THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AS APPLIED TO NON-SIGNATORY NATIONS: GETTING TO SQUARE ONE

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I. INTRODUCTION

Children can't be divided with community property. They're not the good china, the record collection, the cute little etchings on the wall that someone bought on holiday in Scotland.[1]

[C]hild abduction is not an act of love. It has never been and never will be. It's the ultimate revenge on the other partner—and the pain never leaves.[2]

The problem of international child abduction is not a new one. From 1978–1996, more than 5,500 international child abductions by parents have been reported to the U.S. Department of State.[3] Nor is the problem uniquely American. One activist has noted that child abduction is an "international phenomena and is not confined to countries from the west or east, north or south, but wherever there are marital disputes."[4] Most kidnappings occur in multi-cultural nations with high immigration.[5] For example, between the years 1987 and 1995, 317 children were abducted from Australia and 242 children abducted from other countries were brought into Australia.[6] In 1995 alone, 196 children were abducted from Britain to Europe.[7]

The custodial parent of an abducted child faces many challenges. Provided the child is located, the parent must bring a custody proceeding in a foreign and often hostile country.[8] This is an expensive, time consuming, and

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1. Teresa Ooi, *Kidnapped Children: Parents' Pain Never Dies*, STRAITS TIMES (Singapore), Nov. 24, 1994, at 9, *available in* LEXIS, Asiapc Library, Allnws File (quoting Jacqueline Gillespie, an international activist for the prevention of child abduction and "left-behind" mother of two children allegedly kidnapped by her former husband).

2. *Id.*

3. *See* Jake Sandlin, *Son, 4, in Saudi Arabia, Out of Reach of Mom, U.S.*, ARK. DEMOCRAT-GAZETTE, Feb. 8, 1996, at 1A. In 1994, 1,200 cases were reported. *See id.*; Linda L. Creighton, *Parents Who 'Kidnap,'* U.S. NEWS & WORLD REP., Mar. 20, 1995, at 69, 76.

4. Ooi, *supra* note 1, at 9.

5. *See* Michael Perry, *Child Kidnappings on the Rise*, REUTERS N. AM. WIRE, July 29, 1993, *available in* LEXIS, News Library, Arcnws File.

6. *See International Co-operation Vital to Counter Abduction Problems*, NEW STRAITS TIMES (Malaysia), Oct. 29, 1995, at 15 (Focus section), *available in* LEXIS, Asiapc Library, Allnws File [hereinafter *International Co-operation*].

7. *See* Andrew Vine, *EU to Ensure Return of Abducted Children*, YORKSHIRE POST, Aug. 5, 1996, at 1, *available in* LEXIS, World Library, Curnws File.

8. *See* Julia A. Todd, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?*, 2

emotional process.[9] Furthermore, the child suffers greatly from the psychological trauma of abduction.[10]

The international community responded to these challenges by drafting the Hague Convention on the Civil Aspects of International Child Abduction (Convention).[11] Based on the premise that abduction is detrimental to the welfare of children, the Convention's provisions are designed to return the parties to the factual status quo preceding the abduction.[12] In the sixteen years of its existence, the Convention has been largely successful, both as a vehicle for returning an abducted child where appropriate[13] and as a deterrent to future abductions.[14]

One commentator suggested that the Convention would "re-educate" foreign judiciaries and child welfare authorities.[15] "Re-education" refers to the abandonment of the practice of using the child's interests to justify keeping the wrongfully removed child in the country to which he or she was abducted.[16] Courts would "lose their tendency to believe that foreign countries are detrimental to any child's welfare."[17] This concept highlights an important Convention

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IND. J. GLOBAL LEGAL STUD. 553, 560 (1995) (citing Monica Marie Copertino, Comment, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Its Efficacy*, 6 CONN. J. INT'L L. 715, 731–35 (1991)); *see also* Brenda J. Shirman, Note, *International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L.J. 188, 197 (1991).

9. *See* Todd, *supra* note 8, at 553.

10. *See id.*

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

12. *See* A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 543, 549 (1981). Mr. Anton was chairman of the Commission of the Hague Conference on Private International Law which drafted the Convention. *See id.* at 537. The Convention's preamble states its desire "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Hague Convention, *supra* note 11, T.I.A.S. No. 11,670 at 4, 1343 U.N.T.S. at 98; *see also* Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,505 (1986).

13. *See generally* Rhona Schuz, *The Hague Child Abduction Convention: Family Law and Private International Law*, 44 INT'L & COMP. L.Q. 771 (1995) (analyzing the Convention's efficacy in light of conflict of laws principles).

14. *See* Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 11 (1994). *But see* Schuz, *supra* note 13, at 776 n.23.

15. *See* Cornelis D. van Boeschoten, *Hague Conference Conventions and the United States: A European View*, 57 L. & CONTEMP. PROBS. 47, 54 (1994).

16. *See id.* at 54 n.23.

17. *Id.* Unfortunately, national bias still exists, often in favor of the abducting parent. *See id.*

principle and will prove useful in analyzing abduction cases that fall outside the Convention.

Part I of this Comment will provide a general overview of the Convention's provisions and note its limitations.[18] It will also discuss current movements to improve the Convention. Part II will then examine how certain signatory countries approach and decide cases involving a non-Convention country.[19] This Comment will primarily focus on the approaches of the United States, Australia, and Great Britain, but will also consider some alternate remedies from other countries. This Comment will also highlight the difficulties which a parent may encounter in obtaining an appropriate forum to hear a custody dispute without the Convention's guidance. Part III will briefly conclude with a call for more action by signatory nations to alleviate the complications that arise when the Convention does not apply.

II. THE HAGUE CONVENTION IN A NUTSHELL

A. Provisions

The Hague Convention is the starting point once a child has been wrongfully removed from or retained in another country.[20] It focuses on procedure and jurisdiction rather than on the merits of any underlying custody issue, and it is not an extradition treaty.[21] The Convention addresses the issue of whether there has been a "wrongful removal or retention," and, if so, it mandates the summary return of the child to the place of his or her "habitual residence."[22] Only

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18. It is not this Comment's purpose to provide a deep analysis into the Convention's provisions and application. For excellent analyses on the application of the Hague Convention, see Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 L. & CONTEMP. PROBS. 209 (1994); Caroline LeGette, Note, *International Child Abduction and The Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L L.J. 287 (1990).

19. The analysis will discuss both abductions from and to non-Convention countries.

20. *See* Warren Cole, *Border Crossing*, A.B.A. J., July 1993, at 90.

21. *See* Anton, *supra* note 12, at 540–41; Silberman, *supra* note 14, at 10–11 (stating that the Convention does not provide for enforcement of custody decrees); *see also* Lynda R. Herring, Comment, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. INT'L L. & COM. REG. 137, 148 & n.90 (1994) (commenting on the procedural nature of the Convention and its lack of enforcement mechanisms).

22. *See* Hague Convention, *supra* note 11, art. 3, T.I.A.S. No. 11,670 at 4–5, 1343 U.N.T.S. at 98–99, art. 12, T.I.A.S. No. 11,670 at 7–8, 1343 U.N.T.S. at 100; Herring, *supra* note 21, at 148–49.

then may a court consider the underlying merits of a custody case.[23] Thus, the Convention merely empowers a court to determine the merits of an abduction, and not the merits of any custody claim.[24] The custody issues are left for the courts of the child's habitual residence to resolve once the child returns.[25] The State of habitual residence has the most significant interest in the dispute and is the best situated with information necessary to adequately assess the child's best interests in a custody determination.[26]

1. Wrongful Removal or Retention

A removal or retention is wrongful when it is in breach of another's custody rights under the laws of the State of habitual residence where those rights were actually exercised or would have been exercised but for the removal or retention.[27] A formal custody decree from the State of habitual residence need not exist in order to obligate a court to return the child.[28] Nor is the absence of a formal custody decree reason to decline return.[29] Furthermore, that the forum court itself had issued a custody order is not per se a ground for refusing return.[30] The abducting parent will often seek and obtain a custody decree in the forum country before the left-behind parent initiates Convention proceedings.[31] The Convention does, however, allow the forum court to consider

23. *See* Herring, *supra* note 21, at 149.

24. *See* Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991).

25. *See id.* The Convention implicates a State's choice of law rules as well as the State's internal custody rights laws. *See* Feder v. Evans-Feder, 63 F.3d 217, 225 (3d Cir. 1995). Only when a court declines to return the child under the Convention may the court itself resolve any custody dispute. *See* Hague Convention, *supra* note 11, art. 16, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101; Anton, *supra* note 12, at 553.

26. *See* Silberman, *supra* note 14, at 11.

27. *See* Hague Convention, *supra* note 11, art. 3, T.I.A.S. No. 11,670 at 4–5, 1343 U.N.T.S. at 98–99. Custody rights relate "to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* art. 5(a), T.I.A.S. No. 11,670 at 5, 1343 U.N.T.S. at 99. They "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect" under State law. *Id.* art. 3, T.I.A.S. No. 11,670 at 5, 1343 U.N.T.S. at 99.

28. *See* Silberman, *supra* note 14, at 12.

29. *See, e.g.*, Herring, *supra* note 21, at 156–59 (illustrating situations giving rise to custody rights absent a formal custody decree).

30. *See* Hague Convention, *supra* note 11, art. 17, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101; Anton, *supra* note 12, at 554.

31. *See* Silberman, *supra* note 14, at 20.

the reasons for that custody decision in applying the Convention.[32]

2. Habitual Residence

In any Convention proceeding, determining "habitual residence" is a threshold issue.[33] For instance, the Convention only applies if a child was habitually residing in a "Contracting State" immediately before any breach of custody or access rights.[34] The usual remedy under the Convention is to summarily return the child to his or her habitual residence.[35] In addition, the laws of the State of habitual residence determine custody.[36] Yet the Convention's provisions do not define the term "habitual residence." According to some commentators, this was a deliberate omission.[37] The drafters considered the child's habitual residence to be a factual issue, and thus distinguishable from domicile.[38] Courts may consequently assess a child's habitual residence free from technical or standardized constraints.[39] Indeed, most courts have come to believe that habitual residence centers on the child's life and can only be altered "by a change in geography [prior to the abduction] and the passage of time, not by changes in parental affection and responsibility."[40] The primary factor courts consider is the degree of "settled purpose" in the residence.[41] To phrase

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32. *See* Hague Convention, *supra* note 11, art. 17, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101; Anton, *supra* note 12, at 554.

33. *See* Feder v. Evans-Feder, 63 F.3d 217, 222 (3d Cir. 1995). For an excellent discussion of habitual residence, see Herring, *supra* note 21, at 152–56.

34. *See* Hague Convention, *supra* note 11, art. 4, T.I.A.S. No. 11,670 at 5, 1343 U.N.T.S. at 99.

35. *See id.* art. 12, T.I.A.S. No. 11,670 at 7–8, 1343 U.N.T.S. at 100. In the "classic" abduction case, a court orders the child returned to his or her habitual residence; however, the Convention's provisions do not mandate that result. *See id.*; Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,511 (1986). The child is returned to the petitioner, even if the petitioner has moved from the child's State of habitual residence. *See id.*

36. *See* Hague Convention, *supra* note 11, art. 3(a), T.I.A.S. No. 11,670 at 4, 1343 U.N.T.S. at 98.

37. *See* Herring, *supra* note 21, at 152 & n.136.

38. *See id.* at 152–53. According to one Convention commentator, the concept of domicile was too technical to be the appropriate criterion. *See* Anton, *supra* note 12, at 544.

39. *See* Herring, *supra* note 21, at 152–53; Todd, *supra* note 8, at 558; *see also In re* Bates, No. CA122.89, slip op. at 9–10 (Fam. Div'l Ct. 1989) (U.K.) (cited in Walton v. Walton, 925 F. Supp. 453, 457 (S.D. Miss. 1996)).

40. Friedrich v. Friedrich, 983 F.2d 1396, 1401–02 (6th Cir. 1993).

41. *See In re* Ponath, 829 F. Supp. 363, 367 (D. Utah 1993); *see, e.g.*, Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) (stating that a child's habitual

it succinctly: "All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."[42]

3. Discretionary Exceptions[43]

An abducting parent may still avoid a return order by establishing a defense under Article 13 or Article 20.[44] These provisions represent a compromise among the drafting nations which were divided as to whether to permit any possible justification for the abductor's actions.[45] To remain true to the Convention's principles and to avoid judicial overreaching, the drafters specifically enumerated permissible bases upon which a court may refuse return.[46] The defenses are only grants of discretion which stem from the belief that, in certain situations, the child's interests may require more than his or her summary return.[47] Even so, fear of abuse has prompted courts and commentators to emphasize that they must narrowly interpret these provisions.[48] An inquiry under these articles may not become a comprehensive investigation into the merits of the underlying custody case.[49] Thus, merely asserting a possibility that the abduction was justified is not sufficient to

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residence is "the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective"). For a more exhaustive American case law analysis, see Silberman, *supra* note 14, at 20–24.

42. Regina v. Barnet London Borough Council, [1983] 2 App. Cas. 309, 344 (1982) (appeal taken from Eng.).

43. The Convention articles discussed in this section have been referred to as both exceptions and defenses. This Comment will use the terms interchangeably.

44. *See* Hague Convention, *supra* note 11, art. 13, T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101, art. 20, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101.

45. *See* Anton, *supra* note 12, at 550.

46. *See id.*

47. *See* Schuz, *supra* note 13, at 776. To best serve those interests, a court may narrowly look at some underlying facts. The final paragraph of Article 13 reads: "In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child . . . ." Hague Convention, *supra* note 11, art. 13, T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

48. *See* Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,510 (1986); Anton, *supra* note 12, at 550; LeGette, *supra* note 18, at 297; *see also* Silberman, *supra* note 18, at 233–47 (stating that in order for the Convention to be a success, the application of the defenses must be limited).

49. *See* Hague Convention, *supra* note 11, art. 19, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101; Anton, *supra* note 12, at 553.

convince a court to exercise its discretion.[50] It is also important to remember that a prima facie case of an exception does not mandate that a court refuse return.[51]

Article 13(a) permits a court to deny return if the petitioner was either not "actually exercising" custody rights at the time of removal, or had consented to or subsequently acquiesced to the removal or retention.[52] The first part of section (a) is merely a corollary to Article 3, which states that for a removal or retention to be "wrongful," a party must have been exercising custody rights at that time.[53] The second part of Article 13(a) looks at a left-behind parent's conduct with regard to the removal.[54] A court may, in its discretion, refuse return upon finding consent or acquiescence.[55] One court has defined acquiescence as "conduct inconsistent with the summary return of the child . . . . It does not have to be a long-term acceptance of the existing state of affairs."[56] Yet the current trend is to limit the interpretation of "acquiescence."[57] Most courts are reluctant to encourage loopholes in the Convention and have declined to find acquiescence even where the left-behind parent acted ambiguously.[58]

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50. *See* Christina Sachs, *Child Abduction—The Hague Convention and Recent Case-Law*, 23 FAM. L. 585, 586 (1993); Schuz, *supra* note 13, at 776–77 n.28. The party opposing return bears the burden of convincing the court that an exception applies. *See* Sachs, *supra.* In cases brought in the United States, the opponent must prove Article 13(b) and Article 20 exceptions by clear and convincing evidence. *See* International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A) (1994).

51. *See, e.g.*, Schuz, *supra* note 13, at 776–77 n.28 (indicating the extreme reluctance of courts to exercise their discretion).

52. *See* Hague Convention, *supra* note 11, art. 13(a), T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

53. *See id.* art. 3, T.I.A.S. No. 11,670 at 4–5, 1343 U.N.T.S. at 98–99; *see also* Silberman, *supra* note 14, at 25; *supra* text accompanying notes 27–31. Any actions by the abductor to interfere with a party's exercise of those rights do not implicate this defense. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510.

54. *See* Hague Convention, *supra* note 11, art. 13(a), T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

55. *See id.*

56. *Re* AZ (A Minor) (Abduction: Acquiescence), 1 F.L.R. 682, 687 (1993) (Butler-Sloss, L.J.).

57. *See* Silberman, *supra* note 14, at 25.

58. *See* Carol S. Bruch, *International Child Abduction Cases: Experience Under the 1980 Hague Convention*, *in* NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION 1, 8 (1993). This is especially true where a parent subsequently attempts to negotiate with the abductor, for to characterize such negotiations as acquiescence would act as a disincentive to peaceful resolutions. *See* Silberman, *supra* note 14, at 25–26; *see also Re* H and Others, [1997] 2 All E.R. 225, [1997] 2 W.L.R. 563, 573B.

It would thus appear that any judicial discretion under the acquiescence exception focuses on the parent's interests and not on those of the child.[59] Recently, however, the English Court of Appeals stated its considerations for proceeding under this provision.[60] By invoking an Article 13(a) defense, a parent calls upon the court to exercise its discretion, which necessarily entails accounting for the child's best interests.[61] The English courts nevertheless keep this discretion in check by balancing the child's interests against the Convention's fundamental purpose to return the child to the State from which he or she was wrongfully removed.[62]

Under Article 13(b), a court may refuse to return a child if "[t]here is a grave risk that . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[63] The basis for this exception, as with the other Article 13 provisions, is that in some circumstances, the policy of protecting children in general may override that of protecting them from abductions.[64] The discretion thus bestowed enables a court to address the situations where the particular child's welfare may require more than his or her summary return.[65]

Quite possibly, this "grave risk" defense poses the foremost risk of undermining the Convention's objectives.[66] Nowhere does the Convention define the terms "grave risk" and "intolerable situation," leaving interpretation open to the courts.[67] What is clear, however, is the drafters' intention not to have Article 13(b) function as a means to litigate the particular child's best interests.[68] Only evidence directly

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59. *See* Hague Convention, *supra* note 11, art. 13(a), T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

60. *See In re* A, [1993] Fam. 1, 12–14 (Eng. C.A. 1992).

61. *See id.* at 12. Scott, L.J., held that there was no distinction between an Article 13(a) defense and an Article 13(b) defense insofar as both permit the court to exercise its discretion. *See id.* at 13.

62. *See id.*

63. Hague Convention, *supra* note 11, art. 13(b), T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

64. *See* Schuz, *supra* note 13, at 776.

65. *See id.*

66. *See* Silberman, *supra* note 14, at 26.

67. *See* Todd, *supra* note 8, at 571. Indeed, one early commentator forewarned that Article 13(b) "permits a broad subjective consideration on which countries may substantially disagree." Lynn Acker Starr, Recent Development, 24 STAN. J. INT'L L. 289, 298 (1987).

68. *See* Tahan v. Duquette, 613 A.2d 486, 489 (N.J. Super. Ct. App. Div. 1992); Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,510 (1986).

demonstrating a grave—and not merely serious—risk that subjects the child to positive harm is pertinent to the inquiry.[69] A court will not usually hold a separate hearing to discern the particular facts underlying the allegation.[70] Nor will a court heavily rely on psychological profiles or detailed evaluations of a parent's fitness.[71] Furthermore, Article 13(b) must be narrowly construed,[72] and its provisions are not to apply to those situations where the child may face economic or educational hardships upon return.[73] Rather, the drafters envisioned that this article would apply to instances of physical or sexual abuse.[74]

Nevertheless, Article 13(b) remains the most litigated exception.[75] Parents often use Article 13(b) to surreptitiously introduce evidence of what is in the child's best interests.[76] Yet despite all of the above noted problems, Article 13(b) has not proven to be the Convention's undoing. Courts have been true to its narrow interpretation, and many nations implementing legislation impose high burdens of proof for such allegations.[77] Accordingly, it is rare for a court to actually deny return based on Article 13(b).[78]

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69. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510; *see also* Herring, *supra* note 21, at 168 (explaining that the risk of harm to the child must be "of an extreme and compelling nature").

70. *See, e.g.*, *Re* E, 1 F.L.R. 135 (Eng. C.A. 1989). Such action also precludes parents from using Article 13(b) as a vehicle for delay. *See id.*; *see also* Todd, *supra* note 8, at 571 (explaining that the Convention prohibits litigation on matters that relate to the "underlying custody dispute, including the 'best interests' of the child").

71. *See Tahan*, 613 A.2d at 489.

72. *See supra* text accompanying note 49.

73. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510; *see also* LeGette, *supra* note 18, at 297–98 (arguing that a child facing limited educational and economic opportunities does not qualify as being in an "intolerable situation" under Article 13(b)).

74. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510; *see also* LeGette, *supra* note 18, at 297–98 (explaining that only where the child is threatened with sexual or physical abuse is the situation "intolerable").

75. *See* LeGette, *supra* note 18, at 297. For excellent case law analyses, see Silberman, *Progress Report*, *supra* note 18, at 235–44 (discussing case law through 1993); LeGette, *supra* note 18, at 298–308 (discussing case law through 1989).

76. *See* Todd, *supra* note 8, at 571.

77. For example, the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11610 (1994), requires proof of this defense by clear and convincing evidence. *See* 42 U.S.C. § 11603(e)(2)(A).

78. *See* Silberman, *supra* note 14, at 26–28.

The Convention allows the court further discretion to deny a return order based on the child's preferences.[79] Article 13 provides an exception where "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[80] The drafters intended to accommodate those nations that allow a child under sixteen years of age to determine his or her residence.[81] Notably, the Convention does not provide guidance for other jurisdictions to determine when it would be appropriate to consider the child's wishes.[82] Yet it is perhaps best that no established threshold, either formally or informally, exists.[83]

In evaluating a child's expression of preference, courts must first be satisfied that the views expressed are clearly the child's and are not influenced by another.[84] Similarly, courts must be wary of parents asserting the defense as a delay tactic.[85] In general, however, the child's preference of living with a particular parent rarely persuades the court to decline return.[86] The sole issue in a Convention proceeding is whether or not to return the child for purposes of further custody litigation.[87] A forum court does not involve itself in

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79. *See* Hague Convention, *supra* note 11, art. 13, T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

80. *Id.*

81. *See* Starr, *supra* note 67, at 299. The Convention does not apply to children 16 years of age or older. *See* Hague Convention, *supra* note 11, art. 4, T.I.A.S. No. 11,670 at 5, 1343 U.N.T.S. at 99.

82. *See* Herring, *supra* note 21, at 165.

83. *See id.* (citing *In re* S, [1993] Fam. 242, 251 (Eng. C.A. 1992) (explaining the court's view that establishing guidelines is not "desirable" as the Convention intentionally omitted any such guidelines from the agreement)).

84. *See* Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,510 (1986); Sachs, *supra* note 50, at 586; Schuz, *supra* note 13, at 777. To guard against the undue influence of an abducting parent, one court believed that the inquiry should focus on the child's preference at the time of the abduction. *See* Emmett v. Perry, [1996] F.L.C. 92-645, para. 43, (Austl.), *available in* LEXIS, Aust Library, Ausmax File.

85. *See* P v. P, 1 F.L.R. 155 (1992) (High Ct. Fam. Div.) (noting that an abducting parent has no right to insist on an investigation into the child's maturity and strength of objections); *see also* Schuz, *supra* note 13, at 777 n.31 (arguing that when parents use this defense as a delay tactic, the objectives of the Convention are not being upheld).

86. *See, e.g.*, Sheikh v. Cahill, 546 N.Y.S.2d 517, 521–22 (N.Y. Super. Ct. 1989) (finding that a nine-year-old child had not attained an age and degree of maturity to warrant the court to exercise its discretion); Tahan v. Duquette, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992) (stating that the maturity exception does not apply to a nine-year-old). *But see Re* R (A Minor: Abduction), 1 F.L.R. 105 (1992); S v. S (Child Abduction) (Child's Views), 2 F.L.R. 31 (Ct. App. 1992).

87. *See* Silberman, *supra* note 14, at 30–31.

the merits, and to indiscriminately refuse return on such a basis would undoubtedly frustrate the purposes of the Convention.[88]

In addition to these provisions, some nations required a wider "safety valve," ultimately embodied in Article 20.[89] This Article excuses return "if [it] would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[90] The very language is unique among international agreements,[91] and it addresses the drafters' concerns regarding the role of public policy.[92] Clearly the reference in Article 20 is to the forum State's particular laws and not to international agreements dealing with human rights and fundamental freedoms.[93]

While its language appears broad and exploitable, Article 20 is somewhat of a paper tiger. As with the preceding exceptions, courts are to exercise restraint in interpreting Article 20 so as not to undermine the Convention's objectives.[94] It does not provide an excuse to examine the merits of a custody case, nor to judge the political system from which the child was removed.[95] Rather, the provision applies only where return would "'utterly shock the conscience of the Court or offend all notions of due process.'"[96] Thus far, courts have denied most pleas invoking Article 20.[97]

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88. *See* Hague Convention, *supra* note 11, art. 19, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101; *see also* Silberman, *supra* note 14, at 30–31.

89. *See* Anton, *supra* note 12, at 551.

90. Hague Convention, *supra* note 11, art. 20, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101.

91. *See* Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,510 (1986).

92. *See id.*; *see also* Herring, *supra* note 21, at 170.

93. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,511; Anton, *supra* note 12, at 551–52.

94. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510; Anton, *supra* note 12, at 552.

95. *See* Hague International Child Abduction Convention, 51 Fed. Reg. at 10,510.

96. *See* McCall v. McCall, [1995] F.L.C. 92-551, 81-518 (cited in Emmett v. Perry, [1996] F.L.C. 92-644, para. 47 (Austl.) (quoting McCall)). One commentator suggested that an American parent may possibly invoke Article 20 where, in a custody hearing, the parent was not afforded due process. *See* Dorothy Carol Daigle, Note, *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, 879–87 (1993). This position is debatable. *See* Silberman, *supra* note 14, at 29 n.102 ("[T]he premise of the Child Abduction Convention is that the State of habitual residence has the

B. Limitations

1. Mechanics

In theory, the Convention adequately ensures the speedy return of an abducted child to his or her habitual residence, in accordance with what is viewed to be in the best interests of children generally.[98]

In practice, however, a country's legal system may fail a left-behind parent.[99] First, in some signatory nations, a parent may experience difficulties in gaining access to the legal system.[100] Few courts are willing to grant a custodial parent legal aid to proceed.[101] Additionally, some judges remain biased against foreigners and side with their own nationals in disputes.[102] The bias manifests itself in the Article 13 exceptions under the auspices of a "best interests" analysis, leading several commentators to warn against their abuse.[103]

Particular problems have arisen with German courts, which have faced accusations of giving excessive weight to

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strongest claim in having its procedures and its standards applied, whether or not similar to what the United States might constitutionally require.").

97. *See* Herring, *supra* note 21, at 171; Silberman, *supra* note 14, at 29; *see also* A.B.A. SECTION OF FAMLY LAW, INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS 115–16 (Gloria F. DeHart ed., 2d ed. 1993) [hereinafter A.B.A. GUIDE] (noting that in the majority of cases involving Article 20, the pleas were denied).

98. *See* Hague Convention, *supra* note 11, art. 1(a), T.I.A.S. No. 11,670 at 4, 1343 U.N.T.S. at 98, art. 14, T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101; *see also* Richard D. Kearney, *Developments in Private International Law*, 81 AM. J. INT'L L. 724, 732–33 (1987) (noting the provisions that stress "returning children to their customary environment with the least possible delay").

99. *See* Angela Spencer, *UK: Lawyers Back White Paper*, YORKSHIRE POST, Sept. 18, 1996, at 3, *available in* LEXIS, World Library, Curnws File.

100. *See* Caroline Milburn, *Australia: Pressure Is Urged on Kidnappings*, AGE (Melbourne), June 1, 1994, at 9, *available in* LEXIS, Asiapc Library, Allnws File.

101. *See* Andrew Vine, *UK: Father's £15,000 Fight for Child*, YORKSHIRE POST, Sept. 6, 1996, at 5, *available in* LEXIS, World Library, Allnws File.

102. *See id.* Courts may be motivated by cultural, national, ethnic, or religious bias in favor of the national parent. *See* Tom O. Harper, III, Comment, *The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-Abduction*, 9 EMORY INT'L L. REV. 257, 259 (1995); *see also* LeGette, *supra* note 18, at 293 (noting the reluctance of courts to relinquish control of children abducted into their own countries' borders).

103. *See, e.g.*, Silberman, *supra* note 14, at 32; LeGette, *supra* note 18, at 293, 297. A "best interests" analysis is inconsistent with the spirit of the Convention. *See* Anton, *supra* note 12, at 553. Articles 12 and 13 implicitly reject the view that a court's function is to consider whether a child's return is in his or her best interests. *See id.*

the child's wishes.[104] In Germany, the lowest tier of the local court, staffed with provincial judges, hears custody cases.[105] This tends to exacerbate the influence of nationalist sentiment. For example, a Bavarian judge recently refused to recognize a British High Court order granting a British mother, "Catherine Laylle," custody of her two sons after their German father abducted them.[106] In the ex parte proceeding, the German court reasoned that it was in the children's interest to be raised in Germany.[107] It found that the children would suffer considerably in England, as "the entire social environment is based on a foreign language, since German is not spoken either at school or at home."[108] Their mother has not seen the boys for more than half an hour in two years.[109] Recently, the Human Rights Commission has agreed to take her case to determine if it merits proceeding before the European Court of Human Rights.[110]

Nations have acted to remedy the aforementioned mechanical limitations. Great Britain has taken the lead in lobbying for improvements.[111] Primarily, Great Britain has

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104. *See* Clare Dyer & Sarah Boseley, *Push to Aid "Tug of Love" Parents*, GUARDIAN (London), Sept. 18, 1996, at 9, *available in* LEXIS, World Library, Allnws File. Out of 37 cases heard in Germany in the past two years, not one has resulted in any abducted child being returned. *See* Olga Craig, *The Childless Mothers*, SUNDAY TIMES (London), Feb. 23, 1997, *available in* LEXIS, World Library, Allnws File. According to British authorities, other problem countries are Spain, Italy, Greece, and the United States. *See id.*

105. *See* Patricia Wynn Davies, *Britain to Get Tough on Child Snatching*, INDEP. (London), Sept. 18, 1996, at 6 (News section), *available in* LEXIS, World Library, Allnws File.

106. *See id.*; Alasdair Palmer, *Sunday Comment: In the Name of the Fatherland Alasdair Palmer Argues That, When Children Are Involved, Germany Is Still Nationalist*, SUNDAY TELEGRAPH (London), Mar. 24, 1996, at 35, *available in* LEXIS, World Library, Curnws File. Catherine Laylle is a pseudonym used to protect the identity of her children. *See* Anthea Hall, *Mother Fights German Law for Return of Her Two Sons Legal System Backs Father Who Defied Ruling and Abducted Children*, SUNDAY TELEGRAPH (London), Jan. 22, 1995, at 8, *available in* LEXIS, World Library, Arcnws File. The German court limited Laylle to visits of three hours each month in the presence of a lawyer, and required all communications to be in German. *See* Davies, *supra* note 105.

107. *See* Palmer, *supra* note 106.

108. *Id.* Prior to the abduction, the boys were being raised in London, and according to their mother, they were trilingual in English, French, and German. *See* Hall, *supra* note 106.

109. *See* Palmer, *supra* note 106.

110. *See* Angela Neustatter, *Recent Abduction Cases Have Highlighted the Need for More Powerful European Child Protection Laws. Now One Mother Whose Children Have Been Taken Is Fighting to See That Changes Are Made*, GUARDIAN (London), Sept. 12, 1995, at T9, *available in* LEXIS, World Library, Arcnws File.

111. *See* Spencer, *supra* note 99.

sought to form an international agreement on legal aid for parents in foreign courts and to persuade other countries to respect the rulings from the custodial parent's state.[112] The proposed changes should increase access and decrease the unfair influence of bias in some proceedings. Great Britain has also proposed a priority status for appeals of refusals to return the child and has suggested implementation of an international arbitration panel to resolve disputes between courts.[113]

The European Union (EU) has also responded to concerns by piloting tougher international parental child abduction laws, which aim to strengthen police cooperation among countries and enforce return orders.[114] Other proposed legislation provides for binding custody decisions among member nations.[115] Finally, a new EU law charges Europol, the new international police force, with monitoring child abductions.[116]

2. Non-Signatories

The principle limitation on the Convention, however, lies in the large number of countries that have not yet signed and remain immune to its provisions.[117] Without the Convention's

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112. *See id.*; Davies, *supra* note 105.

113. *See* Spencer, *supra* note 99.

114. *See* Vine, *supra* note 101; Vine, *supra* note 7.

115. *See* Peter Conradi, *Euro-Law to Stop Child-Snatch Parents*, SUNDAY TIMES (London), Aug. 4, 1996, *available in* LEXIS, World Library, Curnws File.

116. *See* Vine, *supra* note 7.

117. Reunite, a British charity that advises parents of abducted children, estimates that approximately one-half of all abduction cases involve non-signatory countries. *See* Davies, *supra* note 105. As of April 8, 1997, 26 States have ratified the Hague Convention: Argentina, Australia, Austria, Bosnia & Herzegovina, Canada, Croatia, Denmark, Finland, Fyrom (the former Yugoslav Republic of Macedonia), France, Germany, Greece, Ireland, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela, and Yugoslavia. *See* Recent Actions Regarding Treaties to Which the United States Is Not a Party, 36 I.L.M. 516, 516–17 (1997) [hereinafter Recent Actions]. In addition, Article 38 permits non-member States to accede to the Convention if they file an accession instrument with the Ministry of Foreign Affairs of the Netherlands. *See* Hague Convention, *supra* note 11, art. 38, T.I.A.S. No. 11,670 at 14, 1343 U.N.T.S. at 104. As of April 8, 1997, 20 States have availed themselves of the Article 38 provision: Bahamas, Belize, Burkina Faso, Chile, Colombia, Cyprus, Ecuador, Honduras, Hungary, Iceland, Mauritius, Mexico, Monaco, New Zealand, Panama, Poland, Romania, Slovenia, St. Kitts and Nevis, and Zimbabwe. *See* Recent Actions, *supra*, at 516–17. As of April 8, 1997, three States have signed the Convention: Belgium, the Czech Republic, and the Slovak Republic. *See id.* As of May 1997, Hong Kong had also signed the Convention. *See* John Flint & Emma Batha,

aid, a parent is virtually helpless to obtain a child's return.[118] Often, the most a parent can then hope for is some kind of contact with the child.[119]

III. NON-CONVENTION COUNTRY CASES

A. Abductions to Non-Signatory Nations

In cases in which the Convention does not apply, the law of the country to which the child was abducted governs.[120] The courts will consider the child's "best interests" in determining custody; however, each country tends to conceptualize that term differently.[121] Various cultures place different significance on what constitutes the "best interests."[122] Religious and social values dictate the answers to questions of upbringing, parental authority, permissible social behavior of minors, and degrees of freedom.[123] As a result, national and cultural biases lead the courts to believe that it is in the child's best interest to be raised in their respective nation or culture, rather than in another country.[124]

The problem is exacerbated in certain countries and cultures. In Islamic countries, for example, foreign laws and customs raise immense barriers between the foreign parent

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Hong Kong: Mother Fights for "Abducted" Sons, S. CHINA MORNING POST, June 8, 1997, at 3, *available in* LEXIS, World Library, Curnws File.

118. *See* Nick Thorpe, *Warning Over Child Abduction*, SCOTSMAN, July 2, 1996, at 4, *available in* LEXIS, World Library, Curnws File.

119. *See id.*

120. *See* Harper, *supra* note 102, at 266. The Convention contains a provision that states a petitioner may additionally seek relief under the Contracting State's internal laws, regardless of whether a suit is brought under the Convention. *See* Hague Convention, *supra* note 11, art. 29, T.I.A.S. No. 11,670 at 12, 1343 U.N.T.S. at 103. Accordingly, such an action may be the sole recourse for a parent whose child was abducted to a non-Convention country. *See* Harper, *supra* note 102, at 268.

121. *See* Harper, *supra* note 102, at 266–67; Schuz, *supra* note 13, at 773 & n.11; *see also* Starr, *supra* note 67, at 292.

122. *See International Co-operation*, *supra* note 6.

123. *See id.*

124. *See* Anton, *supra* note 12, at 542–43 (quoting *Hansard* (H.C.), vol. 946, col. 1849). Former Senator Alan Dixon (D-Ill.) has stated that "[a]lmost without exception, a foreign court rules in favor of their [sic] own citizen's case." Cara L. Finan, Comment, *Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction*, 34 SANTA CLARA L. REV. 1007, 1029 (1994) (citing NEIL C. LIVINGSTONE, RESCUE MY CHILD 96 (1992)).

and the child.[125] American parents, in particular, face overwhelming odds in trying to reclaim their child from a Middle Eastern country.[126] A mother's situation is compounded, as these patriarchal countries customarily favor men's rights over women's rights.[127]

In Japan, on the other hand, the foreign father is disadvantaged, due to the culture's lingering prejudice against foreigners and strong belief in the mother-child bond.[128] Further complications arise from the Japanese tradition of resolving family disputes outside the court system.[129] A party cannot simply obtain a court order compelling the other parent to physically hand over the child.[130]

In general, non-signatory nations often ignore requests for an abducted child's return.[131] The government of the country from which the child was abducted can do little to help parents secure their child's return short of providing information and direction on how to handle the situation.[132] In a few special cases, the United States has successfully

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125. *See* Sandlin, *supra* note 3. In one non-abduction case, a Saudi Arabian court granted custody to another male relative rather than the foreign mother when the child's father died. *See* Finan, *supra* note 124, at 1029 & n.171.

126. *See* Sandlin, *supra* note 3.

127. *See id.* For example, Middle Eastern countries automatically classify the child as having the father's nationality. *See Guide Gives Advice to Tug of Love Parents*, HERALD (Glasgow), July 2, 1996, at 11, *available in* LEXIS, World Library, Curnws File.

128. *See* Evelyn Iritani, *Lost in a Loophole: Foreigners Who Are on the Losing End of a Custody Battle in Japan Don't Have Much Recourse*, L.A. TIMES, Sept. 19, 1996, at E1.

129. *See id.* According to one Japanese lawyer, the courts are "reluctant to disrupt the status quo, especially if the child is Japanese and under the age of 10." *Divorced Foreigners Fight for Right to See Children*, MAINICHI DAILY NEWS, July 11, 1996, at 1, *available in* LEXIS, Asiapc Library, Allnws File [hereinafter *Divorced Foreigners*].

130. *See Divorced Foreigners*, *supra* note 129. Simply gaining visitation rights may require a court procedure called *chotei*—a committee of community representatives who have been known to deliberate for nearly a year before allowing a parent limited visitation. *See id.* For information on habeas corpus proceedings, see *infra* notes 152–63 and accompanying text.

131. *See* Thorpe, *supra* note 119.

132. *See* Sandlin, *supra* note 3. *See generally* Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35, 36–46, 51–52 (1994) (describing the role a Central Authority has in each signatory nation of making the Convention work by providing assistance in initiating requests for the prompt return of children abducted from both signatory and non-signatory nations).

intervened on behalf of an abducted American child.[133] Yet such activity is rare for any government, and it would certainly be unrealistic to repeatedly depend upon such intervention and diplomacy to secure a child's return.

Some aggrieved American parents have attempted to use the International Child Abduction Remedy Act (ICARA)[134] as an independent source of relief.[135] Yet the Act's provisions exist "in addition to and not in lieu of the provisions of the Convention,"[136] and American courts have interpreted it accordingly.[137] Thus, while ICARA enables a parent to seek relief under an international agreement, it does not bestow substantive rights itself.[138]

In *Mezo v. Elmergawi*,[139] a mother sought an injunction ordering Secretary of State Warren Christopher to perform his duties under the Hague Convention.[140] Barbara Mezo's husband took her two children from the United States to Egypt and then Libya, both non-signatories.[141] A U.S. court awarded Mezo custody; thereafter, Mezo alleged that an Egyptian court also awarded her custody.[142] Following the alleged Egyptian order, Mezo's husband fled with the children to Libya.[143] The U.S. District Court for the Eastern District of New York dismissed Mezo's complaint because it found nothing in the Convention, the ICARA, or the Department of

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133. *See* Ana Quindlen, *Trade Arms for Kids*, SACRAMENTO BEE, Sept. 16, 1994, at B6; *see also Children in Custody Case Return to U.S.*, PHOENIX GAZETTE, Aug. 19, 1994, at A5.

134. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (1994). The ICARA is the Convention's implementing legislation in the United States. *See* 42 U.S.C. § 11601(b)(1).

135. *See* Mezo v. Elmergawi, 855 F. Supp. 59, 60 (E.D.N.Y. 1994); Mohsen v. Mohsen, 715 F. Supp. 1063, 1064 (D. Wyo. 1989).

136. 42 U.S.C. § 11601(b)(2).

137. *See Mohsen*, 715 F. Supp. at 1064 (holding that ICARA does not create any remedy outside the Convention).

138. *See id.*

139. 855 F. Supp. 59 (E.D.N.Y. 1994).

140. *See id.* at 60. The Department of State is the U.S. "Central Authority" for purposes of the Hague Convention. *See* Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (1988). The Convention requires signatories to designate a Central Authority to coordinate the administrative arrangements necessary to fulfill the Convention's objectives. *See* Hague Convention, *supra* note 11, art. 6, T.I.A.S. No. 11,670 at 5, 1343 U.N.T.S. at 99; *see also* Anton, *supra* note 12, at 546–47; Bruch, *supra* note 132, at 46–52 (analyzing the implementation and functions of Central Authorities in signatory nations).

141. *See Mezo*, 855 F. Supp. at 61.

142. *See id.*

143. *See id.*

State implementation regulations[144] that provided a remedy for abductions to non-signatory nations.[145]

Other parents have attempted to use habeas corpus proceedings to compel the return of their children.[146] In general, habeas corpus proceedings are rarely used to determine questions of custody, as they are highly inconvenient and other alternatives are available.[147] As one court stated, the rules governing habeas corpus proceedings are too arbitrary to determine questions of custody, which require more time to gather information to make a proper decision.[148] Where, however, the circumstances produce no other statutory alternative, as in an abduction to a non-Convention country, a habeas corpus proceeding may secure the child's return so that the forum in the child's habitual State of residence may determine the custody issues.[149]

Habeas corpus generally operates to command the return of a person wrongfully detained by another.[150] In matters concerning children, wrongful detention depends upon the custody rights bestowed on each party.[151] Absent a court order, statutory provisions determine custody rights.[152] For example, in *Ruppen v. Ruppen*, an Indiana statute required that the court consider each parent as being equally entitled to custody.[153] The Indiana Court of Appeals thus found that

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144. International Child Abduction, 22 C.F.R. §§ 94.6, 94.7 (1997).

145. *See Mezo*, 855 F. Supp. at 63.

146. *See, e.g.*, Ruppen v. Ruppen, 614 N.E.2d 577, 580 (Ind. Ct. App. 1993) (concerning Italian father who sought physical custody of daughters detained in the United States so custody could be determined in Italy); *Re* Jayamohan [1996] 1 N.Z.L.R. 172, 175 (H.C.), *available in* LEXIS, Nz Library, Nzcas File (regarding father, permanent resident of New Zealand, who petitioned for writ of habeas corpus to secure return of his children from Sri Lanka, a non-signatory country).

147. *See Re Jayamohan*, 1 N.Z.L.R. at 174 (citing *Re* D (Infants) [1969] N.Z.L.R. 865, 865–66 (Wilson, J.).

148. *See id.* at 174–75.

149. *See id.* at 175; *see also Ruppen*, 614 N.E.2d at 583 ("A habeas corpus proceeding . . . is the proper procedure to obtain custody of a child wrongfully held.") (citation omitted); Crain v. Crain, [1991] N.Z.F.L.R. 224.

150. *See Ruppen*, 614 N.E.2d at 583; *Re Jayamohan* [1996] 1 N.Z.L.R. 172, 180 (H.C.).

151. *See* Hague Convention, *supra* note 11, art. 3, T.I.A.S. No. 11,670 at 4–5, 1343 U.N.T.S. at 98–99.

152. *See Ruppen*, 614 N.E.2d at 584–85; *Re Jayamohan*, 1 N.Z.L.R. at 178–80 (stating that although the custody arrangement did not specify the custodian or guardian, the court could infer from its terms that the father-petitioner had significant rights).

153. *See Ruppen*, 614 N.E.2d at 584 (citing Simons v. Simons, 566 N.E.2d 551, 554 (Ind. Ct. App. 1991)); *see also* IND. CODE ANN. § 31–1–11.5–21 (Michie 1987).

to grant habeas corpus relief would violate the statutory presumption of equal rights.[154] Yet the court's ruling ultimately provided no relief to the mother, as she had already relinquished the children to their father pursuant to the initial habeas corpus order.[155]

In addition, there is normally no guarantee that the abducting parent will comply with a court's habeas corpus order. Problems of enforcement continue to plague the process, especially where the abducting parent remains outside the issuing court's jurisdiction.[156] In light of this judicial inability to directly assist a left-behind parent in such situations, he or she must resort to other means to secure the child's return.[157] The parent can attempt to enforce a custody decree in the foreign country or initiate criminal proceedings against the abducting parent.[158] In general, however, foreign custody decrees do not automatically receive reciprocal treatment in many jurisdictions.[159]

A custody decree may influence a foreign court's decisions, but it does not have binding authority.[160] As noted above, the foreign court will apply its own domestic law in a custody determination, and it may very well be biased in favor of its nationals.[161]

No less difficult is criminally prosecuting the abducting parent.[162] The left-behind parent may proceed under the law of his or her home country or the law of the foreign nation, yet either option may only provide nominal satisfaction.[163] For domestic proceedings to commence, the abducting parent must first be located and brought under the home State's jurisdiction.[164] Although extradition treaties do exist among nations, they do not operate if the action is not criminal in the foreign country.[165] Alternatively, foreign proceedings

154. *See Ruppen*, 614 N.E.2d at 584.
155. *See id.* at 585.
156. *See id.*; *see also* Harper, *supra* note 102, at 266 (explaining that the domestic laws of the non-signatory country where the abducted child is located dictate custody decisions).
157. *See* A.B.A. GUIDE, *supra* note 97, at 168–73.
158. *See id.* at 168.
159. *See id.* at 169.
160. *See id.*
161. *See supra* notes 125–29 and accompanying text.
162. *See* A.B.A. GUIDE, *supra* note 97, at 169.
163. *See id.* at 168–69.
164. *See id.* at 170.
165. *See* Harper, *supra* note 102, at 275–77 (discussing implications of re-abduction).

require a left-behind parent to navigate in an unfamiliar criminal justice system where the interests lie in prosecuting criminal conduct and not simply in looking to the interests of the child.[166] Accordingly, a parent should explore alternate avenues before initiating criminal proceedings.

As a final solution, desperate parents may resort to "self-help" measures, or re-abduction.[167] The U.S. Department of State strongly opposes such action, as it may exacerbate international tensions.[168] It also serves only to further traumatize the child,[169] and may expose the re-abductor to criminal sanctions in the foreign country.[170] It thus appears a very gloomy picture indeed for a parent to secure the return of a child from a country in which the Convention does not operate.

B. Abductions from a Non-Signatory Nation

The parent of a child abducted to a Contracting State from a non-signatory nation faces his or her own challenges as well.[171] Some courts hesitate to apply the Convention's principles, based on notions of reciprocity, comity, and the child's best interests.[172] Alternatively, other courts apply the Convention's principles to return the child to his or her habitual residence if consistent with his or her overall best interests.[173]

1. Australia

Early Australian judgments have oscillated and struggled with reconciling the common law forum non conveniens principle with the statutory "paramountcy principle"[174] in

166. *See* A.B.A. GUIDE, *supra* note 97, at 169–70. In at least one instance, however, the issuing of an arrest warrant induced a parent to come out of hiding and return the child. *See* Kevin Kwong, *Up for Grabs*, S. CHINA MORNING POST, Aug. 13, 1995, at 1, *available in* LEXIS, Asiapc Library, Allnws File. British authorities issued an international warrant for a British man's arrest after he abducted his children from Britain to China. *See id.*

167. *See, e.g.*, Finan, *supra* note 124, at 1029–30.

168. *See id.* at 1008.

169. *See* A.B.A. GUIDE, *supra* note 97, at 174.

170. *See id.*; *see also* Harper, *supra* note 102, at 268–69 (discussing the criminal nature of, and possible sanctions for, re-abduction).

171. *See* Copertino, *supra* note 8, at 731–35 (discussing lack of redress under the Convention where the child is abducted from, or taken to, a non-signatory nation).

172. *See* A.B.A. GUIDE, *supra* note 97, at 169.

173. *See* Harper, *supra* note 102, at 259.

174. The paramountcy principle was first statutorily embodied in section 64(1)(a) of the Family Law Act of 1975.

international custody cases.[175] The primary focus in forum non conveniens analyses is to promote justice among the litigants.[176] As such, an oft-encountered problem in cases involving children is determining the appropriate weight to give to the child's welfare.[177] Usually, the choice of venue does not directly affect the child.[178] Yet, if the child's residence were to change during the proceeding, or if either forum were to delay, or if the other forum were to base its decision on something other than the child's interests, the forum choice most certainly affects the child.[179] Where these three exigencies do not exist, and the child is not otherwise directly affected by forum choice, the child's welfare merely dictates that justice be done.[180] Thus, as one commentator believes, the applicability of the paramountcy principle will make little difference.[181]

After Australia signed the Convention, the Family Court relied on its principles in non-Convention abduction cases to decline jurisdiction over custody issues.[182] The Full Court of the Family Court later displaced this reasoning in *In re Marriage of Scott*.[183] Where welfare considerations are "unclear or equivocal," as they often are, the test of "clearly inappropriate forum" applied.[184] Several cases followed this reasoning[185] until the Full Court in *In re Marriage of Van Rensburg and Paquay*[186] tried to reconcile the two. In that case, the court found that issues of the child's welfare and of forum non conveniens were often coincidental.[187] Following

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175. For a historical summary of Australian case law dealing with these issues, see *International Child Abduction Outside the Convention: The High Court Pronounces in ZP v PS*, 8 AUSTL. J. FAM. L. 211 (1994) [hereinafter *High Court Pronounces*].

176. *See* Schuz, *supra* note 13, at 785.

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See High Court Pronounces*, *supra* note 175, at 213 (citing *In re* Marriage of Barrios and Sanchez, (1989) 13 Fam. L.R. 477; *In re* Marriage of Van Rensburg and Paquay,(1993) 16 Fam. L.R. 680).

183. *See In re* Marriage of Scott, (1991) 14 Fam. L.R. 873.

184. *See id.* at 878. The High Court defined the clearly inappropriate forum test in the leading case *Voth v. Manildra Flour Mills Pty Ltd*, 171 C.L.R. 538 (1991).

185. *In re* Marriage of Erdal, (1992) 15 Fam. L.R. 465; *In re* Marriage of Chong, (1991) 15 Fam. L.R. 629.

186. (1993) 16 Fam. L.R. 680.

187. *See id.* para. 16. The court first referred to the accepted notion that abduction was detrimental to a child's welfare and then declined jurisdiction on

the High Court's recent decision in *ZP v. PS*,[188] however, forum non conveniens principles are no longer relevant in custody cases.[189] Rather, the child's best interests are paramount in evaluating applications to return a child to a non-signatory nation.[190] This transition from deferring to conflict of laws principles to focusing on the child's welfare is of great import insofar as to what it reveals about Australia's "re-education" in light of the Hague Convention.

The parents in *ZP v. PS* married in Greece in 1987.[191] Both were Greek-born, and each had lived in Australia for a considerable amount of time prior to their marriage.[192] Their son, Dimitrios, was born in Greece in 1987; in 1988 the parents registered him as an Australian citizen at the Australian Embassy in Athens.[193] The parents separated in 1989 and subsequently registered a temporary custody agreement in the mother's favor with a Greek court.[194] The agreement precluded the mother from taking Dimitrios abroad unless his father consented and it was in the child's welfare.[195] The agreement also provided that a court should resolve any disagreement relating to what was in the child's welfare.[196] In April 1993, the mother and son left Greece without the father's consent or a court order.[197] In May, she applied to the Family Court of Australia for sole custody of Dimitrios and limited access for the father.[198] The father, in turn, applied to an Athens court for custody.[199] The Greek court revoked the earlier temporary custody agreement and granted the father's application in late September.[200]

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the ground that it would not permit a person to profit from deceitful or illicit acts. *See id.* paras. 27–28.

188. (1994) 122 A.L.R. 1.

189. *See id.*

190. *See id.*; *see also* The Hon Dr. Peter Nygh, *Voth in the Family Court Re-Visited: The High Court Pronounces Forum Conveniens and Lis Alibi Pendens*, 10 AUSTL. J. FAM. L. 1, 2 (1996), *available in* 1996 A.J.F.L. LEXIS 10, *1.

191. *See* ZP v. PS, (1994) 122 A.L.R. 1.

192. *See id.*

193. *See id.*

194. *See id.* The husband had liberal access that was to "be free and in accordance with the reasonable welfare of the child." *Id.*

195. *See id.*

196. *See id.*

197. *See id.* At that time, Greece was not yet a signatory to the Hague Convention. *See High Court Pronounces*, *supra* note 175, at 213.

198. *See* ZP v. PS, (1994) 122 A.L.R. 1. She claimed, *inter alia*, that the father heavily drank and gambled, and that his Jehovah's Witness relatives were brainwashing Dimitrios. *See id.*

199. *See id.*

200. *See id.*

Meanwhile, however, the Australian Family Court had granted the mother interim custody and restrained either parent from removing Dimitrios from Australia.[201] The father subsequently filed in the Family Court for Dimitrios's summary return to Greece.[202]

At first instance, Judge Mushin ordered the child's summary return to Greece based on forum non conveniens principles.[203] The Full Court of the Family Court, while disagreeing with Mushin's emphasis on forum non conveniens principles, dismissed the mother's appeal.[204] They determined that the child's welfare still required his or her summary return.[205] The mother subsequently appealed to the High Court.[206] The justices all agreed that in any international child abduction case to which no agreement applied, the child's welfare is the sole and paramount consideration.[207] The justices set up a bifurcated approach in which the court first decides whether the child's welfare requires his or her summary return.[208] If not, then the court may delve into the particular merits to determine custody.[209] A court must address the appropriateness of any forum from the viewpoint of the child's interests rather than justice to the litigants.[210] Furthermore, the justices all agreed that the abduction is a legitimate welfare consideration, but it weighs no more heavily than any other factor.[211] Thus, it appears that the Australian courts have been "re-educated" in that they do not look at an abduction as merely a choice between international jurisdictions, but as one that affects children.

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201. *See id.*
202. *See id.*
203. *See High Court Pronounces*, *supra* note 175, at 212.
204. *See id.*
205. *See id.* The court did not perform an extra inquiry into the original petition's factual allegations. *See id.*
206. *See id.*
207. *See* ZP v. PS, (1994) 122 A.L.R. 1; *see also High Court Pronounces*, *supra* note 175, at 214 (describing the High Court's overruling of earlier decisions of the Family Court to the extent they differed).
208. *See High Court Pronounces*, *supra* note 175, at 214.
209. *See id.* Thus, not every case will require a full investigation into the merits. *See id.*
210. *See* ZP v. PS, (1994) 122 A.L.R. 1.
211. *See id.* Justices Brennan and Gaudron stated that welfare is a multi-faceted concept; thus, the proposition that any one factor is determinative is mistaken. *See id.*

2. Great Britain

Perhaps encouraged by their successful application of the Convention,[212] courts in Great Britain apply its principles to abduction cases involving non-signatory nations.[213] In *Re M,* the Court of Appeal enumerated the guiding principles for such cases:

> First, . . . the best interests of children are normally best secured by having their future determined in the jurisdiction of their habitual residence . . . .
>
> Secondly, in acting by analogy with the Convention the court takes account of those matters which it would be relevant to consider under Art. 13.
>
> Thirdly, it is of the essence of the jurisdiction to grant a peremptory return order that the judge should act urgently. That means that the court has no time to go into matters of detail. . . .
>
> Fourthly, . . . the principle of comity applies. It is assumed, particularly in the case of States which are fellow members of the European Union, that such facilities as rights of representation . . . will be secured as well within one State's jurisdiction as within another.[214]

It thus appears that, contrary to courts elsewhere, reciprocity is not a primary concern for British courts in non-Convention cases.[215] Instead, British courts focus on the child's welfare which, more often than not, calls for returning the child home "whether or not his home is in a Contracting State."[216]

In most non-Convention cases, the British courts acquire jurisdiction over an abducted child through wardship

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212. *See* Schuz, *supra* note 13, at 771 & n.3.

213. *See, e.g.*, D v. D, [1994] 1 F.L.R. 137, *summary in Case Reports: Abduction*, 24 FAM. L. 126, 127 (1994); S v. S, [1994] 2 F.L.R. 681, *summary in Case Reports: Abduction*, 24 FAM. L. 666, 667 (1994); *see also* Todd, *supra* note 8, at 560–62 (describing how courts in the United Kingdom "have consistently applied the principles of the Convention to order the return of children to nonsignatory States").

214. *Re* M (Abduction: Non-Convention Country), 1 F.L.R. 89 (C.A. 1994).

215. *See* Todd, *supra* note 8, at 560; *cf.* Mohsen v. Mohsen, 715 F. Supp. 1063, 1065 (D. Wyo. 1989); Emmett v. Perry, (1996) F.L.C. 92–644, para. 29 (Austl.).

216. Todd, *supra* note 8, at 561 (quoting Ian Karsten, *The Fight Against Child Abduction*, 141 NEW L.J. 1290, 1290 (1991)); *see also* Kisch Beevers, *Child Abduction—Welfare or Comity?*, 2 FAM. L. 365, 365 (1996); Gillian Douglas, *S v S (Child Abduction: Non-Convention Country)*, 24 FAM. L. 666 (1994).

proceedings.[217] Any child under the age of eighteen years who owes "allegiance to the British Crown" may be made a ward.[218] "Wardship gives the court very substantial powers to make orders to protect children . . . ."[219] Of paramount consideration in any wardship analysis is the individual child's best interests.[220] A court retains the discretion to consider evidence relating to the impropriety of return, as well as wider aspects of the ward's welfare.[221] Thus, in non-Convention cases, the British courts do not apply the Convention principles per se,[222] but do apply the principles to the extent they are in accord with the child's welfare.[223] As a result, wardship proceedings pursuant to child abductions involving non-Convention countries appear to follow the approach laid out in the Hague Convention.[224]

Generally in a divorce situation, the child's best interests require that a court in the child's State of habitual residence determine the child's future.[225] In *S v. S*, the Family Division heard an application in wardship for a child's return from England to South Africa, a non-signatory nation.[226] The

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217. *See* Nigel Lowe & Michael Nicholls, *Child Abduction: The Wardship Jurisdiction and the Hague Convention*, 24 FAM. L. 191, 191 (1994). Courts may also use wardship if a Convention application were to fail for any other reason. *See id.* at 191, 193.

218. *Id.* at 191. The child's presence in the jurisdiction appears to be an important factor in determining wardship. *See id.* In no reported case has wardship been based on a child who was neither present nor a resident in England or Wales. *See id.*

219. *Id.*

220. *See* Children Act, 1989, § 1; *see also* Beevers, *supra* note 216, at 366.

221. *See* D v. D, [1994] 1 F.L.R. 137, *summary in Case Reports: Abduction*, 24 FAM. L. 126, 127 (1994); *see also* Schuz, *supra* note 13, at 774–75 & n.19 (explaining that such an analysis runs exactly counter to that of a case brought under the Convention, which mandates immediate return except in narrow circumstances). *But see* Hague Convention, *supra* note 11, art. 12, T.I.A.S. No. 11,670 at 7–8, 1343 U.N.T.S. at 100, art. 13, T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101 (requiring the return of the child "forthwith").

222. The two main principles at issue are the child's interests (1) in having custody issues determined by courts in his or her place of habitual residence, and (2) in not suffering from the potential distress and disruption of being abducted. *See Re* M, 1 F.L.R. 89; *see also* D v. D, [1994] 1 F.L.R. 137, *summary in Case Reports: Abduction*, 24 FAM. L. 126, 126–27 (1994) (describing a Court of Appeals ruling that the Convention is not to be applied literally in non-Convention cases, and that a court retains the discretion to consider the welfare of the child).

223. *See* Beevers, *supra* note 216, at 366; *see also, e.g.*, *D v. D*, 1 F.L.R. at 144.

224. *See* Douglas, *supra* note 216; *see also D v. D*, 1 F.L.R. at 137.

225. *See* Beevers, *supra* note 216, at 365; Douglas, *supra* note 216.

226. *See* S v. S, [1994] 2 F.L.R. 681, *summary in Case Reports: Abduction*, 24 FAM. L. 666, 667 (1994).

father was a British national and a South African citizen, and the mother was British.[227] The family moved from the Isle of Man to South Africa when the child was three years old.[228] A few months after the move, the mother and father separated, and a South African court granted the mother custody *pendente lite*, with reasonable access to the father.[229] The mother then moved the child to England, and the father initiated wardship proceedings for the return of his son to South Africa.[230]

Pursuant to its wardship jurisdiction, the English court found that returning the child to South Africa would best serve his interests.[231] The court acknowledged, however, that the child likewise had strong connections with the Isle of Man as he did with South Africa.[232] Yet the court found that the parents had chosen South Africa to be the child's home for the foreseeable future.[233] In addition, the parents' divorce action was already pending before a South African court; thus, that tribunal had the resources necessary to make a fair decision about the child's future.[234]

3. The United States

Compared to Great Britain and other nations, U.S. case law on abductions from non-signatory nations is somewhat disheveled and inconsistent.[235] American courts do not apply a set standard; however, one thing is certain—they do not expressly mention that the Convention's principles guide their analyses.[236]

The Uniform Child Custody Jurisdiction Act (UCCJA)[237] is a potential remedy for a parent whose child is wrongfully removed to or retained in the United States. Every state has enacted the UCCJA in some form.[238] It provides for both the exercise of original custody jurisdiction and the enforcement

227. *See id.* at 682.
228. *See id.*
229. *See id.*
230. *See id.* at 683. It was unclear why the mother went to England instead of the Isle of Man, as they are separate jurisdictions. *See id.*
231. *See id.* at 684. The court also noted that had this been a Convention case, the father's petition would have failed insofar as the mother did not breach his custody rights. *See id.* at 683.
232. *See id.* at 687.
233. *See id.*
234. *See id.*
235. *Cf.* Friedrich v. Friedrich, 983 F.2d 1396, 1400–01 (6th Cir. 1993).
236. *See, e.g.*, *In re* Anschuetz & Co., 838 F.2d 1362, 1363 (5th Cir. 1988).
237. 9 U.L.A. 115 (1988) [hereinafter UCCJA].
238. *See id.* at 115–16.

of custody decrees.[239] The distinction between the UCCJA's dual purposes permeates the entire Act.[240] A court determines jurisdiction based on a "home state" or "best interests" analysis.[241] Full faith and credit is due to an existing custody decree only if the issuing court exercised jurisdiction in compliance with the UCCJA.[242] Otherwise, the new court may relitigate the custody issue, subject only to the "unclean hands" provision.[243]

Section 23 applies the Act's substantive provisions to international custody disputes:

> The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.[244]

Notwithstanding section 23, the UCCJA is inapplicable to foreign countries since they are not a "State" as defined by the Act.[245]

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239. *See id.* § 1, at 123–24; *see also* Julia R. Rutherford, Note, *Removing the Tactical Advantages of International Parental Child Abductions Under the 1980 Hague Convention on the Civil Aspects of International Child Abductions*, 8 ARIZ. J. INT'L & COMP. L. 149, 152 (1991) (explaining that the UCCJA allows a court to enforce a prior custody decree).

240. *See* Ivaldi v. Ivaldi, 672 A.2d 1226, 1230 (N.J. Super. Ct. App. Div.), *rev'd*, 685 A.2d 1319 (N.J. 1996).

241. *See* UCCJA § 3, at 143–44. Most states, however, have amended their version of the UCCJA to comply with the federal Parental Kidnapping Prevention Act (PKPA) which prefers "home state" jurisdiction. *See* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994). The PKPA itself is not a remedy as nothing in its language or legislative history suggests that Congress intended it to apply to foreign decrees. *See* Ivaldi, 672 A.2d at 1232.

242. *See* UCCJA § 14, at 292.

243. *See id.* § 8(a)–(b), at 251.

244. *Id.* § 23, at 326. Missouri, New Mexico, Ohio, and South Dakota have not included section 23 in their respective statutes. *See id.* at 327. Indiana is the only state to formally adopt a special version of section 23. *See* Robert J. Levy, *Memoir of an Academic Lawyer: Hague Convention Theory Confronts Practice*, 29 FAM. L.Q. 171, 174 & n.11 (1995). In effect, the Indiana statute repealed the "unclean hands" provision of section 8 of the UCCJA. *See id.* at 174. Arguably then, the mere occurrence of an abduction does not by itself dictate that Indiana state courts hearing international abduction cases decline jurisdiction. *See id.* at 175.

245. *See* UCCJA § 2(10), at 134; *see also* Ruppen v. Ruppen, 614 N.E.2d 577, 581–82 (Ind. Ct. App. 1993); Roszkowski v. Roszkowska, 644 A.2d 1150, 1154–55 (N.J. Super. Ct. Ch. Div. 1993); Koons v. Koons, 615 N.Y.S.2d 563,

The UCCJA is reciprocal among U.S. territories and states, but not between the United States and another country.[246] The Act, therefore, only recognizes and enforces custody decrees within the United States and its territories; it does not enable an American court to order a foreign court to return a child to the United States.[247]

Alternatively, an American court may order the return of an abducted child pursuant to the enforcement of a foreign custody decree, although this is not the necessary result.[248] Some courts may nonetheless be wary about returning children to a foreign country.[249] In such instances, they may require additional procedural amenities, such as an evidentiary hearing concerning the child's situation.[250] For example, in Minnesota, courts have held that the UCCJA may be interpreted to authorize judicial discretion in ordering a child's return.[251] Sections 8(a) and (b) govern the return of an abducted child; subsection (b) includes the language "[u]nless required in the interest of the child," and states that a court may decline jurisdiction if "this is just and proper under the circumstances."[252] In general, however, courts tend to interpret section 8 narrowly so as not to undermine the UCCJA's overall purpose.[253]

IV. CONCLUSION

It is apparent that absent the Hague Convention, left-behind parents have few remedies to effect their children's return, with even fewer guarantees. Clearly, signatory countries should put pressure on non-signatories to sign or accede to the Convention. In the meantime, nations should

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567 (N.Y. Sup. Ct. 1994). *But see* Black v. Black, 657 A.2d 964, 970 (Pa. Super. Ct. 1995), *appeal denied*, 668 A.2d 1119 (Pa. 1995) (construing the definition of "home state" to apply to a foreign country).

246. *See Ivaldi*, 672 A.2d at 1231 (quoting Rutherford, *supra* note 239, at 152).

247. *See id.*; *see also Roszkowski*, 644 A.2d at 1155 (quoting Rutherford, *supra* note 239, at 152).

248. *See* Harper, *supra* note 102, at 273; Silberman, *supra* note 18, at 250.

249. *See* Levy, *supra* note 244, at 175.

250. *See id.*

251. *See id.* at 176 n.17; *see also* Schoeberlein v. Rohlfing, 383 N.W.2d 386, 391 (Minn. Ct. App. 1986) (explaining that judicial discretion is authorized under just and proper circumstances).

252. *See* UCCJA § 8(a)–(b), 9 U.L.A. 251 (1988).

253. *See* Levy, *supra* note 244, at 176 n.17 (quoting Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 914 (1992)).

take steps to implement a substitute procedure. While this will not necessarily share equal success with the Convention, it may provide hope and peace to the left-behind parent.

Great Britain shows the most hope, being truly re-educated in light of the Convention, as evidenced by its application of the Convention's principles in non-signatory cases. Additionally, Australia evidences a non-prejudicial attitude in its paramountcy principle. The United States, on the other hand, has its work cut out for itself. What legislation it does have is ineffectual, and the lackadaisical attitude does not help anyone, least of all the children torn away from their homes.

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