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Interpreting the Hague Abduction Convention:  
In Search of a Global Jurisprudence

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Bodenheimer Lecture

Interpreting the Hague Abduction Convention:  
In Search of a Global Jurisprudence

*Linda Silberman*<sup>1</sup>

INTRODUCTION

I am honored to have delivered and now to publish the 2004 Brigitte M. Bodenheimer Memorial Lecture on the Family.<sup>2</sup> Although I did not know Professor Bodenheimer personally, there are striking parallels between us with respect to both our academic work and our professional interests. Indeed, many of Professor Bodenheimer's ideas and efforts have provided the foundation on which I have tried to build.

When I started teaching in 1971, I was not then a specialist in family law. I did teach civil procedure and conflict of laws, and thus I knew and admired Professor Bodenheimer's work, particularly on the Uniform Child Custody Jurisdiction Act for which she served as the Reporter, and I read her numerous articles on the development and effectiveness of the Uniform Act.<sup>3</sup> Other related articles in her last years overlapped with interests of my own.<sup>4</sup> But Professor Bodenheimer's enduring legacy to me was her service as a member of the U.S. delegation to the Hague Special Commission that negotiated and drafted the Convention on the Civil Aspects of International Child

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<sup>1</sup> Martin Lipton Professor of Law, New York University School of Law; B.A. 1965, University of Michigan; J.D. 1968, University of Michigan Law School. Thanks to Anderson Bailey, a second-year student at NYU School of Law, and Karin Wolfe, a 2000 graduate of NYU School of Law, for their research and cite-checking assistance in preparing this article for publication. The Filomen D'Agostino and Max E. Greenberg Research Fund has provided continuing financial support for my research on issues of international child abduction.

<sup>2</sup> This Article is an expansion of the Brigitte M. Bodenheimer Memorial Lecture on the Family I delivered on February 19, 2004 at the University of California at Davis School of Law.

<sup>3</sup> See, e.g., Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981); Brigitte M. Bodenheimer, *Progress Under the UCCJA and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977); Brigitte M. Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975); Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304 (1969); Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

<sup>4</sup> See, e.g., Brigitte M. Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83 (1977); Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction over Child Custody and Adoption after Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229 (1979).

Abduction.<sup>5</sup> That Convention, finalized in 1980, just a year before she died, represented a cooperative effort by the international community to create and develop a legal order to deter and remedy international parental abduction.<sup>6</sup>

I recently reread Professor Bodenheimer's article on the Hague Draft Convention that was published in the *Family Law Quarterly* in 1981.<sup>7</sup> As one of the experts involved in those negotiations, she identified and foresaw two problem areas that continue to plague the Convention — the time frame for bringing a return action and the exceptions to return, the latter which — as she put it — “are apt to turn what are to be summary proceedings into adversary hearings on the merits, contrary to the purposes of the Convention.”<sup>8</sup> Her concerns were prescient and these issues have turned out to be of significant contemporary importance in the operation of the Convention today.

Although I was not part of the U.S. delegation to the Special Commission that drafted the Abduction Convention as Professor Bodenheimer was, once the Convention was drafted, I was involved in the State Department Study Group that advised on the implementing legislation — the International Child Abduction Remedies Act (“ICARA”)<sup>9</sup> — which was enacted in 1988, thereby bringing the Convention into force in the United States.<sup>10</sup> Subsequently, I was invited as an expert consultant to the Hague Conference for its Second Special Commission meeting to review the operation of the Abduction Convention, and in following years, I served as part of the U.S. State Department delegations to the Third and Fourth Special Commission meetings at The Hague, and to a later interim Special Commission in 2002 concerned with developing a guide to good practices. The meetings of the Special Commissions consider the operation of the Convention worldwide and discuss practical problems as well as issues of interpretation that arise under the Convention. Professor Bodenheimer's interest and commitment to this important international convention is one that I share and continue to nurture.

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<sup>5</sup> See Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, 1343 U.N.T.S. 98 [hereinafter Abduction Convention].

<sup>6</sup> For the genesis of the Convention, see Adair Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. INT'L L. & POL. 1 (2000).

<sup>7</sup> Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99 (1980-81); see also Bodenheimer, *The International Kidnapping of Children*, *supra* note 4.

<sup>8</sup> Bodenheimer, *The Hague Draft Convention on International Child Abduction*, *supra* note 7, at 110.

<sup>9</sup> 42 U.S.C. §§ 11601-10 (2004).

<sup>10</sup> The United States signed the Convention in 1981, and the Senate gave its advice and consent in 1986. Implementing legislation was passed in 1988, see the International Child Abduction Remedies Act (codified at 42 U.S.C. §§ 11601-10). The treaty entered into force in the United States on July 1, 1988. See Hague Convention (Multilateral Treaty) on International Child Abduction Enters Into Force on July 1, 1988, 53 Fed. Reg. 23,843-01 (June 24, 1988).

To mention just one more parallel, just as Professor Bodenheimer was a member of the U.S. delegation that negotiated the Hague Abduction Convention, I too was part of a U.S. delegation to The Hague that negotiated another international children's treaty — the 1996 Hague Convention on the Protection of Children.<sup>11</sup> That treaty recently entered into force in January, 2002, and ten States have ratified or acceded to the Convention.<sup>12</sup>

The topic I have chosen for this lecture — *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence* — is one with which I believe Professor Bodenheimer would have had great sympathy. She did not live to see the Convention enter into force on December 1, 1983 with the ratifications by Canada, France, and Portugal, joined shortly thereafter by Switzerland. She would have been gratified when the Convention finally entered into force for the United States in July 1988, but even she might have been a bit surprised at the broad support that the Convention now enjoys, expanding quickly from twenty-three States in 1994 to seventy-five States by January 2005.<sup>13</sup> Of course, the Convention is in effect only between those countries that have ratified the Convention (ratifying States are those Contracting States that were members of the Hague Conference at the time of the adoption of the Convention in 1980) and other States whose

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<sup>11</sup> 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 [hereinafter Protection of Children Convention]. The 1996 Convention operates as a jurisdiction and judgments convention for custody orders as well as providing for recognition and cooperation with respect to more routine measures taken on behalf of a child. For more on this Convention, see Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239 (2000). On the relationship between the 1980 Abduction Convention and the 1996 Protection Convention, see Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L L. & POL. 83 (2000).

<sup>12</sup> Australia, the Czech Republic, Estonia, Latvia, Lithuania, Monaco, Morocco, the Slovak Republic, and Slovenia have ratified the Convention, and Ecuador has acceded to it. Thus, the 1996 Convention is in force in ten States. Three other States — the Netherlands, Poland and Switzerland — signed but have not ratified the Convention; and then on December 19, 2002, the Member States of the European Union adopted a Council Decision authorizing the Member States of the European Union to sign the Convention. See Council Directive 2003/93/EC, 2003 O.J. (L 48) 1. Council of the European Union action was required because after the Treaty of Amsterdam aspects of the 1996 Convention were viewed as within EU rather than individual State competence. See *id.*, ¶¶3-6, at 1. A number of Member States that had not already signed the Convention — Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden, and the United Kingdom — did so on April 1, 2003, and Cyprus followed on October 14, 2003. See Full Status Report Convention #34, available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=70#mem](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70#mem) (last visited Feb. 27, 2005).

<sup>13</sup> For a list of countries that have ratified or acceded to the Convention, see Hague Conference on Private International Law, Status Table Convention #28, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=24](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24) (last visited Feb. 27, 2005).

Member States of the European Union are party to the Convention as are common law countries (the United States, the United Kingdom, Canada, Ireland, Australia, and New Zealand). Many of the countries in South and Central America have also joined, as well as several countries from the former Soviet Union, but only a few African countries (South Africa and Zimbabwe), and only Israel and Turkey from the Middle East. Perhaps the most notable non-party is Japan.

accessions are accepted by particular countries.<sup>14</sup> Thus, the Convention is in effect between the United States and only 54 of the 75 parties to the Convention.<sup>15</sup>

## I. AN OVERVIEW OF THE CONVENTION

Notwithstanding the reference to “Abduction” in its title, the Convention covers violations of custody rights more generally, encompassing wrongful removals or wrongful retentions of children up to the age of 16. The Convention takes a somewhat unique approach to the problem of international parental abduction. Rather than address the issue through jurisdictional rules and the recognition of judgments — which is the approach of the Uniform Child Custody Jurisdiction Act (“UCCJA”)<sup>16</sup> and the more recent Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”)<sup>17</sup>, as well as that of the new 1996 Protection of Children Convention<sup>18</sup> — the Abduction Convention simply requires the “return” of a child who has been wrongfully removed or retained in another Contracting State. If a child (up to the age of 16) habitually resident in a Convention country is wrongfully taken or retained in another Convention country, the authorities of the country to which the child is taken are required to return the child to the country of its habitual residence.<sup>19</sup> With respect to a child who is brought to the United States, this is done by filing a Hague application for return in the state or federal court of the state where the child is located.<sup>20</sup>

The “return” remedy can be thought of as a “provisional” remedy because it does not dispose of the merits of the custody case — additional proceedings on the merits of the custody dispute are contemplated in the State of the child’s habitual residence once the child is returned there. The objectives of the Convention are several-fold. First, the remedy under the Convention “reverses”

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<sup>14</sup> See Abduction Convention, *supra* note 5, arts. 37-38, 1343 U.N.T.S. at 104.

<sup>15</sup> See Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Party Countries and Effective Dates with U.S., *available at* [http://travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_1487.html](http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html) (last visited Feb. 21, 2005). By way of example, the United States has not accepted accessions from Paraguay, El Salvador, Guatemala, Nicaragua, Turkmenistan, and Uzbekistan. *See id.*

<sup>16</sup> UNIF. CHILD CUSTODY JURISDICTION ACT OF 1968, 9 (Part IA) U.L.A. 261 (1999 & Supp. 2004).

<sup>17</sup> UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT OF 1997, 9 (Part IA) U.L.A. 649 (1999 & Supp. 2004). For the impact of the UCCJEA in international cases, see Robert G. Spector, *International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act*, 33 N.Y.U. J. INT’L L. & POL. 251 (2000). *See also* D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547 (2004).

<sup>18</sup> See Protection of Children Convention, *supra* note 11.

<sup>19</sup> For a thorough analysis of the operation of the Abduction Convention, *see* PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* (1999)[hereinafter BEAUMONT & MCELEAVY].

<sup>20</sup> 42 U.S.C. § 11603 (1988).

the abduction by having the child returned, thus mitigating the psychological trauma for the child that is associated with parental abductions. Second, return facilitates an underlying premise of the Convention that the State of habitual residence of the child is the appropriate place to make any decision about custody and visitation. It is the place where the child and the family have lived and where much of the evidence about what will be in the best interests of the child will be located. Third, the Convention should help deter future abductions because parties are made to understand that wrongfully removing a child to another country will not give the abductor a new forum in which to get the custody dispute resolved. Thus, the Convention is both remedial and preventive.

The Convention applies whenever there has been a “breach of rights of custody”<sup>21</sup>, and that means that it can be used even where no formal custody order is in effect. Thus, the Convention reaches situations not only where there has been an actual custody order, but also pre-decree situations — a common scenario where a marriage is breaking down and one of the parties may have an incentive to leave the country of marital residence and take the child with him or her. The Convention operates to discourage that kind of unilateral action because a child removed under those circumstances will be subject to the Convention and ordered returned.

The requirement under the Convention that there be a breach of “custody rights” is critical, and it has given rise to important issues of interpretation to which I will return. For now, it is sufficient to take note that the Convention draws a line between various custodial arrangements (which may include guardianships, custody, and certain types of joint custody) which are held to be “rights of custody,” and mere rights of visitation or access, which are not rights of custody within the meaning of the Convention and when violated do not require return. A separate provision of the Convention deals with securing rights of access, but the Convention’s unique remedy of return cannot be invoked.<sup>22</sup> If there has been a wrongful removal or retention in breach of custody rights and the application for return is filed within one year of the wrongful removal or retention, Article 12 of the Convention requires return of the child.<sup>23</sup> The one-year time period is not an absolute deadline, and return is still required after that time “unless it is demonstrated that the child is now settled in its new environment.”<sup>24</sup> Even when a child is found to be so settled, the authorities appear to have

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<sup>21</sup> Abduction Convention, *supra* note 5, art. 3, 1343 U.N.T.S. at 98-99.

<sup>22</sup> *See id.*, art. 21, 1343 U.N.T.S. at 100.

<sup>23</sup> *See id.*, art. 12, 1343 U.N.T.S. at 100.

<sup>24</sup> *Id.*

discretion to order return.<sup>25</sup> These provisions with respect to “time limits” were of particular concern to Professor Bodenheimer because she feared that they might be difficult to meet when an abductor was moving from place to place often surreptitiously.<sup>26</sup>

A party resisting return does have a number of limited defenses under the Convention, and those defenses are found in Articles 13 and 20. The most commonly invoked exception is the defense under Article 13(b), which allows a judge to avoid return — although it does not mandate non-return — if there is a grave risk that return of the child would lead to physical or psychological harm or otherwise place the child in an intolerable situation. However, the Convention is quite clear that this defense should not serve as a pretext for inquiring into the merits of the custody issue and is not to be equated with a “best interests of the child” standard. Return of the child is to the country — not to a particular parent — and thus only if return would somehow expose a child to serious harm because the court in that country cannot provide sufficient protection — should the defense be satisfied.

There are several other defenses as well. Return is not required if the left-behind parent has failed to exercise custody rights or “acquiesced” or consented to the removal,<sup>27</sup> if a child of an age and degree of maturity where its views should be considered objects to being returned,<sup>28</sup> or if the country to which the child is to be returned is one where fundamental freedoms are not observed.<sup>29</sup>

The judicial remedy offered by the Convention is the focus of much of the case law and scholarship around the Convention.<sup>30</sup> But it would be remiss not to point out that a primary goal of the Convention was to secure return of the child without the initiation of formal proceedings. To

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<sup>25</sup> See Elisa Pérez-Vera, Explanatory Report, in 3 Hague Conference on Private International Law, 426, 460; *infra* note 55.

<sup>26</sup> See Bodenheimer, *The Hague Draft Convention on International Child Abduction*, *supra* note 7, at 109.

<sup>27</sup> See Abduction Convention, *supra* note 5, art. 13(a), 1343 U.N.T.S. at 101.

<sup>28</sup> See *id.*, art. 13(b)(second paragraph).

<sup>29</sup> *Id.*, art. 20, 1343 U.N.T.S. at 100. Interestingly, Article 20 has not been included in the implementing legislation of several states, for instance Finland and the United Kingdom. This is permissible under Article 36, which provides that nothing shall prevent two or more states from limiting the restrictions to which the return of a child may be subject.

<sup>30</sup> I myself have written on a number of such issues. See Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209 (1994)[hereinafter Silberman, *Progress Report*]; Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and A Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41 (2003)[hereinafter, Silberman, *Patching Up*]; Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT’L L. & POL. 221 (2000). See also Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000); Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275 (2002).



that end, the Convention imposes an obligation on each country to create a Central Authority responsible for coordinating the numerous tasks necessary to facilitate a child's return.<sup>31</sup>

The obligations of Central Authorities are "two-way responsibilities." One, there are obligations in cases in which a child is taken *from* one country to another country. In such cases, the Central Authority requests assistance from the country to which the child is taken. These are the so-called "outgoing cases." Two, the Central Authorities assume obligations in situations in which a child is currently *in* a country as the result of an alleged removal or retention. The Central Authority in that country is often requested to help locate and return the child. These are the so-called "incoming cases."

In the United States, the State Department is designated as the Central Authority, and its Office of Children's Issues handles outgoing cases. With respect to a child who has been taken from the United States, the U.S. Central Authority will help prepare and process a request to have that child return; it will provide information about the options and resources available in the foreign State, and it will contact the relevant Central Authority in the State to which the child has been taken for help in locating the child.<sup>32</sup> Incoming cases in the United States have now been delegated to the National Center for Missing and Exploited Children, and the Center will assist in locating a child who has been brought to the United States.<sup>33</sup> The Center will try to secure a voluntary return, where possible, or assist in finding counsel for the left-behind parent if judicial proceedings are necessary.<sup>34</sup>

This thumbnail sketch provides a quick overview of the Convention, its objectives, and its operation, and underscores the importance of international cooperation in combating international child abduction.<sup>35</sup> Although the Convention has created a set of important international legal

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<sup>31</sup> See Abduction Convention, *supra* note 5, art. 6, 1343 U.N.T.S. at 99. For more on the role of the Central Authorities, see Jean-Marc Neault, *The Role of Central Authorities Before, During and After Submission of a Child Abduction Case to the Court*, in A NEW VISION FOR A NON-VIOLENT WORLD: JUSTICE FOR EACH CHILD 225 (Anne-Marie Trahan ed., 1998).

<sup>32</sup> For an excellent discussion on the role of the Central Authority, see Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

<sup>33</sup> See Hague Convention Abduction Issues, available at [http://travel.state.gov/family/abduction\\_hague.html](http://travel.state.gov/family/abduction_hague.html) (last visited Feb. 21, 2005).

<sup>34</sup> For more information on the National Center, see [http://www.missingkids.org/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=261](http://www.missingkids.org/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=261) (last visited Feb. 27, 2005).

<sup>35</sup> For a comprehensive treatment of the Convention, see BEAUMONT & MCELEAVY, *supra* note 19; see also Linda Silberman, *Progress Report*, *supra* note 30.

norms, it has not provided any formal mechanisms to ensure that they are applied uniformly and consistently in the numerous Contracting States.<sup>36</sup> That brings me to the topic of this lecture.

## II. A MULTILATERAL CONVENTION IN THE HANDS OF NATIONAL COURTS

As regards the understanding and interpretation of the provisions of the Abduction Convention, there is no supra-national institution or tribunal to provide guidance or to resolve controversies on interpretive issues that arise under the Convention. Thus, the effectiveness of the Convention is left in the hands of the respective Central Authorities and the national courts that implement and interpret the Convention. With respect to interpretation, it is important to consider the role of judges of national courts in deciding cases under the Convention and in interpreting various provisions of the Convention. On the one hand, of course, a judge hearing a Hague case is pronouncing national law because the treaty is an aspect of the domestic law of that country. At the same time, the national judge is engaged in the exercise and development of international law because the treaty itself is an embodiment of international law.

Concern about uniform interpretation of multilateral treaties is not unique to the Abduction Convention,<sup>37</sup> and that concern has been addressed in a variety of different ways. One method of achieving uniformity is to provide some form of supra-national judicial review. The European Court of Justice was designed to serve precisely that purpose for certain disputes under the Treaty of Rome, which established the European Economic Community.<sup>38</sup> However, when the Brussels Convention<sup>39</sup> entered into force in 1968 setting forth rules on jurisdiction and the recognition of judgments within the Community, it did not contain a role for the European Court. Three years later, the Contracting States adopted a protocol conferring jurisdiction on the Court of Justice to

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<sup>36</sup> For more extensive discussion of the operation of the Convention in particular countries, see, with respect to Canada, Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. J. INT'L L. & POL. 17 (2000); with respect to Germany, Karin Wolfe, *A Tale of Two States: Success and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL. 285 (2000) and Kurt Siehr, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: Failures and Successes in German Practice*, 33 N.Y.U. J. INT'L L. & POL. 207 (2000); and with respect to England, Nigel V. Lowe, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint*, 33 N.Y.U. J. INT'L L. & POL. 179 (2000).

<sup>37</sup> See generally Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 559 (1996).

<sup>38</sup> Treaty of Rome, art. 177, Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>39</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 2.

issue binding rulings on questions arising under the Convention at the request of specific domestic courts.<sup>40</sup>

The solution of a supra-national tribunal may be attractive for a limited treaty regime such as the European Union. However, it is less practical for a world-wide treaty involving a large number of countries with different legal systems as potential parties.<sup>41</sup> Apart from the Abduction Convention, the United States is a party to many treaties that operate in the absence of any overarching review structure. These include the Warsaw Convention,<sup>42</sup> the Vienna Convention on the International Sale of Goods (“CISG”)<sup>43</sup>, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>44</sup> and the North American Free Trade Agreement (“NAFTA”).<sup>45</sup>

With the exception of NAFTA, the treaties I have mentioned are “private law” treaties. They are interpreted by national courts and affect the rights of parties in private disputes. Uniformity of interpretation is an important objective for all of them, but is perhaps even more critical to the Abduction Convention. This is because the Abduction Convention operates as a mechanism for cooperation to deter and remedy parental abduction internationally. If Convention cases become subject to varying national approaches and perspectives, neither of the core objectives of the treaty — deterring abductions and directing adjudication of custody cases to the State of the child’s habitual residence — will be possible. The question, of course, is how such a global jurisprudence can be attained.

Principles of interpretation are an important starting point. Internationally, a separate treaty — the Vienna Convention on the Law of Treaties<sup>46</sup> — provides rules of interpretation for

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<sup>40</sup> Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1978 O.J. (L 304) 97. *See generally* JUSTIN NEWTON, *THE UNIFORM INTERPRETATION OF THE BRUSSELS AND LUGANO CONVENTIONS* 6-10 (2002).

<sup>41</sup> In fact, there is a protocol, signed on March 27, 1931, which confers jurisdiction on the Permanent Court of International Justice to hear disputes concerning the interpretation of Hague Conventions on international law. That court, and subsequently the International Court of Justice, has the power to determine how a State applies the treaty in its own territory. The Protocol has been invoked only once, in the *Boll Case* (Neth. v. Swed.), I.C.J. 55 (Nov. 28, 1958) involving interpretation of the 1902 Hague Convention on the Guardianship of Minors. *See* BEAUMONT & MCELEAVY, *supra* note 19, at 239 n.109; *see also* Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 639-40 (1997).

<sup>42</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereafter Warsaw Convention]. The Warsaw Convention has been amended by subsequent protocols, and appears reprinted in note following 49 U.S.C. § 40105.

<sup>43</sup> Convention on Contracts for the Sale of International Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668.

<sup>44</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (commonly known as the New York Convention).

<sup>45</sup> Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289.

<sup>46</sup> May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (entered into force July 1969).

international treaties.<sup>47</sup> Article 31 of the Vienna Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A second provision, Article 32 of the Convention, directs those interpreting a treaty to look to “supplementary means” of interpretation — including preparatory work of the treaty and the circumstances of its conclusion — to “confirm the meaning that results from the application of Article 31” or “to determine meaning when either the meaning is obscure or it leads to a result which is manifestly absurd or unreasonable.”<sup>48</sup>

A third provision of the Vienna Convention may also be relevant to interpretive issues arising under the Abduction Convention. The fact that the Abduction Convention was simultaneously drafted in English and French offers the possibility that ambiguities in the text may be clarified by reference to the wording in the other language, if the alternative text is more precise. However, if differences in meaning cannot be resolved, Article 33 of the Vienna Convention provides that the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

These basic principles of interpretation laid down in the Vienna Convention appear to have been endorsed by the Supreme Court of the United States in setting forth how courts in the United States should approach interpretation of a multinational treaty.<sup>49</sup> Though not making reference to the Vienna Convention itself, the U.S. Supreme Court in *Air France v. Saks*<sup>50</sup> adopted similar principles for interpretation of private law treaties in national courts.<sup>51</sup> *Air France v. Saks* involved an issue of interpretation under the Warsaw Convention, and the Court made clear that interpretation of a multinational treaty is different than interpretation of pure domestic law. In understanding the text of the treaty, the Court acknowledged that treaties are to be construed more liberally than private agreements, and that judges may look beyond the written words to the history

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<sup>47</sup> See generally Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004).

<sup>48</sup> See generally IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 141-47 (2d ed. 1984).

<sup>49</sup> The United States has signed but not ratified the Vienna Convention. However, the Restatement (Third) of Foreign Relations Law of the United States provides that the Vienna Convention “represents generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a (1987).

<sup>50</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

<sup>51</sup> It is important here to underscore the context of the *Air France v. Saks* decision as a “private law” treaty. In the public international law and foreign affairs context, concerns for protection of U.S. sovereign interests may lead to a more nationalistic approach to interpretation. Cf. *United States v. Alverz-Machain*, 504 U.S. 655 (1992)(rejecting customary international law as aid in construing U.S.-Mexico Extradition Treaty). For a critique of the resistance by courts in the United States to accept the canons of the Vienna Convention for such “public law” treaties, see Criddle, *supra* note 47, at 473-98.

of the treaty, the negotiations, and the practical construction adopted by the parties. Consistent with the rules of interpretation in the Vienna Convention, the Supreme Court in *Air France v. Saks* emphasized that the analysis “must begin . . . with the text of the treaty and the context in which the written words are used.”<sup>52</sup> The Court then went further and observed that it was proper to refer to the records of the drafting and negotiation of the treaty.<sup>53</sup> The direction to consult supplementary materials is particularly important in respect to the Abduction Convention because there is an extensive negotiating history of the Convention, and the “travaux préparatoires” of the Convention are easily accessible in the *Acts and Documents of the 14th Session (Tome III) on Child Abduction*, Oct. 6-25, 1980.<sup>54</sup> Included in that material is the Pérez-Vera Explanatory Report, which serves as the official commentary on the Convention.<sup>55</sup> Thus, judges of national courts have information available to them with respect to the drafting history and debates during the negotiations of the Convention, and these sources may prove a valuable aid in arriving at an accurate interpretation of a particular issue.<sup>56</sup>

The direction to look to supplementary material in addition to the text of the Convention in both the Vienna Convention and the Supreme Court’s opinion in *Air France v. Saks* elevates the importance of the Pérez-Vera Report that accompanies the Convention and provides its own guidance on various matters of construction. One important point emphasized in the Report is the Convention’s objective to create autonomous definitions and concepts (apart from domestic law) in effectuating the Convention’s innovative cooperative approach for returning children wrongfully taken or retained across international borders.<sup>57</sup> It is imperative that national courts come to understand the function of these “autonomous concepts” if a global jurisprudence for the Abduction

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<sup>52</sup> *Air France*, 470 U.S. at 397.

<sup>53</sup> *Id.* at 400.

<sup>54</sup> See 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction (1980)[hereinafter Acts and Documents, Child Abduction].

<sup>55</sup> See *supra* note 25. Mlle. Elisa Pérez-Vera of Spain, then Professor of International Law at the Université autonome de Madrid, was the Reporter to the Special Commission that negotiated the 1980 Abduction Convention. The Report was prepared from the Reporter’s notes and from the procès-verbaux after the Diplomatic Session and, thus, did not have formal approval from the Conference. Nonetheless, the Report has been a significant tool for interpretation since its purpose was to explain the principles that form the basis of the Convention and to offer detailed commentary on its provisions in aid of interpretation of the Convention. See generally BEAUMONT & MCELEAVY, *supra* note 19, at 234.

<sup>56</sup> For a discussion of cases in various countries where the Explanatory Report has been relied upon, see BEAUMONT & MCELEAVY, *supra* note 19, at 234-35.

<sup>57</sup> Pérez-Vera Report, *supra* note 25, at 436.

Convention is ever to come about. Moreover, national courts must be willing to look to decisions of foreign courts and not just domestic precedents if an international jurisprudence is to be realized.<sup>58</sup>

There is no specific text in the Abduction Convention calling for the creation of an international jurisprudence such as that found in specific provisions in the Convention on the International Sale of Goods.<sup>59</sup> In the CISG, for example, there is an express provision stating that in interpreting that Convention, “regard is to be had to its international character and to the need to promote uniformity in its application.”<sup>60</sup> The same article requires courts in Contracting States to “take into account decisions rendered by foreign courts.”<sup>61</sup> Even without such express direction, it is clear that the object and purpose of the Abduction Convention seeks a similar uniformity and consideration of foreign precedents. With respect to courts in the United States faced with an issue of interpretation of the Convention, the Supreme Court in the *Air France v. Saks* case made particular reference to the desirability of looking to the opinions of other signatory countries in interpreting an international convention.<sup>62</sup>

Such an inquiry is certainly made much easier in this electronic age where internet databases like LexisNexis and WestLaw make English-language decisions easily accessible. U.K., Canadian, Australian, and U.S. decisions interpreting the Abduction Convention as well as law review articles about the Convention and the developing case law are available to judges on national courts who want to consult them. In addition, the Hague Conference on Private International Law has developed its own database of Convention cases — known as the International Child Abduction Database (“INCADAT”).<sup>63</sup> INCADAT contains summaries and short analyses of cases from

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<sup>58</sup> For some illustrations of courts in various countries citing to foreign case law, see BEAUMONT & MCELEAVY, *supra* note 19, at 235-36.

<sup>59</sup> See *supra* note 43. For the type of interpretive approach that is called for by the CISG, see generally Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

<sup>60</sup> CISG, *supra* note 43, art. 7, 1489 U.N.T.S. at 61, 19 I.L.M. at 673.

<sup>61</sup> *Id.*

<sup>62</sup> *Air France*, 470 U.S. 392, 404 (1985). More particularly, in ICARA itself, Congress explicitly recognized the “international character of the Convention” and the “need for uniform international interpretation of the Convention.” 42 U.S.C. § 11601(b)(3)(A) and (B). While the citation of foreign case law has recently become a controversial issue in the United States, that debate is principally concerned with matters of constitutional interpretation; even those judges who disfavor the use of foreign precedent in such instances agree that it is an invaluable tool of treaty interpretation. For example, in a recent debate at American University, Justice Scalia suggested that foreign decisions should be shown the kind of deference courts accord agency interpretation of domestic law. (Transcript available online at <http://www.wcl.american.edu/secler/founders/2005/050113.cfm> (last visited Feb. 21, 2005).) Judge Richard Posner’s arguments against citing foreign authority similarly except at least some forms of treaty interpretation. (Leiter Reports posting of Dec. 28, 2004, available online at [http://leiterreports.typepad.com/blog/2004/12/citing\\_foreign\\_.html](http://leiterreports.typepad.com/blog/2004/12/citing_foreign_.html) (last visited Feb. 21, 2005).)

<sup>63</sup> INCADAT is available, free of charge, at <http://212.206.44.26/index.cfm> (last visited Feb. 21, 2005).

different countries, and the material is presented in English, French, and Spanish. On occasion, access to a full text decision may even be available.

### III. AUTONOMOUS CONCEPTS

So far I have indicated the need and desire for a global jurisprudence for the Abduction Convention, and I have identified some of the tools for achieving it: (1) principles of treaty interpretation, (2) the structure of the Convention itself and its incorporation of certain “autonomous concepts” in the treaty, (3) an extensive *travaux préparatoires* and an Explanatory Report of the Convention that can help to achieve uniform interpretation, (4) new technology that makes it possible to obtain decisions and rulings from other courts, and (5) the role of the Hague Conference that superintends the operation of the Convention.

I would like to focus for a moment on the structure of the Convention itself that calls for development of a global jurisprudence. Several times I have referred to the innovative approach to international parental abduction that is adopted by the Abduction Convention. That is because a Hague application for return is not a traditional custody case. Thus, some of the concepts and approaches with which a national judge is familiar in an ordinary custody case do not translate to a Hague case, and domestic analogues are often not appropriate. For example, the usual kind of “best interests” evaluation that a judge makes in a custody case is not called for in a Hague case because the “best interests” determination is to be made back in the courts of the State of the habitual residence *after* the child has been returned.

For these reasons, the structure of the Abduction Convention adopts autonomous concepts that are to be understood and interpreted with the particular object and purpose of the Convention in mind. Therefore, it is necessary to look elsewhere and beyond domestic definitions and understandings in interpreting certain key concepts, such as “custody rights” and “habitual residence,” which are common issues in Hague cases. Interpretive questions arising with respect to both of these issues illustrate the importance of developing an international jurisprudence in the context of the Abduction Convention.

#### A. Habitual residence

The concept of “habitual residence” comes into play at several different points in a Hague case. First, under Article 3 of the Convention, a removal or retention of a child is only wrongful if it “is in breach of rights of custody attributed to a person . . . under the law of the State in which the

child was habitually resident.”<sup>64</sup> Thus, the State of habitual residence must be identified in order to determine the relevant law that will determine whether there has been a wrongful removal. Second, a child is to be returned to the country of habitual residence, and, thus, if the child is already at the habitual residence, there is no need for return. In many cases, the initial resistance to a Hague application is that the child is in fact already at the place of habitual residence, and the court of that State is the appropriate place to have the hearing on the merits of custody. So it is often the case that one of the first questions that a court confronts in a Hague case is what is the habitual residence of the child.

Unfortunately, the Convention does not include a definition of “habitual residence” anywhere in the Convention or in the Pérez-Vera Report. This was probably one of the greatest deficiencies in the drafting of the Convention, but it is said to be a time-honored tradition not to define “habitual residence” in any of the Hague Conventions.<sup>65</sup> And although neither the Pérez-Vera Report nor the travaux préparatoires is particularly helpful in providing a definition of habitual residence, both make clear that the concept of “habitual residence” is to have an autonomous definition with the context of the Abduction Convention. Thus, similar definitions used for domestic law purposes — such as in the Family Relations Acts of the Canadian provinces or in the two Uniform Child Custody Jurisdiction Acts in the United States — are not transportable.

A recent decision by the British Columbia Court of Appeal in *Chan v. Chow*,<sup>66</sup> reversed a lower court’s finding that the child was habitually resident in Canada. Rejecting the definition of habitual residence as it appeared in the provincial Family Relations Act, the Court of Appeal instead relied on English and other international precedents for guidance because otherwise “world wide consistency in the application of the Convention will be lost.”<sup>67</sup> In the *Chan* case, the child had moved with her family back and forth between Canada and Hong Kong but had been living in Hong Kong either with both parents or with each separately in a joint custodial situation. Irrespective of the requirements of the Canadian Act, the court held that in order to comport with the object and purpose of the Convention, the child should be found to be habitually resident in Hong Kong.

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<sup>64</sup> Abduction Convention, *supra* note 5, art. 3, 1343 U.N.T.S. at 98-99.

<sup>65</sup> The precise issue was faced again in the negotiations for the 1996 Protection of Children Convention, *supra* note 11, and again there was the same resistance to including a definition of “habitual residence,” even though the problems that arose under the Abduction Convention were already well-documented. See Silberman, *The 1996 Hague Convention*, *supra* note 11, at 247-48; see also Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 20-24 (1994).

<sup>66</sup> 199 D.L.R. (4th) 478 (B.C.C.A. 2001).

<sup>67</sup> *Id.* at 492.



Not all courts have appeared so enlightened. In an early New Jersey case, *Roszkowski v. Roszkowski*,<sup>68</sup> a state trial judge determined that a child who had been in New Jersey for six months — which satisfied the time-limit for home state jurisdiction under the UCCJA — was necessarily habitually resident for purposes of the Abduction Convention. However, more recent decisions in the United States seem to have gotten the message that the concepts of “habitual residence” under the Abduction Convention and “home state” for purposes of the U.S. Uniform Custody Acts are not equivalents.

In a leading case from the Ninth Circuit, *Mozes v. Mozes*,<sup>69</sup> the children had spent a full year in the United States. However, they had done so with only one parent, and they continued to have a strong connection to Israel. Rejecting analogies to the Uniform Acts, the Ninth Circuit observed: “To achieve the uniformity of application across countries, upon which depends the realization of the Convention’s goals, courts must be able to reconcile their decisions with those reached by other courts in similar situations.”<sup>70</sup> In a carefully-reasoned opinion, the court indicated that in these international parental abduction cases, courts should be slow to infer that an earlier habitual residence had been abandoned.<sup>71</sup> Requiring a clear showing that a “new” residence has been acquired reduces the ease with which habitual residence may be shifted without the consent of both parents. Since the objective of the Convention is to prevent unilateral decisions to move a child, such an interpretation maximized the goals of the Convention. Accordingly, the Ninth Circuit reversed the lower court and remanded for reconsideration as to “whether the United States had supplanted Israel as the locus of the children’s family and social development.”<sup>72</sup>

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<sup>68</sup> 644 A.2d 1150 (N.J. Super. Ct. 1993).

<sup>69</sup> 239 F.3d 1067 (9th Cir. 2001).

<sup>70</sup> *Id.* at 1072.

<sup>71</sup> *See id.* at 1079.

<sup>72</sup> *See id.* at 1084. A recent case in the Second Circuit, *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005) expanded upon both the “intention” and “acclimatization” prongs of the *Mozes* inquiry, noting that a court should first look into the “shared” intent of those entitled to fix the child’s residence (usually the parents); and second, it should determine whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents’ most recent shared intent. In *Gitter*, the family moved from New York to Israel, apparently with some reluctance by the wife. The district court concluded that even though the family had been in Israel for about fifteen months “there was no settled mutual intent to make Israel the child’s permanent home”, and the Second Circuit could not say that this finding was “clearly erroneous”. However, the Court of Appeals remanded the case for a further inquiry as to whether other factors pointed to the child having acclimatized to Israel such that the habitual residence had changed regardless of the parents’ “shared intention”. Citing *Beaumont & McEleavy*, *supra* note 19, the Court of Appeals observed that “[i]t would be difficult to affirm that whatever an individual’s alleged intention he should not be connected to a country that has been his place of residence over a period of years”). *Id.* at 134.

A recent decision from the Eleventh Circuit Court of Appeals, *Ruiz v. Tenorio*,<sup>73</sup> seems to have taken *Mozes* to an inappropriate extreme and overlooked its emphasis on acclimatization. In *Ruiz*, the parties moved with their children to Mexico after living for seven years in the United States, and they then remained in Mexico for close to three years. The district court characterized the move to Mexico as a “trial period,” and noted that the mother went to Mexico in order to save the marriage, but did not desire or intend to move there permanently. The court pointed to such evidence as the mother subsequently moving her nursing license to Florida, retaining bank accounts and credit cards in the United States, and remaining on a tourist visa rather than seeking to acquire permanent legal status or Mexican citizenship for herself or the children. The district court also found that the husband himself had second thoughts about staying in Mexico permanently.<sup>74</sup> In affirming the district court’s finding that the habitual residence of the children remained in the United States, the Eleventh Circuit placed great emphasis on the intention of the parties, and gave less weight to objective facts such as the length of time the *entire* family lived in Mexico, their building of a house in Mexico, and the children’s attendance at school in Mexico and acclimatization to life in Mexico. The Eleventh Circuit acknowledged that the issue of habitual residence was a “relatively close” one<sup>75</sup> and attempted to distinguish an earlier Third Circuit decision, *Feder v. Evans-Feder*<sup>76</sup>. The Third Circuit in *Feder* found similar activities — such as buying and renovating a house, pursuing interests and employment, and arranging for the child’s immediate and future schooling — sufficient to establish that the habitual residence had shifted from the United States to Australia. In reversing the district court’s determination that the habitual residence remained in the United States, the circuit court in *Feder* ruled that the mother’s ambivalence about the initial move did not negate the objective facts indicating that the family had established habitual residence in Australia.<sup>77</sup> In distinguishing *Ruiz* from *Feder*, the Eleventh

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<sup>73</sup> 392 F.3d 1247 (11th Cir. 2004).

<sup>74</sup> *Id.* at 1250.

<sup>75</sup> *Id.* at 1256.

<sup>76</sup> 63 F.3d 217 (3d Cir. 1995).

<sup>77</sup> *Id.* at 224. A very recent case in the Third Circuit, *Whiting v. Krassner*, 391 F.3d 540 (3rd Cir. 2004) emphasized the importance of the “shared intent” of the parties when the child is very young and “acclimatization” is more difficult to satisfy. In *Whiting*, the father removed the child from Canada two months after the mother and child had moved there pursuant to an agreement with the father that they could move to Canada but would return to the United States under certain conditions after two years. The Court of Appeals held that the agreement reflected a shared intention to establish habitual residence in Canada and abandon the child’s prior place of residence in New York: “the fact that the agreed-upon stay was of a limited duration in no way hinders the finding of a change in habitual residence . . .”. *Id.* at 550. But compare *Holder v. Holder*, 392 F.3d 1009 (9th Cir. 2004)(mother who took child back to United States approximately eight months after family’s relocation to Germany where father was

Circuit pointed to the district court's explicit finding that both parents had reservations about the move, thereby indicating that there was no "shared intent" to move to Mexico.<sup>78</sup>

The result in *Ruiz* places undue weight on subjective and difficult-to-ascertain intentions of the parties. Habitual residence ought not to be confused with domicile, which usually does require both residence and "intention to remain"; habitual residence would not appear to rest so heavily on the long-term intentions of the parties. Moreover, in the particular context of international parental abduction, the policy underlying the concept of habitual residence is to both prevent unilateral removals of children by one parent and to identify the place where the children are settled and where recent information about the quality of family life is available.<sup>79</sup> Where the family is merely on a temporary visit or stay, such as a sabbatical year, and/or where only one parent has come with the children for a limited period of time abroad, as in *Mozes*, the objective facts along with the length of the stay should be sufficient to distinguish those situations where the parties are merely "visiting" from those in which they have established a habitual, but not necessarily a permanent, residence. In *Ruiz*, however, the court embarks on an inquiry about the parties' motivations that includes reservations that they may have had about permanent relocation. More often than not, such an approach will yield conflicting testimony, introduce an inappropriate element of subjectivity, and ultimately impair the operation of the Convention.

These cases illustrate differences in the understanding and interpretation of the concept of habitual residence even among courts in the United States. Eventually the Supreme Court of the United States may take such a case and provide guidance for the lower courts in the United States. But such a decision would clearly not bind and might not even influence courts in other countries as to the appropriate interpretation of habitual residence.<sup>80</sup> Because the core concept of the Convention is preserved only if unilateral moves by one parent are resisted, an international and autonomous concept of habitual residence needs to be shaped.<sup>81</sup>

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posted for four-year assignment did not wrongfully remove or retain child because habitual residence had remained in United States).

<sup>78</sup> *Ruiz*, 392 F.3d at 1250. The Eleventh Circuit determined that it would review the ultimate issue of habitual residence "de novo" but that it was to accept the district court's finding of historical facts — such as the question of the parties' intent — unless clearly erroneous. *Id.* at 1252.

<sup>79</sup> In order to deter wrongful removals or retentions, it would be inappropriate and inconsistent with the aim of the Convention to accept "dual habitual residences." See, e.g., *In re Marriage of Hanbury-Brown*, 130 F.L.R. 252 (Fam. Ct. Austl. 1996). Thus, I disagree with the suggestion by Beaumont & McEleavy that it is not always necessary that a child has one, and only one, habitual residence. See BEAUMONT & MCELEAVY, *supra* note 19, at 110-13.

<sup>80</sup> For more on the subject of habitual residence, see E.M. Clive, *The Concept of Habitual Residence*, THE JURID. REV. 137 (1997). See also BEAUMONT & MCELEAVY, *supra* note 19, at 88-113.

<sup>81</sup> See Silberman, *Progress Report*, *supra* note 30, at 225-31.

## B. Custody Rights

One of the most critical concepts for the operation of the Convention is the concept of “custody rights.” Whether there has been a breach of “rights of custody” depends upon what rights the parties have according to the “law of State in which the child was habitually resident immediately before the removal or retention.”<sup>82</sup> The interrelationship of the “autonomous” rights of custody under the Convention and the directive to look at the “law of the habitual residence” can create some confusion.

On the one hand, a right of custody under the Convention is an autonomous definition whose meaning comes directly from the Convention and must be interpreted with the purposes and goals of the Convention in mind. To that end, Article 5(a) of the Convention does offer a particular definition of “rights of custody” which includes “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”<sup>83</sup> On the other hand, the “rights” that the respective parents or guardians have in respect of a child are found in the laws of the State of habitual residence.

It is important that courts — whether in the United States or elsewhere — understand and respect that “custodial rights” under a foreign law can be quite different from their own. Some courts have been quite diligent in engaging in that inquiry. One good example is *Whallon v. Lynn*,<sup>84</sup> where the Court of Appeals for the First Circuit was asked to determine custodial rights of unwed parents under the law of Mexico, which is where the family had lived. The mother had brought the child to the United States, and in resisting the petition for return, asserted that the father did not have custody rights under Mexican law. The court in *Whallon* observed that Mexico had the doctrine of *patria potestas* — a civil law concept incorporated in diluted form in Mexican law and not known to the common law; the court noted that it was taking care “to avoid imposing American legal concepts onto another legal culture.”<sup>85</sup> It then carefully reviewed Mexican law and found that unwed parents under Mexican law had the right to exercise “parental authority” in the absence of a judicial determination or agreement otherwise. The “rights” that the father had under Mexican law met the qualifications for “rights of custody” within the meaning of the Convention.<sup>86</sup>

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<sup>82</sup> Abduction Convention, *supra* note 5, art. 3(a), 1343 U.N.T.S. at 98-99.

<sup>83</sup> *Id.*, art. 5(a) at 99.

<sup>84</sup> 230 F.3d 450 (1st Cir. 2000).

<sup>85</sup> *Id.* at 456.

<sup>86</sup> *Id.* at 459.

As I have indicated, it is important to separate Convention concepts from domestic analogues found in particular judicial systems. The term “rights of custody” is an important concept within the meaning of the Convention and rests on an autonomous definition that triggers the return remedy. Contracting States have agreed to those situations in which they will order return — i.e. a breach of “rights of custody” — and domestic definitions of custody rights are not necessarily the equivalent of the concept created by Article 5(a).<sup>87</sup>

Recent decisions by courts in the United States have been the most blatant offenders of this important principle by imposing parochial domestic notions of custody on the Convention concept, effectively undermining the goals and objectives of the Convention. The first of these cases was *Croll v. Croll*,<sup>88</sup> which involved a custody order of a Hong Kong court that contained a *ne exeat* clause — that is, a provision that the custodial mother not remove the child from Hong Kong. The issue faced by the Court of Appeals for the Second Circuit in the *Croll* case was whether the non-custodial father, who had access rights and a “right” to have the child reside in Hong Kong, had “custody rights” within the meaning of the Convention.

Notwithstanding the Convention definition of “custody rights” in Article 5(a) — which specifically mentions the right to determine the child’s place of residence — the Second Circuit turned to Webster’s Third and Black’s Law Dictionaries as the source for a definition of custody rights. Relying on those definitions, the court then concluded that the right to prevent a child’s removal from a country does not constitute a right to “determine the child’s place of residence.”<sup>89</sup>

A perceptive dissent by Judge Sotomayor in *Croll* was critical of her colleagues for applying American concepts instead of international and Convention norms. She emphasized the object and purpose of the Convention and explained that the official history and commentary on the Convention “reflect a notably more expansive conception of custody rights” than U.S./English dictionaries.<sup>90</sup> As she pointed out, a restriction on removal affects the specific choice as to whether

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<sup>87</sup> That said, however, it must still be kept in mind that it is the law of the habitual residence that determines what rights the parties have under that law. Thus, in a recent Australian case, *Jiang v. Director-General Department of Community Services*, Appeal No. 24 (Fam. Ct. Austl. 2003)(on file with the author), the Full Court at Sydney reversed an order of return of a child on the ground that Georgia law did not confer upon the father a right of custody within the meaning of the Convention and the Australian Regulations. Nominally, the father appeared to have “joint legal custody,” but the expert testimony accepted by the court was that the mother had physical custody and under Georgia law had an absolute right to relocate with the child. Also, the divorce decree stated that if the parties were unable to agree on issues regarding child rearing, the mother, as primary physical custodian, had the right to make the decision. *See id.*

<sup>88</sup> 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001).

<sup>89</sup> *Id.* at 140.

<sup>90</sup> *Id.* at 146.

a child will live in England or Cuba, Hong Kong or the United States, and it is precisely this kind of choice that the Convention is designed to protect. Moreover, Judge Sotomayor also faulted the panel majority for failing to consider the overwhelming case law from other countries that had interpreted a *ne exeat* clause as creating “rights of custody” in the non-custodial parent.<sup>91</sup> Had the panel majority paid greater attention to the foreign case law (although it did not completely ignore it), it would have not have characterized it as “scattered [and] conflicting.”<sup>92</sup> Judicial decisions in Australia, Austria, Canada, England, France, Germany, Hungary, Ireland, Israel, New Zealand, Scotland, and South Africa had found that a “right of custody” existed in similar circumstances.

I referred earlier to the negotiation history that can be found in the *travaux préparatoires* and its utility in helping to determine how Convention concepts should be understood. When one looks to the debates during the negotiations, it is clear that the negotiators intended that a parent with a right to restrict relocation was to be included in the Article 5 definition of who held “rights of custody.”<sup>93</sup>

Unfortunately, certiorari was denied in *Croll*, and, although earlier decisions by state intermediate courts had almost unanimously held that a parent who could restrict whether the child moved away did have “rights of custody” within the meaning of the Convention,<sup>94</sup> other federal appellate courts have followed *Croll*.<sup>95</sup>

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<sup>91</sup> See *id.* at 153.

<sup>92</sup> *Id.* at 143.

<sup>93</sup> I detail this negotiation history elsewhere. See Silberman, *Patching Up*, *supra* note 30, at 46 n.34. I should acknowledge that I had a formal role in the *Croll* case, writing an amicus brief to the Supreme Court in a pro bono capacity — and in effect, making arguments that I have expressed here with respect to the need for autonomous Convention concepts and an accompanying global jurisprudence.

<sup>94</sup> See, e.g., *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991).

<sup>95</sup> See *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), *cert. denied*, 540 U.S. 1068 (2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); see also *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634 (E.D.N.Y. 2000) (following analysis of *Croll* but distinguishing on facts).

The mischief potentially caused by *Croll* should not be underestimated. In one recent case, an argument was made to the English Court of Appeal that *Croll* not only constituted an interpretation of the Convention under United States law, but also necessarily negated any claim that a *ne exeat* order gave rise to “custody rights” under New York state law. Fortunately, the English court was able to separate the two issues and understood that its task was to apply an autonomous Convention term. It then followed prior English case and other foreign authorities in holding that a *ne exeat* clause established a right of custody under the Convention because it allowed the non-custodial parent to determine the child’s place of residence. In dismissing counsel’s wrong but clever attempt to link the issue of rights of custody under New York state law to the decision in *Croll*, the Court of Appeal observed that the task of the English court was to determine the rights of the parents under the law of the particular State where the child was habitually resident and then to consider whether those rights were “rights of custody” for Convention purposes; and such a determination, it held, did not depend on how such rights were regarded for domestic or Convention purposes within the United States. See *In Re P.*, [2004] EWCA Civ. 971 (Eng. C.A. 2004) (on file with the author). The English Court of Appeal also noted that the

A second Court of Appeals case, *Fawcett v. McRoberts*,<sup>96</sup> in the Fourth Circuit, is perhaps the most disturbing, because in addition to the restriction on the custodial father's removal of the child from Scotland, there was an express undertaking by the father made to and recorded by the Scottish court that the child would not be removed from Scotland. Thus, in addition to the mother arguably having a "right to custody" because she had control over the child's place of residence, the *Scottish court* could also be said to have a "right of custody."<sup>97</sup> The district court found that there had been a breach of the mother's "rights of custody,"<sup>98</sup> but the Fourth Circuit reversed the order of return, even though the child had already been sent back to Scotland. The Fourth Circuit held that neither a restriction on removal nor an express undertaking to the court conferred a "right of custody" in the non-custodial mother.<sup>99</sup> Although the Fourth Circuit made passing reference to its ability to consider "opinions of sister signatories,"<sup>100</sup> it did little with that opportunity.

A very similar situation had arisen in the Supreme Court of Canada in *Thomson v. Thomson*,<sup>101</sup> where the Canadian Supreme Court held that the Scottish court's interim order restricting the child from being taken from Scotland created rights of custody in the Scottish court. Neither the *Thomson* case nor any of the decisions from the courts of other countries on *ne exeat* clauses is discussed in *Fawcett*. One of the major points the Scottish government made in its amicus brief in support of certiorari was that there was a need to interpret the Convention consistently with other signatories to the Convention and that the judicial opinions of Contracting States should have been given substantial weight by the court in the United States in interpreting Article 5 of the Convention.<sup>102</sup>

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South Africa Constitutional Court in *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC), had criticized and rejected *Croll* and that a different Court of Appeals in the United States, in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), had reached a contrary result to *Croll*.

<sup>96</sup> *Fawcett*, 326 F.3d at 491.

<sup>97</sup> The Scottish court's "right of custody" may have been more significant because the mother in *Fawcett* had brought this proceeding only to seek an increase in her access rights. See *Fawcett*, 326 F.3d at 501.

<sup>98</sup> See *id.* at 498.

<sup>99</sup> See *id.* at 500-01.

<sup>100</sup> *Id.* at 500.

<sup>101</sup> [1994] 3 S.C.R. 551 (Can.).

<sup>102</sup> See Brief of Amici Curiae Scottish Ministers at 10-12, 19, *Fawcett v. McRoberts*, *cert. denied*, 124 S. Ct. 805 (2003) (No. 03-261). For example, in the United Kingdom, the Court of Appeal held that an Australian decree granting "custody" to the mother and joint guardianship to both parents created "custody rights" because the order gave the father the right to determine the child's place of residence. See *C. v. C.*, [1989] 1 W.L.R. 654. In Australia, the Family Court of Australia ruled that a custody order providing reciprocal *ne exeat* right for both parents created "rights of custody" in the otherwise non-custodial father. See *In the Marriage of Jose Garcia Resina and Muriel Ghislaine Henriette Resina*,

A more encouraging approach has come from the recent decision of the Court of Appeals for the Eleventh Circuit in *Furnes v. Reeves*,<sup>103</sup> where Judge Hull’s opinion canvassed cases from other national courts in attempting to determine whether a *ne exeat* clause created custody rights under the Convention.<sup>104</sup> Judge Hull relied on cases from the United Kingdom, Australia, South Africa, and Israel; in holding that the Convention contemplated “custody rights” in this situation, she observed that “our reasoning and conclusions are in harmony with the majority of the courts of our sister signatories that have addressed this treaty issue.”<sup>105</sup> In addition, she carefully analyzed the convention history, which contained evidence that a restriction on removal was considered by the Convention’s drafters to be a “right of custody.”<sup>106</sup>

#### IV. THE ROLE OF DOMESTIC INTERESTS

Notwithstanding the many points in the Convention where autonomous concepts are critical to interpretation, the Convention framework creates room for “domestic interests” to operate.<sup>107</sup> But, even where an important local concern with respect to the well-being of the child is acknowledged, that interest must play out within the parameters of the Convention. The clearest example of this precarious balance is found in the most commonly-asserted defense to a return under the Convention: when there is a “grave risk” that return would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>108</sup> In this context, it is for the court hearing the petition to assess conditions in the State of habitual residence and how the

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Appeal No. 52 (Fam. Ct. Austl. 1991) (unpublished decision on file with author). More recently, the Constitutional Court of South Africa ordered a child returned to Canada when the mother removed the child to South Africa in violation of a court order granting the mother custody and the father access, but restricting either parent from removing the child from British Columbia. *See Sonderup v. Tondelli*, 2002(1) SA 1171 (CC). In *Sonderup*, the Constitutional Court expressly adopted the reasoning of Judge Sotomayor’s dissent in *Croll*. See also the view expressed by the Second Special Commission reviewing the operation of the Convention, concluding that a *ne exeat* clause, when combined with access rights, created “custody” rights in the parent who did not have primary care and control of the child. *See Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (Jan. 18-21, 1993), *reprinted in* 33 I.L.M. 225, 233-34.

<sup>103</sup> 362 F.3d 702 (11th Cir. 2004), *reh’g denied* May 3, 2004, *cert. denied*, 2004 WL 2070617.

<sup>104</sup> For a recent decision following *Furnes*, see *Lalo v. Malca*, 318 F. Supp. 2d 1152 (S.D. Fla. 2004).

<sup>105</sup> *Furnes*, 362 F.3d at 714-18.

<sup>106</sup> *See id.* at 719-21, citing Silberman, *Patching Up*, *supra* note 30, at 46 n.34 (quoting Hague Conference on Private International Law, III Actes et Documents de la Quatorzième Session, Oct. 6-25, 1980, at 266 (1980)).

<sup>107</sup> Indeed, even on the issue of “custody rights,” States do have freedom to shape through their own law whether such a right exists. For example, a country is free to use its own domestic law to give complete freedom to a custodial parent to relocate. In such circumstances, a parent with only access rights would not have any say in determining the child’s place of residence and under the autonomous Convention concept of “rights of custody,” there would be no wrongful removal. That is quite different, however, from refusing to return a child to the State of habitual residence when the habitual residence State has imposed a restriction on the custodial parent from relocating with the child, and that restriction has been violated. *See generally* Linda Silberman, *Custody Orders Under the Hague Abduction Convention*, in *A NEW VISION FOR A NON-VIOLENT WORLD*, *supra* note 30, at 233.

<sup>108</sup> *See Abduction Convention*, *supra* note 5, art. 13(b), 1343 U.N.T.S. at 101.



parties relate to one another and to the child. At the same time, the need to avoid State chauvinism in making these assessments is important.

In *Friedrich v. Friedrich*,<sup>109</sup> the Court of Appeals for the Sixth Circuit considered the mother's contention that returning her son to Germany would cause him psychological harm and observed: "The exception for grave risk of harm is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence." In other words, the test is not one of "best interests," and the case is not a "custody case." The standard is much higher — there must be a serious risk of harm to the child — if return is to be denied.

Recently, two different categories of cases have raised interesting questions about the scope of the "grave risk" defense and the range of options a court should consider before finding the defense established.<sup>110</sup> The first involves cases where there are allegations of abuse to the child, physical and/or sexual; the second relates to concerns about the child because of the potential absence of the primary caretaker, usually a mother who has wrongfully removed the child, but who resists returning herself, often because of domestic violence or other threat to her safety.<sup>111</sup> Indeed, this latter set of cases has become quite common because more and more it is mothers who are the abductors.

I begin with what I believe are the cases with the strongest claims for non-return: allegations of physical and even sexual abuse of the child. The instinct to rely on the pervasive and accepted values of one's own societal norms is difficult to resist in these cases, and interests in child protection are likely to outweigh any sense of cultural relativism. However, the obligation of the

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<sup>109</sup> 78 F.3d 1060 (6th Cir. 1996).

<sup>110</sup> See, e.g., *Turner v. Frowein*, 752 A.2d 955, 976, 978 (Conn. 2000) (reversing denial of petition for return on the basis of the father's sexual abuse of the child and remanding "for further consideration of the range of placement options and legal remedies that might allow the child to return to Holland with adequate safeguards for his protection, pending a final custody determination in due course by a Dutch court with proper jurisdiction").

<sup>111</sup> Professor Merle Weiner has written extensively and passionately on the issue of domestic violence in the context of the Convention. See Merle Weiner, *Using Article 20*, 38 FAM. L.Q. 583 (2004); see also Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701 (2004); Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL'Y & LAW 749 (2003); Merle Weiner, *International Child Abduction and the Escape from Domestic Violence*, supra note 30; see also Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004); Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL. & FAM. 191 (1999).

State to which the child is abducted is the remedy of return, usually to the country of habitual residence, and not to the left-behind parent.<sup>112</sup>

A particularly challenging case is *Danaipour v. McLarey*,<sup>113</sup> a decision authored by Judge Sandra Lynch. In *Danaipour*, a Swedish mother, suspecting abuse on the part of the father, removed the children to the United States where she arranged for an evaluation of the children for sexual abuse. The district court ordered return, but imposed conditions — agreed to by the father — that the children would remain with the mother and that he would have no contact with the children until the Swedish authorities had conducted an evaluation of the abuse charges according to established protocols.<sup>114</sup> The Court of Appeals for the First Circuit reversed, holding that the district court should have conducted proceedings to determine whether there had been sexual abuse. The court also expressed doubt about ordering return on the basis of “undertakings” or “conditional orders,” and noted that the condition requiring the Swedish authorities to follow particular procedures in conducting their evaluation was unacceptable to the Swedish court.<sup>115</sup>

There is some question in my mind whether the district court should have been required to determine the truth of the abuse allegations. In effect, such a requirement transforms a Hague case into a full-blown custody proceeding and evidences a lack of confidence in the courts of other systems to protect children. On the other hand, the appellate court’s decision reflects its obligation under the Convention to ensure that a child is not placed in an unsafe environment in case of return. If the court had good reason to distrust the authorities in Sweden to carry out a serious evaluation of

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<sup>112</sup> See *Laing v. The Central Authority*, 21 Fam. L.R. 24 (Fam. Ct. Austl. 1996), where the father was accused of sexual misconduct and had little relationship with the children. The court emphasized that it was not returning the child to the father but was relying on the court in the United States to decide the custody issue and protect the child’s best interests, noting that it was “inconceivable that the judicial system of the State of Georgia in the U.S. would not be able to protect the children from any significant risk of physical and/or psychological harm arising from the implementation of this court’s order.” *Id.* at 44.

<sup>113</sup> 286 F.3d 1 (1st Cir. 2002).

<sup>114</sup> See *id.* at 9, 11.

<sup>115</sup> See *id.* at 12. In its subsequent decision upholding the district court’s refusal to return the children on the basis of a finding that sexual abuse had occurred and that as a result return of the children to Sweden posed a grave risk of psychological harm, the First Circuit expressed its view that in such a case it was unnecessary to consider remedies available in the country of habitual residence because the harm was “beyond the power of any court to prevent or remedy if the children were returned”. See *Danaipour v. McLarey*, 386 F.3d 289, at 303 (1st Cir. 2004)(appeal after remand). Other courts have found it necessary to consider whether there are any ameliorative measures that would mitigate the risk of harm to the children if they were to be returned pending a final adjudication of custody. See, e.g., *Olguin v. Santana*, 2005 WL 67094 (E.D.N.Y. 2005)(noting that lack of sufficient social services for victims of domestic and child abuse in Mexican municipality and failure of father to take any action to reduce risk of repatriation indicated that no ameliorative measures were possible).

the abuse allegations, the refusal to return was appropriate. However, it would be presumptuous to assume that only authorities in the United States have the necessary competence and expertise to make a proper inquiry.<sup>116</sup>

In some cases, it may be possible to effectuate return by having the court in the country to which the child is being returned make a “safe harbor” order prior to the entry of a return order in the requested State.<sup>117</sup> Such orders are more desirable than ones made by a court hearing the return petition because any such order will need enforcement in the country of habitual residence to be effective. “Undertakings” have also been used by courts in some countries to deal with the transition period between the time when a court makes a return order and the time in which a child is brought before a court in the country of its habitual residence.<sup>118</sup>

It may be that issues like the use of mirror orders, safe harbor orders, and/or undertakings are not susceptible to uniform treatment internationally because their use is highly dependent upon national law. Although courts in common law countries have been willing to adopt such mechanisms, civil law countries have traditionally been more resistant. But a change in the approach of civil law countries may be forthcoming in light of Article 11(4) of the new 2003

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<sup>116</sup> Unfortunately, courts continue to find reasons to refuse to return. In *Blondin v. DuBois*, 19 F. Supp. 2d 123, 129 (S.D.N.Y. 1998), the district court found both children had been abused by the petitioner and denied the return application, holding that the children’s “primary interest” in not being exposed to “physical or psychological danger” outweighed the petitioner’s rights. In vacating the lower court’s ruling, the Second Circuit noted that ordering the return of the children would not automatically submit them to the custody of the petitioner and remanded for a hearing as to whether the children could be protected in France. *See Blondin v. DuBois*, 189 F.3d 240 (2d Cir. 1999). On remand, the district court found that, despite the French government’s willingness to assist with housing and financial arrangements during the pendency of the custody proceeding, these measures could not protect the children from the grave risk of harm, as the harm was actually being returned to the place where they were traumatized. *See Blondin v. DuBois*, 78 F. Supp. 2d 283 (S.D.N.Y. 2000). The Second Circuit affirmed “[s]ince the District Court found—on the basis of uncontested expert testimony—that the children will face a recurrence of traumatic stress disorder if repatriated to France, and we have concluded that this finding is not clearly erroneous, we cannot say that Article 13(b) does not apply in this case.” *Blondin v. DuBois*, 238 F.3d 153, 163 (2d Cir. 2001).

<sup>117</sup> Such an order is designed to ensure that children are sufficiently protected upon their return. *See BEAUMONT & MCELEAVY, supra* note 19, at 167-68. The “safe harbor” order may be issued by the State to which the child is being returned — i.e. the court of habitual residence. Or it may be a condition placed on an order of return by the court hearing the Hague petition. In that situation, the court in the country to which the child is to be returned may use a “mirror order” to implement that condition upon the child’s return.

<sup>118</sup> In the context of the Abduction Convention, “undertakings” refer to promises, usually by the left-behind parent to perform certain obligations and to agree to certain conditions to facilitate return of the child prior to the time the foreign court assumes jurisdiction and can issue an order. “Undertakings” can be incorporated in the court’s order of return and can lead to sanction by the court that issued them if disobeyed. However, such orders are not necessarily enforceable in the country to which the child is returned. For an excellent discussion of undertakings, *see HON. JAMES D. GARBOLINO, INTERNATIONAL CHILD CUSTODY: HANDLING HAGUE CONVENTION CASES IN U.S. COURTS* 71-83 (National Judicial College 3d ed. 2000).

Brussels II Regulation<sup>119</sup> that recently went into effect among Member States of the European Union.

Article 11(4) directly speaks to the Hague Convention Article 13(b) defense with respect to abductions from one EU State to another. It prevents a court from refusing to return a child “if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.”<sup>120</sup> In an earlier article, I recommended that the Hague Conference consider a protocol to the Abduction Convention that would authorize courts to make safe harbor orders or impose conditions where appropriate, in an attempt to enhance return under the Convention.<sup>121</sup>

Although initially there was little enthusiasm for such a protocol, partly because it could open up too many issues in a Convention that has broad support and is working relatively effectively, a developing international practice in the use of such orders might make a narrow protocol on this limited issue attractive. Alternatively, a growing international consensus about the need for cooperation among courts to develop and effectuate such measures might result in some type of “soft law” alternative.<sup>122</sup> The Hague Conference itself has embarked on a project to explore various mechanisms that would facilitate direct international judicial communication,<sup>123</sup> which could be helpful in encouraging safe harbor and mirror orders as a means of effectuating a return under the Convention.<sup>124</sup>

The second category of cases raising issues about when the “grave risk” to the child threshold is met involves the situation of a primary caretaker parent who has wrongfully removed a

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<sup>119</sup> For an explanation and discussion of Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) 1 [hereinafter 2003 Brussels IIbis Regulation], see note 129, *infra*.

<sup>120</sup> See 2003 Brussels IIbis Regulation, *supra* note 119, art. 11(4), 2003 O.J. (L 338) 6.

<sup>121</sup> See Silberman, *Patching Up*, *supra* note 30, at 55.

<sup>122</sup> The Conclusions and Recommendation of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention included a recommendation on safe return orders: “Contracting States should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary provisional protective measures prior to the return of the child.” See Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Mar. 22-28, 2001), rec. 5.1, Permanent Bureau of the Hague Conference, *available at* [http://hcch.e-vision.nl/upload/concl28sc4\\_e.pdf](http://hcch.e-vision.nl/upload/concl28sc4_e.pdf) (last visited Feb. 21, 2005).

<sup>123</sup> Hague Conference on Private International Law, Preliminary Report, Practical Mechanisms for Facilitating Direct International Judicial Communications in the Context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Preliminary Document No. 6 of August 2002 *available at* [http://hcch.e-vision.nl/upload/abd2002\\_pd6e.pdf](http://hcch.e-vision.nl/upload/abd2002_pd6e.pdf) (last visited Feb. 21, 2005).

<sup>124</sup> See Justice Carl Eberhard, *International Communications between Judges—Direct International Communications between Judges*, THE JUDGES’ NEWSL. (Hague Conf. On Private International Law, The Hague, Netherlands), Summer 2002, at 16-17.

child, but refuses to return with the child. In some situations — and these are the more difficult ones — the primary caretaker asserts that she has been the victim of serious domestic violence or other threat and that she cannot return without danger to herself. Although the Convention only requires the return of the child and not the parent, when a child has been in the care of one parent, return without the primary caretaker potentially places a child at “grave risk” or creates an “intolerable situation.”<sup>125</sup> Courts in England<sup>126</sup> and Canada<sup>127</sup> have crafted orders that attempt to protect the endangered spouse upon return while leaving the child in the care of the primary caretaker as part of the return order. However, just as in the other situations described above where safe harbor orders have been used to protect the safety of the child, there is no assurance that the protection ordered will be sufficient or that the order will be enforced back in the State of habitual residence. Courts, when they find the danger serious enough, will deny return altogether.<sup>128</sup>

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<sup>125</sup> See, e.g., *Steffen F. v. Severina P.*, 966 F. Supp. 922, 928 (D. Ariz. 1997) (determining that return of child to Germany would pose grave risk of harm due to separation from primary caretaker). The court noted that German courts had reached a similar conclusion in an analogous case, citing *B. v. B.*, AG Westerberg decision of Sept. 29, 1992 (F.R.G.).

<sup>126</sup> One of the earliest cases, *C. v. C.*, 2 All E.R. 465 (Eng. C.A. 1989), did not involve the issue of domestic violence; rather the “grave risk” resulted solely from the mother’s refusal to accompany the child upon return. The mother stated that she could not return to Australia because she had no money or employment. Lord Justice Elizabeth Butler-Sloss of the English Court of Appeal first observed that a parent could not rely on the psychological harm that might result from her own refusal to return with the child, but ultimately conditioned the return order on the promise of the father to provide financially for the mother and child in Australia. For a more recent application in the context of allegations of family violence, see *In re H.*, [2003] EWCA Civ. 355 (Eng. C.A. 2003), where the court of appeal reversed the trial judge’s refusal to return due to violence by the father and remanded to a new High Court judge to structure arrangements to protect the children on return.

<sup>127</sup> See, e.g., *Finizio v. Scoppio-Finizio*, [1999] 46 O.R.3d 226 (Ont. C.A.), where the Ontario Court of Appeal reversed the trial court’s ruling refusing to order return because the father had physically assaulted the mother. The Court of Appeal focused on the question of how the children could be returned safely, and then imposed various undertakings, agreed to by the father, whereby the wife and children would live separately from the father pending the hearing, the father would pay sufficient support, and would refrain from harassing the wife. In *N.P. v. A.B.P.*, [1999] R.D.F. 38 (C.A. Que.), the Quebec Court of Appeals noted that in ordinary circumstances an abducting primary caregiver’s refusal to return with the child would not be a valid or acceptable reason to refuse to order return, and that in most cases appropriate conditions to protect the safety of the child and spouse can and should be put in place. But on the facts before it, the husband’s links with the Russian Mafia appeared to put him beyond the control of law enforcement officials, the danger to the wife was severe, and the child could not be sent back without the mother to a father who was engaged in the prostitution business. Compare *Pollastro v. Pollastro*, [1999] 43 O.R.3d 485 (Ont. C.A.), where the court appeared to have found the violence so substantial that it refused return without even considering the possibility of safeguards for return of the child.

<sup>128</sup> See, e.g., *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000), where the father’s past violations of court orders, his indictment for threatening to kill someone in an unrelated case, and his violent behavior toward the family were such that “grave risk” could not be alleviated. See also discussion of *Blondin v. DuBois*, *supra* note 117; *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 462-63 (D. Md. 1999) (noting that petitioner’s “complete denial of any culpability in this matter leaves little doubt that he would make no effort to alter the destructive manner in which he interacts with his family” and that “the risk to his wife and children has increased exponentially as a result of these proceedings”); *Ostevoll v. Ostevoll*, 2000 WL 1611123, at \*1, \*17 (S.D. Ohio 2000) (“While the authorities in Norway quite possibly may be able to protect against physical harm, the same cannot be said regarding the psychological harm which we believe the children will suffer if ordered to return. Moreover, we are not willing to take the chance that the authorities may fail, as authorities

One particularly troublesome case in my view comes from Australia's highest court, *JLM v. Director-General NSW Dept. of Community Service*,<sup>129</sup> where in a 4-2 ruling, the court refused return because the mother threatened to commit suicide should she lose custody at the hearing once the child was returned to Mexico. The Australian court thought that the possibility that the mother would lose custody was likely given her financial and emotional situation, and thus denied return. But rulings like *JLM* encourage threats of this kind as well as more general refusals by primary caretakers to accompany the child if return is ordered. In both situations, the psychological welfare of the child can be jeopardized if return is ordered. To deny return in these circumstances is a license for blackmail and will increase the likelihood of international abductions because an abductor knows that such manipulations are a means to avoid having the child sent back.

#### V. THE SEARCH FOR A GLOBAL JURISPRUDENCE

The implementation of an international Convention in seventy-five countries will necessarily reflect certain national characteristics of the respective States. The structure of the court systems in various countries will obviously affect how the Convention is interpreted.<sup>130</sup> Also, the implementing legislation itself will reflect details not expressly covered by the Convention,<sup>131</sup> and in the implementation process, States may express views as to the meaning of the Convention.<sup>132</sup>

In certain States, the Convention may be affected by the operation of internal domestic rules, including constitutional limitations, and/or its relationship to other international instruments.<sup>133</sup> In particular, as regards the Member States of the European Union, the new 2003 Brussels *Ibis* Regulation has created a certain number of particularistic rules for abduction cases, which will

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sometimes do, to protect the children from physical harm.”); *Pollastro v. Pollastro*, 43 O.R.3d 485 (Ont. C.A. 1999)(reversing lower court's order of return where left-behind parent had been physically abusive to mother and made ongoing harassing phone calls including death threats).

<sup>129</sup> 27 Fam. L.R. 569 (High Ct. Austl. 2001).

<sup>130</sup> For example, in England and Wales, all Convention cases are heard at first instance in the Family Division of the High Court, where there are eighteen judges who hear these cases. In Germany, pursuant to new legislation in 1999, jurisdiction in Hague Convention cases is restricted to twenty-four first-instance (Amtsgericht) and twenty-four appeals (Oberlandesgericht) courts. By contrast, in the United States, both federal and state courts have concurrent jurisdiction to hear Hague cases, and thus many judges have no familiarity or expertise with these issues. *See generally*, Nigel Lowe and Sarah Armstrong, *Good Practice in Handling Hague Abduction Convention Return Applications* (2002) (describing court systems of select Convention states).

<sup>131</sup> For example, the U.S. implementing legislation — the International Child Abduction Remedies Act — requires that a defense under Article 13(b) or Article 20 be established by clear and convincing evidence. *See* 42 U.S.C. § 11603(e). Other defenses must only be proved by a preponderance of the evidence. *See* 42 U.S.C. § 11603(e)(2)(B).

<sup>132</sup> For the United States, see *Hague International Child Abduction Convention: Text and Legal Analysis*, 51 Fed. Reg. 19494 (1984).

<sup>133</sup> *See* Dagmar Coester-Waltjen, *The Future of the Hague Child Abduction Convention: The Rise of Domestic and International Tensions—the European Perspective*, 33 N.Y.U. J. INT'L L. & POL. 59, 60-69; 74-80 (2000).

apply among EU Member States and thus alter the application of the 1980 Convention in their mutual relations.<sup>134</sup>

For example, the 2003 Brussels II Regulation requires that, when applying the 1980 Convention between EU Member States, the child must be heard in return proceedings, unless this is inappropriate having regard to the child's age or maturity.<sup>135</sup> Also, as between EU Member States, a court cannot refuse to return a child based on an Article 13(b) defense "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."<sup>136</sup> Finally, the 2003 Brussels II Regulation requires that a court of a Member State refusing return under Article 13(b) of the Hague Convention transmit a copy of that decision to the competent court of the former habitual residence.<sup>137</sup> The file will remain open in the court of the former habitual residence for three months to permit further proceedings to be brought there.<sup>138</sup> If the left-behind parent succeeds in the court of the former habitual residence in obtaining an order of custody and return of the child, such a decision prevails over the earlier judgment of non-return under the Hague Convention.<sup>139</sup>

Nonetheless, *interpretation* of the Hague Abduction Convention itself — i.e. harmonization of "Convention law" in the national courts and a commitment to develop a global jurisprudence — remains an important priority. Numerous issues arising under the Convention — habitual residence, rights of custody, and "grave risk" — have resulted in quite different interpretations by national courts and undermine much of the reciprocal treatment that is contemplated by the Convention. There are other issues that have presented similar problems: how to deal with the one-year time-period when a child has been concealed,<sup>140</sup> what it means to be "settled in the new environment" for

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<sup>134</sup> See Andrea Schulz, *The New Brussels II Regulation and the Hague Conventions of 1980 and 1996*, INT'L FAM. L.J. 22, 23-25 (2004); N.V. Lowe, *Regulating International Parental Child Abduction — Brussels Style*, in CONTEMP. ISSUES IN LAW 315 (2002/2003).

<sup>135</sup> See 2003 Brussels IIbis Regulation, *supra* note 119, art. 11(2), 2003 O.J. (L 338) 6.

<sup>136</sup> 2003 Brussels IIbis Regulation, *supra* note 119, art. 11(4), 2003 O.J. (L 338) 6. Such a provision is consistent with Article 36 of the 1980 Convention, which allows States to agree among themselves to limit the restrictions to which the return of the child may be subject. See Abduction Convention, *supra* note 5, art. 36, 1343 U.N.T.S. at 103.

<sup>137</sup> See 2003 Brussels IIbis Regulation, *supra* note 119, art. 11(6), 2003 O.J. (L 338) 6-7.

<sup>138</sup> See *id.*, art. 7, 2003 O.J. (L 338) 5.

<sup>139</sup> See *id.*, art. 11(8), 2003 O.J. (L 338) 7. The provision is not inconsistent with the Abduction Convention and actually underscores an important aspect of the Abduction Convention — that non-return does not immediately or necessarily result in jurisdiction in a State that refuses return. The Abduction Convention itself does not address the issue of jurisdiction, but the 1996 Convention on the Protection of Children contains a provision similar to that in the 2003 Brussels IIbis Regulation whereby jurisdiction continues in the court of the original habitual residence if proceedings there are pending. See 1996 Protection Convention, *supra* note 11, art. 13, 35 I.L.M. at 1398.

<sup>140</sup> Compare *Lops v. Lops*, 140 F.3d 927, 946 (11th Cir. 1999) (finding that because of concealment child was not "settled" in new environment and intimating that one-year period might be "equitably tolled" in cases of

purposes of Article 12,<sup>141</sup> and whether a court still has discretion to return a child if it is so settled;<sup>142</sup> the age at which a child's objections should be considered and what weight those objections should be given;<sup>143</sup> and the understanding of Article 20's exception to return when principles relating to human rights and fundamental freedoms are at stake.<sup>144</sup>

Is the goal of uniform interpretation realistic, and if so, how can it be achieved? A few basic steps can be taken by the national courts themselves. National courts should: (1) observe principles of interpretation that focus on the object and purpose of the Convention and avoid conflating domestic custody law with law developed in the context of an international convention, (2) make use of the travaux préparatoires in determining the object and purposes of the Convention, (3) look to foreign case law, as is now possible with on-line technology and the INCADAT data

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concealment so as not to reward wrongdoer) and *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362-63 (M.D. Fla. 2002)(equitable tolling consistent with purposes of the Convention) *with Cannon v. Cannon*, [2004] EWCA Civ. 1330 (Eng. C.A. 2004)(finding that deliberate concealment does not stop clock running for purposes of Article 12, though it is relevant to determination of settlement).

<sup>141</sup> *Compare Belay v. Getachew*, 272 F. Supp. 2d 553 (D. Md. 2003) (considering factors such as circumstances surrounding child's new living environment, social ties with family and friends, attendance at school and religious institutions, and whether or not abducting parent concealed the child) and *Secretary, Attorney-General's Department v. T.S.*, 27 Fam. L.R. 376, 409 (2001) (arguing that even a very young child can be settled in his environment as "it may be that his environment is more constrained than that of an older child, but I consider that his home environment is likely to be correspondingly more important to him"); *with In re Koc*, 181 F. Supp. 2d 136 (E.D.N.Y. 2001) (considering abducting parent's illegal residency in United States as probative of child not having become settled, despite living here for almost three years); *David S. v. Zamira S.*, *supra* note 95, 574 N.Y.S.2d at 433-34 (citing children's young ages to question their connection to their new community and ordering their return); *New Brunswick (Attorney General) v. Majeau-Prasad*, 229 N.B.R. (2d) 296 (2000)("At any time when a child is removed the fugitive parent has to eventually settle in one community and in all likelihood eventually obtain employment and place her child in day care or secure babysitters. These events in my mind do not necessarily satisfy the concept of "new environment" as defined in the Convention.").

<sup>142</sup> *Compare J.E.A. v. C.L.M.*, 220 D.L.R. (4th) 577 (2002) (Nova Scotia C.A.)(return ordered seven years after the child's wrongful removal in order to deal firmly and unequivocally with child abduction); *Cannon v. Cannon*, *supra* note 140 (holding that, even where child is settled following abduction within meaning of article 12, court has discretion under the Convention pursuant to article 18 to order return of the child); *and Director-General, Department of Community Services v. Moore*, 172 F.L.R. 367 (Fam. Ct. Austl. 2002)(holding that Australian Regulation leaves discretion to order return of child despite child being settled) *with State Central Authority v. Ayob*, 21 Fam. L.R. 567 (Fam. Ct. Austl. 1997)(Kay, J.) (arguing that under Convention and Australian Regulations court has no discretion to order return if child is found to be settled in its new environment).

<sup>143</sup> *Compare Dep't of Cmty. Servs., v. M. and C.*, 24 Fam. L.R. 178 (Fam. Ct. Austl. 1998) ("[W]e see no error in the fact that he assessed the statements of the children [aged 9 and 11] in light of the fact that they were of superior intelligence to most of their peers.") *and Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953 (E.D. Mich. 2001) (ordering discovery and *in camera* interviews to determine the objections of an eight year-old) *with* Decision of 15 December, R.J.Q. 248 (Cour supérieure 1999) (finding an eight year-old too young for her views to be considered).

<sup>144</sup> *Compare Fabri v. Pritikin-Fabri*, 221 F. Supp. 2d 859 (N.D. Ill. 2001) (rejecting abductor's argument that return order would violate her right to travel under U.S. Constitution); *L. v. Ministère Public*, N° de rôle 02/14917 (2002) (comparing French procedures with those of the European Court of Human Rights and other international provisions concerning the protection of children); *and Director-General v. Bennett*, 26 Fam. L.R. 71 (Fam. Ct. Austl. 2000) (finding that Article 20 should only be invoked when a return order would utterly shock the conscience of the court or offend all notions of due process).



base, and (4) treat the jurisprudence developed in courts of other Convention countries as relevant precedent in interpreting the Convention.

These are limited steps, but may be as much as national courts can do. However, I believe there is a more vigorous role for the infrastructure within which the Convention operates. In one of the first articles I wrote about the Abduction Convention, I pointed to the leadership role of the Hague Conference, not only in overseeing the initial negotiations for the Convention, but also for its continuing stewardship of the Convention over the years.<sup>145</sup> Since the negotiations were concluded in 1980, there have been four Special Commissions on the Operation of the Convention. These meetings — each over the course of several days — have been invaluable in bringing together treaty and observer countries to discuss potential problems in the operation of the Convention and to share collective experiences.

The Special Commissions generally issue Reports, which provide information gathered from the participants, and these Reports set forth as Conclusions whatever consensus emerges with respect to the operation of the Convention.<sup>146</sup> An additional Special Commission was held in September 2002, to consider promulgating various “Guides to Good Practice.”<sup>147</sup> Two pamphlets in the form of “Guides to Good Practice” have recently been issued. The first covers practices relating to the Central Authorities<sup>148</sup> and is designed to assist Central Authorities by putting at their disposal a range of practices used successfully in the past. The second is entitled “Implementing Measures” and offers suggestions for implementation of the Convention within national systems.<sup>149</sup>

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<sup>145</sup> See Silberman, *Progress Report*, *supra* note 30, at 257.

<sup>146</sup> See, e.g., Hague Conference on Private International Law: Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 29 I.L.M. 220 (1990); Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (18-21 January 1993), Permanent Bureau of the Hague Conference, 33 I.L.M. 225 (1994); Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (Mar. 17-21, 1997), Permanent Bureau of the Hague Conference, *available at* <http://hcch.e-vision.nl/upload/abduc97e.pdf> (last visited Feb. 21, 2005); See Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Mar. 22-28, 2001), Permanent Bureau of the Hague Conference, *available at* [http://hcch.e-vision.nl/upload/concl28sc4\\_e.pdf](http://hcch.e-vision.nl/upload/concl28sc4_e.pdf) (last visited Feb. 21, 2005).

<sup>147</sup> See Report and Conclusions of the Special Commission Concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Sept. 27-Oct. 1, 2002), Permanent Bureau of the Hague Conference on Private International Law (2003), sec. 2.1, *available at* [http://hcch.e-vision.nl/upload/abd2002\\_rpt\\_e.pdf](http://hcch.e-vision.nl/upload/abd2002_rpt_e.pdf) (last visited Feb. 21, 2005).

<sup>148</sup> See Hague Convention on Private International Law, Guide to Good Practice, Part I — Central Authority Practice, *available at* [http://hcch.e-vision.nl/upload/abdguide\\_e.pdf](http://hcch.e-vision.nl/upload/abdguide_e.pdf) (last visited Feb. 21, 2005).

<sup>149</sup> See *id.*, Part II — Implementing Measures, *available at* [http://hcch.e-vision.nl/upload/abdguide2\\_e.pdf](http://hcch.e-vision.nl/upload/abdguide2_e.pdf) (last visited Feb. 21, 2005).

Its objective is to “draw attention to arrangements, practices and procedures” that have been effective in implementing the Convention in different jurisdictions. An additional chapter relating to “good practices” on transfrontier access in the context of the Abduction Convention is also contemplated.<sup>150</sup>

Other work at The Hague in connection with the Abduction Convention anticipates formal Reports on direct international judicial communications and on measures adopted in different States to prevent abductions from taking place. The Hague Conference has also sponsored international judicial seminars, bringing together judges from around the world with Hague Convention experience to discuss issues.<sup>151</sup> More recently, the Conference has come forward with a proposal to establish a Training Institute at the Hague Conference that will look for ways to provide education, training and technical assistance to States on various Hague Conventions, and in particular the Abduction Convention.<sup>152</sup> It envisions a separate and more intensive focus on these issues under the direction of an Executive Director, who will have both time and resources to devote to this enterprise.

For all of its important work, however, the Hague Conference has been reluctant to assume a more robust role with respect to the interpretation of legal issues that arise under the Convention. On only one occasion did it participate in litigation, by filing an amicus brief some years ago on an issue that arose in a case in the German constitutional court.<sup>153</sup> As for the Reports issued after the Special Commission meetings, case law “conflicts” are described, but rarely, if ever, has a position

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<sup>150</sup> See *Transfrontier Access/Contact*, THE JUDGES’ NEWSL. (Hague Conf. On Private International Law, The Hague, Netherlands), Spring 2003, at 51. For a more extensive analysis regarding the difficulties of enforcing access rights under the Convention, see Marguerite C. Walter, *Toward the Recognition and Enforcement of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U.L. REV. 2381 (2004).

<sup>151</sup> For example, in June 1998, the Conference organized a seminar for judges on the international protection of children and thirty-four judges from twenty-six States participated. In June 2000, a second seminar was held with forty judges attending from four different countries. In October 2001, at the request of Germany and the United States, the Conference hosted a third seminar for judges on the international protection of children. Thirty-one judges from the United Kingdom (England, Scotland and Wales), France, Germany, the Netherlands, Scotland, Sweden, and the United States attended. And in October, 2003, a fourth seminar for judges focused to experience and practice relating to enforcement of return orders. Judges and Central Authority personnel from ten States participated.

<sup>152</sup> Permanent Bureau of the Hague Conference on Private International Law, Proposal for a Hague International Legal Training Institute, Preliminary Document No 6 of March 2003 for the Attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference, at 3, available at [http://hcch.evision.nl/upload/wop/genaff\\_pd06e.pdf](http://hcch.evision.nl/upload/wop/genaff_pd06e.pdf) (last visited Feb. 21, 2005).

<sup>153</sup> See Adair Dyer and The Permanent Bureau of the Hague Conference on Private International Law, Germany: Constitutional Court Decision in Case Concerning the Hague Convention on the Civil Aspects of International Child Abduction, Including Memorandum Prepared by the Permanent Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court, 35 I.L.M. 529 (1996); Groves v. Groves, BvR 982/95 and 2 BvR 983/95 (Oct. 10, 1995).

been taken on an actual decision, possibly because of a hesitancy to criticize national courts of Contracting States.

The INCADAT database is a wonderful resource in providing information about Convention cases world-wide, but it does so usually without much critical analysis. The Hague Conference is positioned to help create a global jurisprudence for the Convention. Under its auspices, it could create panels of experts, possibly made up of national judges or others with specialized knowledge of the Convention, who could provide interpretive rulings on issues that have created conflict in the national courts.

Although such rulings would not be “binding,” they would be a form of “soft law,” available to national courts looking to find the “best interpretation” of a difficult point. Such a model would bear a slight resemblance to the NAFTA Free Trade Commission, which is formally established under the NAFTA Agreement, to provide standardization of interpretation for the NAFTA panels.<sup>154</sup> Alternatively, the Hague Conference might consider a project such as that being carried out by UNCITRAL, which has authorized creation of a digest of decisions construing the CISG, in which the authors are also asked to “provide guidance” as to the proper interpretation of the Convention.<sup>155</sup> The American Law Institute is engaged in a similar effort in analyzing panel decisions of the WTO.<sup>156</sup>

The Hague Conference might also assume a more visible presence in important cases in national courts by submitting friend-of-the-court briefs and taking positions that it believes represent the most faithful interpretations of the Convention.

There are other “players” who are likely to participate in the development of an international jurisprudence relating to cross-border abductions and the Hague Abduction Convention in

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<sup>154</sup> See NAFTA, *supra* note 45, art. 1131(2), 32 I.L.M. at 645 (“An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under [Chapter 11].”). For a discussion of the Free Trade Commission, see Guillermo Aguilar Alvarez & William W. Park, *The New Fact of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT. L. 365, 397-98 (2003). The Commission is comprised of the Trade Ministers of Canada, Mexico, and the United States.

<sup>155</sup> See Joseph Lookofsky, *CISG Foreign Case Law: How Much Regard Should We Have, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION: PAPERS OF THE PITTSBURGH CONFERENCE ORGANIZED BY THE CENTER OF INTERNATIONAL LEGAL EDUCATION 216 (CILE)* (Franco Ferrari et al. eds., 2004).

<sup>156</sup> The ALI project is intended to provide a systematic analysis of decisions of the WTO Dispute Settlement system by lawyers and economists and to evaluate these rulings from both an economic and legal perspective. See American Law Institute Reporters’ Studies, *THE WTO CASE LAW OF 2001* (Horn & Mavroidis eds., 2003). See also American Law Institute Draft, *Principles of Trade Law: The World Trade Organization, The WTO Case Law of 2002* (January 20, 2004).

particular. Several recent decisions by the European Court of Human Rights have addressed various aspects of the Abduction Convention, and future decisions by that Court could have a dramatic impact on the Convention.<sup>157</sup> Heretofore, the decisions from Strasbourg have been in support and not at odds with the Convention.

For example, the European Court found Romania in violation of Article 8 of the European Convention on Human Rights for failing to take adequate measures to secure the prompt return of a child pursuant to its obligations under the Abduction Convention.<sup>158</sup> Austria was also found liable for the same violation in failing to enforce an order of return in favor of the U.S. applicant.<sup>159</sup> These decisions have assumed greater importance in light of decisions in some civil law countries, refusing to enforce an order of return on the grounds that “the Convention does not extend to the question of execution of judgments” and thus a judge ruling on execution may take into consideration changed circumstances, such as a possible impact on the welfare of a child due to a long stay in the new country.<sup>160</sup>

But there remain potential tensions between the Abduction Convention and various provisions, both procedural and substantive found in human rights treaties, such as the child’s right to participate in proceedings, provisions relating to discrimination, and protections for domestic violence. It would therefore be beneficial if the institution that gave birth to the Convention and helps to nourish it would step forward in a more formal and dynamic way and help to shape the global jurisprudence that will ultimately define it.

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<sup>157</sup> See generally Andrea Schulz, *The 1980 Hague Child Abduction Convention and the European Convention on Human Rights*, 12 *TRANSNAT’L L. & CONTEMP. PROBS.* 356 (2002).

<sup>158</sup> See *Ignaccolo-Zenide v. Romania*, 31 E.H.R.R. 7 (Eur. Ct. H.R. 2001).

<sup>159</sup> See *Sylvester v. Austria*, Applications No. 36812/77 and 40104/98, 37 E.H.R.R. 17 (Eur. Ct. H.R. 2003).

<sup>160</sup> Decision of the Swiss Federal Supreme Court, II. Civil Chamber, September 13, 2001, In Re M.G. v. S.P. (docket number 5 P. 160/2001) (on file with author).