (2) this court is reading the Article 13(b) exception too broadly because, for the "grave risk of harm" exception to be applicable, the court must find that France is incapable or unwilling to give the children adequate protection,[471] and (3) this court is interfering with a pending

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461. *See id.* at 288. Judge Chin spoke with the children, again outside the presence of their mother and the attorneys and without wearing his robe to put the children at ease. *See id.* at 293 n.10.

462. *See id.* at 291.

463. *See id.*

464. *See id.* at 292.

465. *Id.*

466. *See id.* at 294.

467. *See id.* at 295 (expounding on the repercussions of the removal of the children from their present environment and giving "great weight" to Dr. Solnit's opinion and citing *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456 (D.Md. 1999), in support).

468. *See id.* at 295-96 (noting as factors the uncertainty and insecurity of temporary living arrangements in France, the effect the one to three months anticipated for the custody proceedings would have on the children, and the inability of this court to guarantee that Mr. Blondin would not gain custody of the children).

469. *See id.* at 296 (stressing that Marie-Eline's objection to being returned to France is not dispositive, but rather a factor to be taken into account by the court in its decision).

470. *See id.* at 297.

471. *See id.* at 297-98.

French custody decision and "unduly asserting jurisdiction over a French custody dispute."[472]

In addressing the first argument, the District Court emphasized the abuse inflicted upon Ms. Dubois and the children.[473] The court relied upon the facts supporting the abuse to distinguish this case from others where the harm alleged was nothing more than the disruption of relocation[474] or the separation from a long-time caretaker.[475]

Regarding the second argument, the court chose to follow the regulations of the U.S. State Department,[476] which do not condition a finding of "grave risk of harm" on a finding that the court of the child's habitual residence is incapable or unwilling to protect the child.[477] Judge Chin stressed confidence in France's ability to protect the children from further abuse, but expressed disbelief that France could protect them from the trauma of being uprooted from a place where they feel safe and secure and returned to a place where they were seriously abused.[478]

The court confronted the third argument with a direct approach.[479] Judge Chin claimed authority under the Hague Convention to apply the Article 13(b) exception, but distinguished his decision from one made on the "ultimate merits of the custody dispute" to one made on the "merits of the abduction claim under the Convention."[480] The judge expressed concern over the "veiled threats" of the French Ministry of Justice to extradite Ms. Dubois and prosecute her for the abduction of the children if Mr. Blondin's petition was not granted.[481] He advocated that the best

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472. *Id.* at 298-99.

473. *See id.* at 297 (characterizing the abuse to the children by their father as severe both physically and emotionally and existing for "an extended period of time").

474. *See id.* (distinguishing this case, with its clear and convincing evidence of abuse, from *Friedrich v. Friedrich* in which no allegation of abuse was made); *see also* Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996) (concluding that Mrs. Friedrich alleges no more than adjustment problems that ordinarily attend the relocation of children).

475. *See* Blondin III, 78 F. Supp. 2d 283, 297 (S.D.N.Y. 2000) (finding this case also differs from *Rydder v. Rydder*, which lacked of specific evidence of harm to the involved children); *see also* Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (denying Mrs. Rydder's claim that separation of the children from their primary caretaker constitutes a grave risk of harm under Article 13(b) of the Convention).

476. 51 Fed. Reg. 10494, 10510 (1986).

477. The court characterized the requirement of a finding that the abducted-from country is incapable or unwilling to give the child adequate protection to be the Sixth Circuit's view, thus suggesting that the requirement is not binding on this court. *See* Blondin III, 78 F. Supp. 2d at 297-98; *see also Friedrich*, 78 F.3d at 1069 (stating that a grave risk of harm exist "in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection").

478. *See* Blondin III, 78 F. Supp. 2d at 298.

479. *See id.* at 298-99 (addressing the claim that the District Court is interfering with a pending French custody order).

480. *See id.*

481. *See id.* at 299. The hostility sensed by the court from Mr. Chauveau is palpable in the last paragraphs of this opinion. *See id.* (reporting that Mr. Chauveau wondered if the judge viewed the French as "uncivilized monkeys or responsible partners to an international convention," to which the judge responds in the opinion that he viewed the French as partners).

interests of children be the motivation of courts, parents, and the governments of both France and the United States.[482] The court concluded that the Convention ultimately provides the judge with the discretion to deny the return of the children if a grave risk of harm is found and that the court's decision in dismissing Mr. Blondin's petition is not a matter of "American chauvinism" or distrust of the French judicial system, but a matter of determining the best interests of the children within the "framework of the Convention."[483]

F. Turner v. Frowein *(2000 United States)*

Ava Turner, a U.S. citizen, married Onno Frowein, a Dutch citizen, in 1986, and although the couple lived a substantial part of their marriage apart with dual residences in New York City and Connecticut, they had a son in 1990.[484] During the marriage, Mr. Frowein inflicted physical and emotional abuse on Ms. Turner in numerous violent episodes.[485] He choked her, tried to push her down stairs, spit in her face, and verbally abused her, as witnessed by their son and, on occasion, by neighbors.[486] By 1994, Ms. Turner began to consider a divorce, to which Mr. Frowein retaliated by abducting the son and threatening permanent separation.[487] Ms. Turner obtained a restraining order against Mr. Frowein, but following the return of the child, the couple reconciled on the stipulation that Mr. Frowein would seek counseling.[488] In May 1994, the couple moved to Holland, where the physical and verbal abuse continued.[489]

After the couple moved to Holland, Mr. Frowein began to sleep alone with his son in a separate bedroom.[490] On the morning of February 7, 1996, Ms. Turner discovered her son sleeping naked from the waist down with his father, and immediately confronted Mr. Frowein with the accusation of sexual abuse.[491] Ms. Turner moved out that day and in July 1997, secured employment in New York, intending to take the child with her. However, Mr. Frowein took the child, the child's passport, and the child's birth certificate, once again threatening never to return him.[492] Ms. Turner called the police and told them of the suspected sexual abuse.[493] The police promised Ms. Turner that a child abuse officer would come to

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482. *See id.*
483. *Id.*
484. *See* Turner v. Frowein, 752 A.2d 955, 961 (Conn. 2000).
485. *See id.*
486. *See id.* at 962 n.3.
487. *See id.* at 962.
488. *See id.*
489. *See id.*
490. *See id.*
491. *See id.*
492. *See id.*
493. *See id.*

her home the next day, but she did not speak to an officer until September and her son was not returned for ten days.[494]

On July 28, 1997, Ms. Turner petitioned the Dutch court for a divorce and permission to relocate to New York with her son.[495] The Dutch court granted temporary custody to Mr. Frowein without a provision for visitation by Ms. Turner.[496] By September, Mr. Frowein's violence intensified and when Ms. Turner begged him to let her see the child, he chocked, kicked, and beat her so badly that she later have to had a hysterectomy—all in the presence of the child.[497] In October, Ms. Turner withdrew her petition for divorce based on Mr. Frowein's promise to give her custody and on her attorney's advice that vacating the divorce action would vacate the temporary custody order granted to Mr. Frowein in September.[498] On that day, October 30, 1997, Ms. Turner took the child with her to New York.[499]

In November, Ms. Turner filed for divorce in New York, and in response, Mr. Frowein filed a petition for the return of the child under the Hague Convention.[500] Ms. Turner defended her removal of the child under the "grave risk of harm" exception, claiming that Mr. Frowein sexually abused his son.[501] The court found the evidence offered by Ms. Turner to prove her allegations of sexual abuse to be clear and convincing.[502]

Ms. Turner's evidence consisted of the following: (1) her own testimony of finding her son half-naked in bed with Mr. Frowein and of the child's disclosure that he had "two secrets" that he could not tell because he would "get in trouble";[503] (2) a letter from a psychotherapist, who examined the child in the summer of 1996 and confirmed that Ms. Turner suspected sexual abuse at that time;[504] (3) the testimony of John Levanthal, director of Yale University's School of Medicine child sexual abuse clinic, who physically examined the child twice in 1997 and found evidence

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494. *See id.* n.5.

495. *See id.* at 963. Ms. Turner's experience with the Dutch court was problematic. *See id.* She did not receive notice of the hearing date until the night before the hearing, and although she flew to Holland and arrived midway through the proceeding, it was conducted in Dutch. *See id.* Speaking limited Dutch and testifying in English, Ms. Turner apparently missed the opportunity to raise the issue of sexual abuse. *See id.*

496. *See id.*

497. *See id.*

498. *See id.*

499. *See id.*

500. *See id.*

501. *See id.* at 963-64.

502. *See id.* at 966.

503. *See id.* at 964. The mother also noted that when the child returned from a stay with his father, he appeared anxious, was afraid to disrobe, and confided that he slept every night with his father and that his "daddy had hurt him." *See id.*

504. *See id.* This therapist recommended that the child continue therapy in Holland but apparently Mr. Frowein refused to consent. *See id.* Psychotherapy in Holland requires referral from a family physician and the agreement of both parents. *See id.* n.6.

of chronic anal injury;[505] (4) the testimony of a clinical social worker and associate of Leventhal's, who had counseled the child four times finding that the child had extreme anger toward his father and was preoccupied with hurting his father's genitals;[506] (5) the testimony of a court-appointed psychologist who, after examining the child on several occasions, reported that his assessment was inconclusive as to whether or not the sexual abuse had occurred;[507] (6) the testimony of the elementary school psychologist, who counseled the child since November 1997, finding that the child feared his father and that his father would discover his whereabouts;[508] and (7) a former neighbor in Connecticut who reported that the child spontaneously said, "I'm going to buy me a big dog to bite my daddy's penis off."[509]

The trial court found for Ms. Turner, granting her temporary custody of her son and denying Mr. Frowein's petition under the Hague Convention, finding that he had sexually abused his son.[510] Mr. Frowein appealed to the Connecticut Supreme Court.[511] Although not bound by the Second Circuit's decision in *Blondin v. Dubois*,[512] the Supreme Court found the decision persuasive and adopted its analysis.[513] Following *Blondin*, the court found that by exploring all possible remedies that would allow repatriation of the child and yet protect the child's physical and emotional well-being, the court could contemporaneously show respect for the authority of the tribunal of the habitual residence.[514] Although affirming the trial court's conclusion that Ms. Turner had proved by clear and convincing evidence that Mr. Frowein sexually abused his son,[515] the court remanded the case in order to give the lower court an opportunity to evaluate whether the child might be returned to Holland under the supervision of the parent opposing the return or a third party, whether remedial measures were needed to guarantee the child's safety, and whether those measures would be enforceable under Holland's legal system.[516]

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505. *See id.* at 964. Leventhal also testified that Ms. Turner admitted that she was still wiping her son's anus which he found "unusual" for a seven-and-a-half year old child. *See id.*

506. *See id.* at 965. Leventhal found the social workers findings particularly indicative of the father's sexual abuse. *See id.* The child reportedly expressed a desire to "kick his father's private part" and to "give him cancer in his private so they cut it out and he won't hurt anyone anymore." *Id.*

507. *See id.* While inconclusive regarding sexual abuse, the court-appointed psychologist noted that the child was "very afraid" of his father and found the emotion not to have been influenced by Ms. Turner. *See id.*

508. *See id.*

509. *Id.* at 966.

510. *See id.* at 955.

511. *See id.*

512. Blondin II, 189 F.3d 240 (2d Cir. 1999).

513. *See Turner*, 752 A.2d 955, 971 (Conn. 2000).

514. *See id.*

515. *See id.* at 966.

516. *See id.* at 973.

V. CAN THE GOAL OF COMITY BE RECONCILED WITH THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE AND CHILD ABUSE?

Comity can be reconciled with the protection of victims of domestic violence and child abuse in Hague Convention cases. Moreover, the reconciliation can be achieved within the framework of the Hague Convention with little or no modification. In its decision in *Blondin v. Dubois,*[517] the Second Circuit developed a mechanism within the construct of the Hague Convention that affords protection for children who are victims of child abuse and domestic violence and yet fosters comity between the Contracting Countries.[518]

In the past, some judges were reluctant to return children to situations of domestic violence and child abuse, but felt compelled to order the return of children in the interest of comity, upon which the Hague Convention is based.[519] Some courts suggested that the solution to this conflict lay in the use of "undertakings."[520] However, "undertakings" offer nothing more than a superficial remedy because they are "absolutely unenforceable" by the authorities of the habitual residence.[521] Under the *Blondin* approach,[522] judges and the authorities of the child's habitual residence can explore together the conditions and circumstances to which the child would return. The judges can then base their decisions according to these findings.[523] Analysis under this approach requires two determinations to be made when confronted by a claim of "grave risk of harm."[524] First, the court must determine whether a "grave risk of harm" exists for the child. Second, while exploring all avenues of possible remedy, the court must decide whether the child can be returned

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517. *See* Blondin II, 189 F.3d 240 (2d Cir. 1999).

518. *See Turner*, 752 A.2d at 972 (advocating the approach taken in *Blondin* because the approach "respects the home country's jurisdictional authority without sacrificing the physical and emotional well-being of abducted children").

519. *See M and J*, *supra* note 162, ¶ 026 (discussing the instinct of family court judges to protect children and the balancing of that instinct against the primary responsibility to promptly return the abducted child).

520. *See supra* notes 190-91 and accompanying text (detailing "undertakings"). Most European Contracting Countries recognize the use of "undertakings." *See* Garbolino, *supra* note 153, at 4.

521. Garbolino, *supra* note 153, at 4; *see also M and J*, *supra* note 162, ¶ 031 (declaring that English case law has established that undertakings should not be used to regulate the affairs of children "beyond the door of the court of the child's habitual residence").

522. Blondin II, 189 F.3d at 249-50 (outlining the approach for the District Court to follow on remand).

523. *See* Blondin III, 78 F. Supp. 2d 283, 299 (S.D.N.Y. 2000) (emphasizing that the courts, the parents and the governments of both countries should be guided by the best interest of the children); *see also M and J*, *supra* note 162, ¶ 049 (approving judicial co-operation and discussing the "real advantages" in securing the best outcome for children when the judges of different jurisdictions communicate and collaborate).

524. The Second Circuit affirmed the District Court's analysis and decision with respect to the first step, which requires a determination of whether a "grave risk of harm" exists for the child; therefore, the Second Circuit opinion predominantly sets out the second step. *See* Blondin II, 189 F.3d 240, 248-50 (2d Cir. 1999). The first step is analyzed in greater depth by the District Court's initial case. *See* Blondin I, 19 F. Supp. 2d 123, 126 (S.D.N.Y. 1998).

to his or her country of habitual residence and still be protected from the "grave risk of harm."[525]

Under the *Blondin* analysis, the abducting parent must show by clear and convincing evidence that the child faces a "grave risk of harm" in his or her habitual residence.[526] If any modification to the Hague Convention is recommended to effectuate consistency in the application of this new approach, the Article 13(b) "grave risk of harm" should be made to explicitly require a high degree of proof equivalent to the "clear and convincing standard"[527] required under the laws of the United States.[528] A high degree of proof, particularly in domestic violence and child abuse cases, helps to protect against the chance that unfounded allegations of abuse could be used to acquire a favorable custody decision. Thus, a high burden of proof deters the use of child abduction as a means of forum shopping yet still protects children that are clearly victims of child abuse and domestic violence.

Review of the cases selected for discussion in this Comment reveals that different degrees of proof required to show domestic violence and child abuse can result in different outcomes. For example, in *Wright v. Gueriel*,[529] the court denied the return of the children based upon the testimony of three witnesses, revealing such behavior as yelling and making violent threats, even though the father presented contrary evidence.[530] The *Wright* case is not explicit in the standard of proof the court required,[531] but review of the case supports the assumption that a "preponderance of evidence standard"[532] was used. More aligned with the Hague Convention and using a "clear and convincing standard" as mandated by the International Child Abduction Remedies Act,[533] the *Nunez-Escudero* court[534] found the husband's failure to secure an infant seat, an incident of violent behavior by the wife's father-in-law, and the objection by the family to the wife nursing her baby were insufficient to establish a "grave risk of harm" exception.[535]

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525. Blondin II, 189 F.3d at 245, 249.

526. *See id.* at 245.

527. "Clear and convincing proof" is demonstrated by evidence that allows a reasonable certainty of the truth of the matter in question. BLACK'S LAW DICTIONARY 172 (6th abr. ed. 1991).

528. *See* Elliott, *supra* note 249, at 21; *see also* 42 U. S. C. § 11603(e)(2)(A) (West 1999) (requiring clear and convincing evidence of an Article 13(b) exception).

529. *Wright*, *supra* note 25; *see also supra* notes 328-44 (expounding on the facts of *Wright*).

530. *See id.* However, this decision may be justified by the fact that regardless which jurisdiction makes a decision, the decision is always subject to the "good sense" or bias of the judge. *See* Levy, *supra* note 297, at 185. Furthermore, the judge, as a fact-finder, has the ability to evaluate the demeanor of the witness, an important aspect in determining credibility of testimony by an eyewitness. *In re A and Another*, *supra* note 203, ¶034.

531. *Wright*, *supra* note 25.

532. "Preponderance of evidence" is the standard whereby the evidence offered is of greater weight or more convincing than the evidence offered by the opposition. *See* BLACK'S LAW DICTIONARY 819 (6th abr. ed. 1991).

533. *See* 42 U.S.C. § 11603(e)(2)(A).

534. 58 F.3d 374, 375 (8th Cir. 1994). For a discussion of the facts of the *Nunez-Escudero*, see *supra* notes 361-374 and accompanying.

535. *See id* at 375.

The outcome in the *Murray* case[536] is troubling because it seems to disregard the evidence of domestic violence, including photographs of the defending wife following one particularly long and brutal beating.[537] The complex and patterned nature of domestic violence is becoming more broadly understood.[538] The accumulative and permanent effects on children who merely witness domestic violence are more clearly known.[539] Moreover, studies show that little deterrence results from batterer treatment and criminal or civil legal sanctions.[540] This growing understanding of domestic violence is hard to reconcile with the *Murray* court's statement that "it would be presumptuous and offensive in the extreme, for a court of [Australia] to conclude that the wife and the children are not capable of being protected by the New Zealand Courts."[541] Criticism for the *Murray* decision centers, not on the return of the children to New Zealand, but on the court's blind assumption that the children were not in any direct danger and that the mother could be protected upon her return.[542] The *Murray* court neither explored the allegations of the "grave risk of harm" to the children if returned, or the protection that the children would receive upon their return. With what is currently known about domestic violence, to assume that any mechanism other than distance can interrupt the cycle of violence is unrealistic.

Despite some disconcerting findings, like that in *Murray*, as international jurisprudence in Hague Convention cases continues to develop, a balancing between the goals of promptly returning children to their habitual residences and protecting children from grave risks of harm is evolving. Courts are developing creative means of dealing with domestic violence and child abuse within the context of the Hague Convention, perhaps due to the increased confrontation of such cases.[543] Courts developed "undertakings" as a means of returning a child to his or her habitual residence, though not necessarily to the custody of the petitioner.[544] In contrast, the *Blondin* approach offers greater protection to children by requiring the courts to

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536. *See Murray, supra* note 188. For a discussion of *Murray*, see *supra* notes 345-360 and accompanying text.

537. *See Murray, supra* note 188, at 4.

538. *See* CRIMINALIZATION OF DOMESTIC VIOLENCE, *supra* note 44, at 18 (distinguishing domestic violence from other forms of violence due to the strong emotional ties between the victim and the abuser, and the involvement of financial dependency and a desire to protect the children). This source presents a 30 year study of domestic violence and characterizes domestic violence as a recurring and often daily event that occurs outside of public observation. *See generally id.*

539. *See supra* notes 26-49 and accompanying text (discussing domestic violence and child abuse).

540. *See* CRIMINALIZATION OF DOMESTIC VIOLENCE, *supra* note 44, at 1 (describing the research and evaluation of prosecution of batterers, protective orders, and batterer treatment as largely ineffective).

541. *Murray, supra* note 188, at 19.

542. *See id.*

543. The *Blondin*, *Rodriguez*, and *Turner* cases are examples of cases involving compelling evidence of domestic violence, and child abuse. *See supra* notes 414-483 and accompanying text (discussing the *Blondin*); *see also supra* notes 375-413 and accompanying text (outlining the facts of the *Rodriguez*); *supra* notes 484-516 and accompanying text (reviewing the *Turner*).

544. *See supra* notes 190-91 and accompanying text (detailing "undertakings").

explore the specifics of possible remedies, rather than merely extracting promises that prove to be unenforceable once the child is returned. This exploration involves the governments of both parties, as well as the parties themselves.[545] It requires the consideration of the full range of remedies that allows the child to both be returned to his or her habitual residence and provides the child with protection from harm.[546] The remedies include temporary placement with a third party and sufficient assurance of the child's protection and the mother's protection if she also returns.[547]

The *Blondin* approach to cases of "grave risk of harm" may provide a long range effect on reducing the incidence of domestic violence. Since children exposed to domestic violence have an increased likelihood of becoming abusers themselves, anything that deters domestic violence has the natural potential to decrease its incidence.[548] Domestic violence studies that involve the empowerment of victims also show promise of deterrent effects.[549] When government authorities fail to protect the victims of domestic violence, that failure has a demoralizing effect on the victims and a perpetuating effect on the abuser.[550] Finally, the refusal to return the victim to his or her abuser as a result of clear and convincing evidence of domestic violence and child abuse, encourages victims to report such abuse. Police reports and other mechanisms whereby persons outside of the home can have knowledge of the abuse aids in establishing clear and convincing evidence of the abuse to later support a "grave risk of harm" defense.

VI. CONCLUSION

The deterrence of international child abduction, domestic violence, and child abuse are of equal-importance. The jurisdictional provision of the Hague Convention that mandates the return of an abducted child to the jurisdiction of his or her habitual residence is an effective tool in deterring international child abduction.[551] However, given that one in three women worldwide are, or will be, a victim of violence,[552] that up to sixty percent of men who abuse their partners also

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545. *See* Blondin II, 189 F.3d 240, 249 (2d Cir. 1999) (instructing the District Court to explore alternate placement, exercise broad equitable discretion in developing a record to support its decision, and to consult freely with the French government and the Department of State).

546. *See id.*

547. *See id.*

548. *See* IMPACT OF DOMESTIC VIOLENCE, *supra* note 21, at 1 (noting that violence in the family increases the likelihood that children who are a product of that environment will also exhibit violent behavior when they become adults).

549. *See* CRIMINALIZATION OF DOMESTIC VIOLENCE, *supra* note 44, at 11.

550. *See generally id.* Note that in most of the select case law presented in this Comment, prior to abducting the child, the victim sought the assistance of a governmental authority to no avail. *See supra* note 333 and accompanying text; *see also supra* note 400 and accompanying text; *see also* Blondin II, 189 F.3d at 243; *see also supra* notes 493-94 and accompanying text.

551. *See supra* note 53 and accompanying text (reporting an increase in the return of abducted children to the United States with the Hague Treaty in force).

552. *See supra* note 35 and accompanying text.

abuse their children,[553] and that approximately twenty percent of parents who abduct their children do so to escape domestic violence,[554] domestic violence and child abuse are bound to significantly impact international child abduction. Select international case law discussed in this Comment vividly reveals the reality of domestic violence and child abuse, and its impact on international child abduction.[555] To narrow the interpretation of the provisions of the Hague Convention to a simple determination of jurisdiction, regardless of the circumstances, ignores this reality.[556] Under such a narrow construction without regard for the circumstances under which victims of domestic violence and child abuse flee their abusers across international borders, the Hague Convention governs their re-victimization.[557]

Domestic violence and child abuse, if proven to exist, present a "grave risk of harm" to a child, both physically and psychologically.[558] Fortunately, the drafters of the Convention had the foresight to adopt the "grave risk of harm" exception, which grants the courts of the country to which the child is abducted the discretion to deny the return of the child if a "grave risk of harm" is found to exists.[559] Because evidence of domestic violence and child abuse often overlaps with factors considered by the jurisdiction of the child's habitual residence in making custody determinations,[560] the denial of the return of the child in instances of domestic violence and child abuse may place the comity shared by the two countries at risk.[561]

The new approach set forth in *Blondin* requires a court in a Hague Convention action to make the following two determinations: (1) whether a "grave risk of harm" exists for the child in his or her habitual residence and (2) whether any remedies exist by which the child can be returned to his or her habitual residence and still be protected from the "grave risk of harm."[562] Using this approach, comity is enhanced by encouraging communication between the court and the governments of the Contracting Countries in the pursuance of the child's protection. Of equal importance is the realistic and planned protection of the child from domestic violence and abuse—from a "grave risk of harm."

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553. *See supra* note 36 and accompanying text.

554. *See supra* note 37 and accompanying text.

555. *See supra* notes 321-516 (providing a review of six cases of international child abduction that cases involve domestic violence and child abuse).

556. *See supra* note 301 and accompanying text.

557. *See supra* notes 9-10 and accompanying text.

558. *See supra* notes 38-43 and accompanying text (describing some of the effects suffered by children as a result of domestic violence).

559. *See supra* notes 164-201 (discussing the "grave risk of harm" exception).

560. *See, e.g.*, Blondin III, 78 F. Supp. 2d 283, 289 (S.D.N.Y. 2000) (reporting that France communicated concern that the U.S. court was interfering with the jurisdiction of a French custody dispute).

561. *See supra* note 80 and accompanying text (discussing the concept of reciprocity among Contracting States).

562. *See* 189 F.3d 240, 240 (2d Cir. 1999).