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### III.B. International Law Pertaining to Families and Children

Globalization is transforming family law. Matters that once were resolved exclusively under the laws of the fifty U.S. states now may be the subject of international treaties. Provisions in some of those treaties are enforceable in U.S. courts, given that the United States is a treaty party and has enacted implementing legislation or regulations.

This section begins with an overview of international law regarding families and children, particularly as implemented in the United States. It then focuses, *infra* § III.B.2, on the issue most litigated in the federal courts – cross-border child abduction, which is subject both to a civil remedy of prompt return and, in some instances, to punishment as a felony.

#### 1. Overview

International treaties cover a range of issues involving families and children, including:

- Marriage/dissolution of marriage
- Child support/child custody
- Adoption
- Domestic violence/violence against women or children
- Health and education
- Sexual exploitation
- Trafficking<sup>2</sup>
- Labor/hazardous working conditions
- Women’s and children’s rights

The United States is not a party to all the treaties concerning such issues. For example, the United States is among the few countries in the world that does not belong to either the 1989 Convention on the Rights of the Child<sup>3</sup> or the 1979 Convention on the Elimination of All Forms of

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<sup>1</sup> For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

<sup>2</sup> The U.S. legal framework that implements international treaties intended to combat the cross-border trafficking of human beings is discussed in another section of this *Benchbook*, *infra* § III.E.3.

<sup>3</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Children’s Convention], available at

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. This treaty, which entered into force on Sept. 2, 1990, has 193 parties; the United States signed on Feb. 16, 1995, but has not ratified. See U.N. Treaty Collection, *Convention on the Rights of the Child*, [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en) (last visited Mar. 13, 2014). The only other nonparty states are Somalia and South Sudan. See *id.*

Discrimination against Women, both negotiated under the auspices of the United Nations.<sup>4</sup> Those treaties are not directly enforceable in U.S. courts. On occasion, however, the Supreme Court has cited them in the course of interpreting constitutional provisions. *See Graham v. Louisiana*, 560 U.S. 48, 81 (2010) (citing Children’s Convention); *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (same); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (citing Women’s Convention). *See also supra* § I (discussing the doctrine of treaty non-self-execution and the interpretive practice).

The United States does belong to two treaties supplemental to the Children’s Convention:

- 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict<sup>5</sup>
- 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>6</sup>

Criminal prohibitions in these two treaties have been implemented via U.S. legislation. *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735, codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010) (making the recruitment or use of children under fifteen as soldiers a federal offense punishable by up to life in prison); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 105(c), 117 Stat. 650 (2003), codified at 18 U.S.C. § 2423(c) (2006) (providing that sex tourism by a U.S. citizen or permanent resident is punishable by up to thirty years’ imprisonment). Except for a reference to the latter statute’s extraterritorial jurisdiction component, *supra* § II.A.3.c, these statutes and treaties are not described further in this edition of the *Benchbook*.<sup>7</sup>

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<sup>4</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter Women’s Convention], *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>. This treaty, which entered into force on Sept. 3, 1981, has 187 states parties; the United States signed on July 17, 1980, but has not ratified. *See* U.N. Treaty Collection, *Convention on the Elimination of All Forms of Discrimination against Women*, [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-8&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en) (last visited Mar. 13, 2014).

<sup>5</sup> 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict, May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 222, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>. This treaty, which entered into force on Feb. 12, 2002, has 154 parties. *See* U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict*, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en) (last visited Mar. 13, 2014). The United States ratified it on Dec. 23, 2002, subject to a declaration and understandings *available at id.*

<sup>6</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, S. Treaty Doc. No. 106-37, 2171 U.N.T.S. 227, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>. This treaty, which entered into force on Jan. 18, 2002, has 166 parties. *See* U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en) (last visited Mar. 13, 2014). The United States ratified it on Dec. 23, 2002, subject to a reservation and understandings *available id.*

<sup>7</sup> Also omitted from this edition is discussion of child and family issues arising in immigration and asylum litigation.

Nearly two dozen treaties involving child and family issues have been negotiated within the framework of the Hague Conference on Private International Law, an intergovernmental organization founded in 1893.<sup>8</sup> The organization's development and monitoring of such treaties furthers its purpose of promoting "the progressive unification of the rules of private international law" – the traditional term for the conflict-of-laws resolution of disputes between private litigants.<sup>9</sup> Among Hague Conference treaties to which the United States is a party are these two:

- 1980 Hague Convention on Civil Aspects of International Child Abduction<sup>10</sup>
- 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>11</sup>

Virtually no state or federal decision refers to the second treaty; accordingly, it is not discussed further in this *Benchbook*.

The first treaty, in contrast, concerns a frequently litigated issue: How to remedy the cross-border abduction of a child? Resolution of that question in the United States is discussed in the sections below.

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<sup>8</sup> See Hague Conf. on Private Int'l L., *Areas of Private International Law: International Protection of Children, Family and Property Relations*, [http://www.hcch.net/index\\_en.php?act=text.display&tid=10#family](http://www.hcch.net/index_en.php?act=text.display&tid=10#family) (last visited Mar. 13, 2014); Trevor Buck, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, *International Child Law* 67 (2d ed. 2010). Documents often refer to this organization as HCCH, the English-French acronym for Hague Conference-Conference de la Haye.

<sup>9</sup> Statute of the Hague Convention on Private International Law, art. 1 (entered into force July 1, 1995), *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=29](http://www.hcch.net/index_en.php?act=conventions.text&cid=29). See generally Peter Trooboff & Frederike E.M. Stikkelbroeck, *Reflections on the Hague Conference on Private International Law at 140 – 20 Years Forward*, 25 *Hague Ybk. Int'l L.* 59 (2013) (publishing commentary on the role of the Hague Conference in relation to other international groups, such as UNICEF).

<sup>10</sup> Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11, 1343 U.N.T.S. 98 [hereinafter Convention or 1980 Hague Child Abduction Convention], *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24). This treaty, which entered into force on Dec. 1, 1983, has ninety-one parties. See Hague Conf. on Private Int'l L., *Status table*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 13, 2014). The treaty entered into force for the United States on July 1, 1988. *Id.* At the time of ratification, the United States attached reservations, discussed *infra* § III.B.3.a.i.

<sup>11</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51, 1870 U.N.T.S. 167, *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69). This treaty entered into force on May 1, 1995, and has ninety-three states parties; it entered into force for the United States on April 1, 2008. See Hague Conf. on Private Int'l L., *Status table*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Mar. 13, 2014). This treaty, which allocates responsibility for adoptions between the two countries involved, was implemented via the Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000), codified at 42 U.S.C. §§ 14901-54 (2006). See generally U.S. Dep't of State, *Intercountry Adoption*, <http://adoption.state.gov/index.php> (last visited Mar. 13, 2014) (giving information on adoption from Convention states parties and nonparty states).

## 2. Cross-Border Abduction of Children

The wrongful taking of children across national borders is regulated by a legal framework that includes an international treaty to which the United States is party, as well as U.S. statutes and regulations, as follows:

- 1980 Hague Convention on Civil Aspects of International Child Abduction<sup>12</sup>
- International Child Abduction Remedies Act of 1988, the statute implementing the 1980 Hague Abduction Convention<sup>13</sup>
- Implementing regulations issued by the U.S. Department of State<sup>14</sup>
- International Parental Kidnapping Crime Act of 1993<sup>15</sup>

The last instrument, which makes cross-border parental kidnapping a federal felony offense and often is reserved for situations not otherwise resolvable, is described *infra* § III.B.4.

The first three instruments pertain to the civil remedy available in U.S. courts: the swift return of the child to his or her habitual place of residence (subject to several enumerated exceptions), in order to restore the *status quo ante* the child's removal. The return remedy often is litigated in U.S. courts; indeed, the Supreme Court has considered aspects of the Hague Abduction Convention in three cases:

- *Abbott v. Abbott*, 560 U.S. 1 (2010), in which the Court construed “rights of custody,” a pivotal term in the Convention. *See infra* §§ III.B.3.d, III.B.3.g.ii.2.
- *Chafin v. Chafin*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1017 (2013), in which the Court held that the return of a child to her country of habitual residence, pursuant to a U.S. District Court order issued in Hague Abduction Convention litigation, did not moot a father's appeal of that court order. *See infra* §§ III.B.3.j.ii.
- *Lozano v. Montoya Alvarez*, \_\_\_ U.S. \_\_\_, 2014 WL 838515 (Mar. 5, 2014), in which the Court held that a one-year deadline – marking the period during which the return of a child

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<sup>12</sup> Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 98 [hereinafter Convention or 1980 Hague Abduction Convention], *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24). This treaty, which entered into force on Dec. 1, 1983, has ninety-one parties. *See* Hague Conf. on Private Int'l L., *Status table*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 13, 2014). The treaty entered into force for the United States on July 1, 1988. *Id.* At the time of ratification, the United States attached reservations, discussed *infra* § III.B.3.a.i.

<sup>13</sup> Pub. L. No. 100-300, 102 Stat. 437 (Apr. 29, 1988), codified as amended at 42 U.S.C. §§ 11601-11 (2006). At times cases are said to concern “the Convention,” as shorthand for “the Convention and the implementing laws.”

<sup>14</sup> 22 C.F.R. §§ 94.1-94.8 (2013) (original version published at 53 Fed. Reg. 23608 (June 23, 1988)).

<sup>15</sup> Pub. L. 103-173, § 2(a), 107 Stat. 1998 (1993), codified as amended at 18 U.S.C. § 1204 (2006).

pursuant to the Hague Abduction Convention is nearly automatic – is not subject to equitable tolling. *See infra* § III.B.3.i.ii.

The rationales of the Supreme Court in these cases – along with selected decisions by lower federal courts respecting both this custody-rights remedy and the access-rights framework – are set forth in the following discussion.

### 3. Civil Aspects of Cross-Border Child Abduction

Establishing prompt return as an international remedy for the wrongful taking or retention of a child across national borders is the 1980 Hague Convention on Civil Aspects of International Child Abduction.<sup>16</sup> This multilateral treaty is the product of years of negotiations conducted under the auspices of the Hague Conference on Private International Law, the century-old intergovernmental organization that monitors implementation, convenes the International Hague Network of Judges described *infra* § III.B.5.b.ii, and provides information, publications, and model forms respecting the Convention. *See* Hague Conf. on Private Int'l L., *Welcome to the Child Abduction Section*, [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21) (last visited Mar. 13, 2014); *supra* § III.B.1.

Countries concluded the Convention in 1980

[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody,

and, furthermore,

[d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access ....

Hague Abduction Convention, preamble; *see also id.*, art. 1, *quoted infra* § III.B.3.c.i.

Among the matters treated in the forty-five articles of the Convention are the return remedy, access rights, and the role of the “Central Authority,” which in the United States is handled by the State Department. Each concern is detailed in the sections that follow.

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<sup>16</sup> Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 98 [hereinafter Convention or 1980 Hague Abduction Convention], *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24). This treaty, which entered into force on Dec. 1, 1983, has ninety-one parties, called “contracting states.” *See* Hague Conf. on Private Int'l L., *Status table*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 13, 2014). The treaty entered into force for the United States on July 1, 1988. *Id.* At the time of ratification, the United States attached reservations, *available at* [http://www.hcch.net/index\\_en.php?act=status.comment&csid=652&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=652&disp=resdn), which stipulated that documents must be in English and that the United States would not assume the costs of litigation.

### **a. Applicability in the United States of the 1980 Hague Child Abduction Convention**

The 1980 Hague Abduction Convention has been in effect in the United States since Sept. 1, 1988. See Hague Conf. on Private Int'l L., *Status table*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 13, 2014).

The Convention applies whenever both countries involved in the cross-border dispute are states parties – called “contracting states” within the framework of this treaty. For a full account of when the Convention took effect in the ninety-one contracting states, see *id.*

No civil remedy is available if the other country at issue does not have a reciprocal treaty relationship with the United States, either because the country is not a party to the Hague Convention or because the United States has not accepted the country’s accession to that Convention. See Hague Abduction Convention, art. 38, para. 4, *quoted in Taveras v. Taveras*, 397 F. Supp. 2d 908, 911 (S.D. Ohio 2005) (ruling that the Convention did not apply because the United States had not accepted the accession of the foreign country involved), *aff’d on other grounds sub nom. Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007). A list setting forth the date on which the Convention entered into force between the United States and seventy-two other contracting states may be found at U.S. Dep’t of State, *Hague Abduction Convention Country List*, [http://travel.state.gov/abduction/resources/congressreport/congressreport\\_1487.html](http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html) (last visited Mar. 13, 2014)).

If the dispute at issue relates to a country that is not in the requisite treaty relationship with the United States, the federal government may choose to prosecute pursuant to the criminal statute discussed *infra* § III.B.4.

### **i. U.S. Reservations to Ratification of the Convention: Translation and Fees**

When the United States deposited its instrument of ratification on April 29, 1988, it attached reservations<sup>17</sup> requiring that:

- All documents from foreign countries must be translated into English; and
- As a general matter, the United States will not assume the costs of litigation.<sup>18</sup>

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<sup>17</sup> For a general discussion of reservations, understandings, and declarations, see *supra* § I.

<sup>18</sup> In full, these reservations stated, with reference to certain Convention articles:

(1) Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the U.S. Central Authority should be accompanied by their translation into English.

(2) Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.

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See [http://www.hcch.net/index\\_en.php?act=status.comment&csid=652&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=652&disp=resdn) (last visited Mar. 13, 2014).

On domestic application of the second reservation, see *infra* § III.B.3.j.i.

## ii. U.S. Implementing Legislation

Implementing the provisions of the 1980 Hague Abduction Convention in the United States is the International Child Abduction Remedies Act of 1988, Pub. L. No. 100-300, 102 Stat. 437 (Apr. 29, 1988), codified as amended at 42 U.S.C. §§ 11601-11 (2006) and often called by its acronym, ICARA.

This statute establishes jurisdiction and procedures for adjudication of Convention disputes, further defines certain Convention terms, and sets out the data collection, processing, and other implementing roles of various governmental agencies.

## iii. U.S. Implementing Regulations

Regulations further implementing this statute initially were published at 53 Fed. Reg. 23608 (June 23, 1988), and now may be found, as amended, at 22 C.F.R §§ 94.1-94.8 (2013).

The regulations first designate the Office of Children’s Issues in the State Department’s Bureau of Consular Affairs as the “Central Authority,” the U.S. agency responsible for working on Hague Abduction Convention matters with counterparts in other countries. *Id.* § 94.2; see International Child Abduction Remedies Act, 42 U.S.C. § 11606(a) (providing for the President to designate the U.S. Central Authority).

The regulations then proceed to discuss the Office’s functions and procedures for seeking assistance from the Office. *Id.* §§ 94.3-94.8.

## b. How Suits under the Hague Abduction Convention Arise in U.S. Courts

U.S. litigation under the Hague Abduction Convention typically begins with the filing of a petition by a parent or other lawful caretaker, often labeled the “left-behind parent.” This petitioner typically seeks the return of a child whom the respondent is alleged wrongfully to have removed to or retained in the United States. On the required showing, the court generally will order the child returned to the country where he or she used to live<sup>19</sup> – the state of habitual residence, a term discussed *infra* § III.B.3.g.i.2 – unless the respondent establishes one of the handful of enumerated exceptions to return.

A petitioner also might endeavor to secure access, or visitation, rights. As detailed *infra* § III.B.3.f.i, federal courts routinely rejected such a request on jurisdictional grounds, but a 2013 decision has created a circuit split on the question.

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Designated as the “U.S. Central Authority” is the Office of Children’s Issues in the State Department’s Bureau of Consular Affairs. See 22 C.F.R. § 94.2 (2013); *infra* § III.B.3.a.iii.

<sup>19</sup> In disputes of this nature, documents following Convention terminology may refer to the United States as “the requested state” and the foreign country as “the requesting state.”

Hague Abduction Convention litigation poses challenges to judges. First, the cases must be resolved within short time frames. In addition, the international nature of the litigation – courts must look both to the federal implementing statute and to Convention provisions that the statute explicitly incorporates – presents an interpretive challenge. These and other matters are discussed below, as follows:

- Prompt adjudication requirement and purposes of litigation
- Interpretation
- Petition of left-behind parent
- Concurrent federal and state jurisdiction
- Federal civil actions for access, or visitation, rights
- Prima facie case for return
- Rights of custody
- Defenses – exceptions to return
- Nature and timing of return remedy

**c. Prompt Adjudication Requirement and Purposes of Hague Abduction Convention Litigation**

A hallmark of Hague Abduction Convention litigation is the speed with which initial proceedings must occur. As Chief Justice John G. Roberts, Jr., wrote in a recent opinion for the Court:

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation.

*Chafin v. Chafin*, \_\_ U.S. \_\_, \_\_, 133 S. Ct. 1017, 1027 (2013). *See also* Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 Fam. L.Q. 99, 110 (1980-81) (stating, in an article by a member of the U.S. delegation that took part in Convention negotiations, that drafters intended Hague Abduction Convention litigation “to be summary proceedings”).

The promptness norm is examined below, by reference to the Convention, the implementing legislation, and case law.

**i. Convention Provisions**

States parties pledged, in the first paragraph of Article 11 of the Convention, that their countries “shall act expeditiously in proceedings for the return of children.” The same article then set a presumptive deadline of six weeks for such proceedings:

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a



statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Convention, art. 11, para. 2.

This deadline is intended to serve the Convention's express purposes; specifically:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Convention, art. 1; *see also id.*, preamble, *quoted supra* § III.B.3.

## **ii. Implementing Legislation Provisions**

Congress endorsed the expressed purposes of the Convention, and the requirement of prompt adjudication, when it enacted implementing legislation. The International Child Abduction Remedies Act, 42 U.S.C. § 11601(a), thus provides:

The Congress makes the following findings:

- (1) The international abduction or wrongful retention of children is harmful to their well-being.
- (2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
- (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
- (4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

Congress proceeded, by way of the same Act, 42 U.S.C. § 11601(b), to make certain declarations about the interrelation of the Convention and the statute:

The Congress makes the following declarations:

- (1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.
- (2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.
- (3) In enacting this chapter the Congress recognizes –
  - (A) the international character of the Convention; and
  - (B) the need for uniform international interpretation of the Convention.
- (4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

### iii. Case Law

Federal jurisprudence has underscored not only the existence of the promptness norm in Hague Abduction Convention litigation, but also the rationale underlying that norm. By way of example, the U.S. Court of Appeals for the Eleventh Circuit recently wrote, in a judgment issued following remand of the case by the Supreme Court:

Prompt proceedings are advantageous because: (1) they ‘will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child,’ and (2) they will allow the jurisdiction of habitual residence to resolve the custody dispute between the parties.

*Chafin v. Chafin*, \_\_\_ F.3d \_\_\_, \_\_\_, 2013 WL 6654389, at \*2 (11th Cir. Dec. 18, 2013) (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1028 (2013), a decision discussed *infra* § III.B.3.j.ii). *Accord Abbott v. Abbott*, 560 U.S. 1, 9 (2010) (“The Convention’s central operating feature is the return remedy.”); *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002) (“The Convention establishes a strong presumption favoring return of a wrongfully removed child.”); Hague Conf. on Private Int’l L., *Outline: Hague Abduction Convention* 1 (July 2012) (same), available at <http://www.hcch.net/upload/outline28e.pdf>.

#### **d. Interpretation of Hague Abduction Convention Provisions**

No provision of the Hague Abduction Convention specifies an interpretive methodology for courts to follow. In this sense, the Convention differs from another treaty to which the United States belongs – the treaty on sales of goods, which expressly requires courts to pay heed “to its international charter and to the need to promote uniformity in its application.”<sup>20</sup> That said, the U.S. law implementing the Hague Abduction Convention mandates a similar interpretive approach:

- (3) In enacting this chapter the Congress recognizes –
- (A) the international character of the Convention; and
  - (B) the need for uniform international interpretation of the Convention.

International Child Abduction Remedies Act, 42 U.S.C. § 11601(b), *quoted in full supra* § III.B.3.b.ii. *See also id.* § 11603(d) (stating that a court adjudicating a petition for return “shall decide the case in accordance with the Convention”).

The Supreme Court has quoted these subsections of the Act in its initial considerations of Hague Abduction Convention litigation. *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). In *Abbott*, the Court consulted a range of sources in the course of construing a critical Convention term. *See* Linda J. Silberman, *International Decision: Abbott v. Abbott*, 105 Am. J. Int’l L. 108, 110 (2011). *See generally* Hague Conf. on Private Int’l L., “Case Comments and Perspectives,” in *17 Judges’ Newsletter on Int’l Child Protection* (2011) (containing comments on the decision in *Abbott* by Justice James Garbolino and Professors Barbara Stark and Peter McEleavy), *available at* [http://www.hcch.net/upload/newsletter/JN17\\_Case\\_Comments\\_E.pdf](http://www.hcch.net/upload/newsletter/JN17_Case_Comments_E.pdf). The Court paid heed to some of the same sources in *Lozano v. Montoya Alvarez*, \_\_\_ U.S. \_\_\_, 2014 WL 838515, at \*9 (Mar. 5, 2014), and *Chafin v. Chafin*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1017 (2013).

The sections that follow discuss the types of sources cited in these decisions.

#### **i. Supreme Court’s Interpretive Methodology**

To determine whether a child had been wrongfully taken from a foreign country to the United States, the Supreme Court in *Abbott v. Abbott*, 560 U.S. 1, 9-10 (2010), considered the following sources, in the order listed:

- (1) Text of the Convention;
- (2) Views of the U.S. Department of State;

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<sup>20</sup> U.N. Convention on Contracts for the International Sale of Goods, art. 7(1), Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, *available at* <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>. The entire provision is quoted in full, and the applicable interpretive methodology discussed, in the *Benchbook* chapter on this treaty. *See infra* § III.C.1.d.

- (3) Judicial decisions in other contracting states, negotiating history, scholarly commentary, and a report written at the time the Convention was adopted; and
- (4) Objects and purposes of the Convention.

The judgment in *Lozano v. Montoya Alvarez*, \_\_\_ U.S. \_\_\_, 2014 WL 838515 (Mar. 5, 2014), cited many of the same sources. *See id.* at \*7-\*8, \*10-\*11; *see also id.* at \*12-\*15 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring).

Although the Court did not so mention in either decision, the list includes sources specified in the principal international treaty setting forth rules of treaty interpretation. *See infra* § IV.A.1 (quoting and discussing Vienna Convention on the Law of Treaties, arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331, *available at* <http://www1.umn.edu/humanrts/instree/viennaconvention.html>).

Each interpretive source is discussed in turn below.

### **i.1. Text of the Convention**

“The interpretation of a treaty, like the interpretation of a statute, begins with its text,” Justice Kennedy wrote for the Court in *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)); *see also Lozano v. Montoya Alvarez*, \_\_\_ U.S. \_\_\_, \_\_\_, 2014 WL 838515, at \*7 (Mar. 5, 2014). In order to construe a Convention term, the Court in *Abbott*, 560 U.S. at 10, first determined the scope of the foreign court order at issue, by reference to the laws of the foreign country and to a description of those laws by an official from the country’s Central Authority. *See supra* § III.B.3.a.iii (discussing “Central Authority”). In deciding whether the rights granted in the court order constituted one of the “rights of custody” subject to the Convention’s return remedy, the Court in *Abbott* drew on the Convention’s own definition of that term. *See* 560 U.S. at 11 (construing Hague Abduction Convention, arts. 3, 5(a)), *quoted infra* §§ III.B.3.g, III.B.3.g.ii.1. Similarly, in *Lozano*, the Court stressed the absence of any textual equitable tolling provision in the course of its decision. \_\_\_ U.S. \_\_\_, \_\_\_, 2014 WL 838515, at \*7-\*8, \*10.

### **i.2. Views of the U.S. Department of State**

As a second-named source, the Court in *Abbott v. Abbott*, 560 U.S. 1, 9, 15 (2010), considered to the views of the Executive Branch; to be specific, the views of the U.S. Department of State, whose Office of Children’s Issues has been designated the U.S. Central Authority respecting the Hague Abduction Convention. *See supra* § III.B.3.a.iii.

Justice Kennedy wrote for the Court in *Abbott*: “It is well settled that the Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’” 560 U.S. at 15 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). Kennedy found “no reason to doubt that this well-established canon of deference is appropriate here,” noting that “[t]he Executive is well informed concerning the diplomatic consequences resulting from this Court’s interpretation

of ‘rights of custody,’ including the likely reaction of other contracting states and the impact on the State Department’s ability to reclaim children abducted from this country.” *Id.* at 15.

In *Lozano v. Montoya Alvarez*, \_\_ U.S. \_\_, 2014 WL 838515 (Mar. 5, 2014), the concurring opinion stressed the views of the State Department. *See id.* at \*13 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring) (writing that a court retains “equitable discretion” regarding the return remedy). The opinion for the Court by Justice Clarence Thomas considered the issue to which the Department’s views pertained “beyond the scope of the question presented,” *id.* at \*9 n.5.

### **i.3. Case Law in Other Countries, Negotiating History, Expert Commentary, and the Pérez-Vera Report on the Convention**

The opinion for the Court in *Abbott v. Abbott*, 560 U.S. 1, 9-10 (2013), described the third source for interpretation of the Hague Abduction Convention as “decisions ... in courts of other contracting states ...” But its discussion at this juncture ranged more widely, including as well negotiating history, expert commentary, and a report written at the time the Convention was adopted. *See id.* at 16-20. All of these sources – as well as databases where they may be found – are described below.

#### **i.3.a. Decisions of Foreign Courts**

With respect to the decisions of foreign courts, Justice Kennedy wrote for the Court in *Abbott v. Abbott* that “the opinions of our sister signatories<sup>21</sup> are entitled to considerable weight.” 560 U.S. 1, 16 (2013) (internal quotations, brackets, ellipsis, and citations omitted). He added:

The principle applies with special force here, for Congress has directed that ‘uniform international interpretation of the Convention’ is part of the Convention’s framework.

*Id.* (quoting International Child Abduction Remedies Act, 42 U.S.C. § 11601(b)(3)(B), *quoted supra* § III.B.c.ii); *see Lozano v. Montoya Alvarez*, \_\_ U.S. \_\_, \_\_, 2014 WL 838515, at \*8 (Mar. 5, 2014) (quoting same provision). Kennedy proceeded to examine decisions by courts in Australia, Austria, Britain, Canada, France, Germany, Israel, Scotland, and South Africa. *Id.* at 16-18.

The Court likewise looked to foreign decisions in its later cases arising out of the Hague Abduction Convention. *See Lozano v. Montoya Alvarez*, \_\_ U.S. \_\_, \_\_, 2014 WL 838515, at \*8, \*10-\*11 (Mar. 5, 2014); *id.* at \*14 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring). *See also Chafin v. Chafin*, \_\_ U.S. \_\_, \_\_ n.1, 133 S. Ct. 1017, 1024 n.1 (2013) (citing decision of court

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<sup>21</sup> To be precise, the United States and other countries that have fully joined the Hague Abduction Convention are not “signatories,” but rather “states parties” or, in the parlance of this particular treaty, “contracting states.” *See supra* § III.B.3.a. Notwithstanding the contrary use in some U.S. opinions, the term “signatory” is to be used only with reference to countries that have signed but not yet fully joined the treaty. *See supra* § I.B.1.a.i.7.

in Scotland); *id.* at \_\_ n.1, \_\_, 133 S. Ct. at 1029 n.1, 1030 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ., concurring) (same).

U.S. courts may consult foreign case law through databases such as LexisNexis and Westlaw, which compile decisions from many countries in addition to those from the United States. Another useful source is Trevor Buck, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, *International Child Law* 212-42 (2d ed. 2010). Moreover, the Hague Conference on Private International Law maintains a database of decisions under the Hague Abduction Convention. The English-language version of this International Child Abduction Database, known by its acronym INCADAT, is available at <http://www.incadat.com/index.cfm?act=text.text&lng=1> (last visited Mar. 13, 2014). INCADAT provides summaries – and sometimes, the full text – of more than a thousand decisions from various national courts as well as international courts operating in regions such as Europe.<sup>22</sup> Decisions may be searched by keyword, legal issue, case name, case number, country, or court.

Respecting the International Hague Network of Judges, aimed at fostering direct judicial communications, see *infra* § III.B.5.b.ii.

### **i.3.b. Negotiating History**

Having discussed foreign court decisions, the Court in *Abbott v. Abbott*, 560 U.S. 1, 19 (2013), then referred to negotiating history, known to international lawyers as *travaux préparatoires*, or preparatory works. To be precise, Justice Kennedy’s opinion for the Court referred to comments made by delegates while the Convention was being drafted – comments that may be found in the third volume of *Actes et documents de la Quatorzième session [Acts and documents of the Fourteenth Session]* (1980), a bilingual document published in 1982. See Hague Conf. on Private Int’l L., *Publications*, [http://www.hcch.net/index\\_en.php?act=publications.details&pid=30](http://www.hcch.net/index_en.php?act=publications.details&pid=30) (last visited Feb. 23, 2014).

### **i.3.c. Expert Commentary**

In addition to the 1982 document cited in the section immediately above, the opinion for the Court in *Abbott v. Abbott*, 560 U.S. 1, 18-20 (2010), consulted other publications of the Hague Conference on Private International Law (described *supra* § III.B.1), as well as law review articles.

Among the Hague Conference documents cited was one of the group’s guides to good Convention practices. *Abbott*, 560 U.S. at 18 (citing Hague Conf. on Private Int’l L., *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice* (2008)). Other guides were cited in a subsequent Supreme Court opinion. *Chafin v. Chafin*, \_\_ U.S. \_\_, \_\_, 133 S. Ct. 1017, 1028-30 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ., concurring) (citing Hague Conf. on Private Int’l L., *Guide to Good Practice under the Hague Convention of 25 October 1980*

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<sup>22</sup> Notably, the Hague Abduction Convention has been the subject of a number of recent decisions in the European Court of Human Rights. For an overview, see Eur. Ct. Hum. Rts., *Factsheet – International Child Abductions* (Nov. 2013), [http://www.echr.coe.int/Documents/FS\\_Child\\_abductions\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf).

*on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (2003), available at [http://www.hcch.net/upload/abdguide\\_e.pdf](http://www.hcch.net/upload/abdguide_e.pdf); Hague Conf. on Private Int'l L., *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (2010), available at <http://www.hcch.net/upload/guide28enf-e.pdf>). For more information on these guides, as well as others covering implementing and preventive measures, see *infra* § III.B.5.a.ii.

Also cited in *Abbott* was a Hague Conference publication known as the Explanatory Report or the Pérez-Vera Report; it is discussed in the section immediately following.

### **i.3.d. Pérez-Vera Explanatory Report**

As a final matter, Justice Kennedy's opinion for the Court in *Abbott v. Abbott* turned to a document written, at the time the Convention was adopted, by the University of Madrid law professor who served as Reporter to the negotiating commission. 560 U.S. 1, 19-20 (2010) (discussing Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, para. 30, at 433, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980) [hereinafter Pérez-Vera Report], available at <http://www.hcch.net/upload/expl28.pdf>). Kennedy cited authorities that identified this Pérez-Vera Report as, on the one hand, an official history providing background on the meaning of Convention terms, and, on the other hand, a document, not officially approved, that at times reflected the author's subjective viewpoint. *See id.* at 19.

This description contrasts with that provided by one scholar:

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.

Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1061 n.54 (2005) (citing Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 234 (1999)).

In any event, Justice Kennedy wrote in *Abbott* that the Court “need not decide whether this Report should be given greater weight than a scholarly commentary,” for the reason that the Pérez-Vera Report was “fully consistent with” the majority's conclusion. 560 U.S. at 19-20. The dissent also cited the report, even as it arrived at a contrary conclusion. *See id.* at 24, 28, 30, 38, 40, 46 (Stevens, J., joined by Thomas and Breyer, JJ., dissenting).

In the second Supreme Court case arising out of Hague Abduction Convention litigation, a separate opinion once again consulted the Pérez-Vera Report. *Chafin v. Chafin*, \_\_ U.S. \_\_, \_\_, 133 S. Ct. 1017, 1029 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ.). Federal appellate courts have done so as well. *See, e.g., Reyes v. Jeffcoat*, \_\_ Fed. Appx. \_\_, \_\_, 2013 WL 6698603, at \*3 (4th Cir. Dec. 20, 2013); *Guzzo v. Cristofano*, 719 F.3d 100, 106 & n.4 (2d Cir. 2013).

#### **i.4. Objects and Purposes of the Convention**

Turning finally to the Convention’s “objects and purposes,” the opinion for the Court in *Abbott v. Abbott* stated:

The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. Ordering a return remedy does not alter the existing allocation of custody rights, but does allow the courts of the home country to decide what is in the child’s best interests. It is the Convention’s premise that courts in contracting states will make this determination in a responsible manner.

560 U.S. 1, 20 (2010) (citing Hague Abduction Convention, preamble, *quoted supra* § III.B.3; *id.*, art. 19). *See also* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005) (“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.”), *quoted in Chafin v. Chafin*, \_\_ U.S. \_\_, \_\_, 133 S. Ct. 1017, 1029 n.1 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ., concurring).

In *Lozano v. Montoya Alvarez*, \_\_ U.S. \_\_, 2014 WL 838515 (Mar. 5, 2014), the Court did not use the term “objects and purposes” expressly. Rather, it examined the “objectives” of the Convention in arriving at its decision. *Id.* at \*3, \*11.

Having discussed the interpretive challenges posed by Hague Abduction Convention litigation, this chapter now sets out how federal courts in fact adjudicate such cases.

#### **e. Left-Behind Parent’s Petition**

Judicial proceedings seeking the return of a child begin with the left-behind parent’s filing of a petition in a court located in the same place as the child. The International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11603(b), provides:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such



action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

The Act further specifies which courts have jurisdiction, as discussed in the section immediately following.

#### **f. Concurrent Federal and State Jurisdiction**

U.S. implementing legislation makes clear that Hague Abduction Convention matters may be litigated both in federal courts and in state courts:

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

International Child Abduction Remedies Act of 1988, 42 U.S.C. §§ 11603(a) (2006). The respondent, however, may seek to remove the matter to federal court pursuant to 28 U.S.C. § 1441 (2006).

A Westlaw search in January 2014 retrieved nearly 300 reported state decisions mentioning the Convention.

This edition of the *Benchbook* concentrates on the application of the Convention and implementing legislation in federal courts; full discussion of state courts' application of the Convention awaits a future edition.

#### **i. Federal Civil Actions for Access, or Visitation, Rights: Circuit Split**

In *Abbott v. Abbott*, 560 U.S. 1, 9 (2010), the Supreme Court wrote:

The Convention also recognizes 'rights of access,' but offers no return remedy for a breach of those rights.

The opinion cited two provisions of the Hague Abduction Convention. First cited was Article 5(b), which states:

For purposes of this Convention –

....

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

See *Abbott*, 560 U.S. at 9; see also *infra* § III.B.3.i.ii.1 (quoting and discussing definition of "right of custody" in Article 5(a) of the Convention). Also cited in the above-quoted passage in *Abbott* was Article 21 of the Convention, the first paragraph of which states:

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.<sup>23</sup>

Until recently, federal courts rejected petitions seeking relief based on denials of access, or visitation, rights. But a circuit split recently emerged on this issue. One appellate court dismissed an access claim as recently as 2006, but in 2013 another appellate court disagreed, and thus affirmed the visitation order issued by the court below. The conflicting decisions are:

- *Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006). In this two-to-one panel decision, the U.S. Court of Appeals for the Fourth Circuit rejected a request for federal relief based on a violation of access rights. The court acknowledged that the International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11603(b), *quoted* in full *supra* § III.B.3.e, mentions “arrangements for organizing or securing the effective exercise of rights of access to a child” among the reasons that a person may file a civil suit “under the Convention . . . in any court which has jurisdiction . . . .” Interpreting that provision to refer only to State Department handling of access claims, the panel majority relied on: congressional declarations in the same Act, 42 U.S.C. § 11601, *quoted supra* § III.B.3.c.ii, which limited the court’s power to rights available under the Convention; Article 21 of the Convention, *quoted* above; legislative history; rulings by five district courts; and the longstanding practice of leaving most child custody matters in state rather than federal courts. *See Cantor*, 442 F.3d at 199-205. The court noted that its ruling did not preclude the left-behind parent’s either from filing an action in state court or from filing a claim with the State Department, acting as the Central Authority for the Convention. *See id.* at 206.
- *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013). In this opinion, a Second Circuit panel unanimously held that left-behind parents may file civil suits seeking access rights in federal as well as in a state court. *Id.* at 371-74. The court grounded its holding in the text of 42 U.S.C. § 11603; in particular, Section 11603(a), *quoted* in full *supra* § III.B.3.f, Section 11603(b), *quoted* in full *supra* § III.B.3.e, and Section 11603(e)(1)(B), which specifies that “in the case of an action for arrangements for organizing or securing the effective exercise of rights of access,” proof “that the petitioner has such rights” must be established by a preponderance of evidence. *See Ozaltin*, 708 F.3d at 372.

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<sup>23</sup> Article 21 of the Convention continues, in its final two paragraphs, as follows:

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and security respect for the conditions to which the exercise of these rights may be subject.

A court presented with an access-rights claim will study with care the above opinions and the authorities on which they rely.

**g. Petitioner’s Prima Facie Case for Return**

Petitioner establishes a prima facie case of wrongful removal through proof by a preponderance of evidence that:

- (1) At the time of the alleged wrongful removal or retention, the child’s habitual residence was in a foreign country;<sup>24</sup>
- (2) Respondent’s removal or retention of the child in the United States breached the petitioner’s rights of custody under the foreign country’s law; and
- (3) At the time of the alleged wrongful removal or retention, petitioner was exercising rights of custody with respect to the child.

See *Hirst v. Tiberghien*, 947 F. Supp. 2d 578, 593 (D.S.C. 2013) (quoting the Convention’s definition of wrongful removal, and then setting forth a version of the above three elements of petitioner’s prima facie case “under the Hague Convention and ICARA,” citing *inter alia* the Supreme Court’s description of the legal framework in *Abbott v. Abbott*, 560 U.S. 1, 7-9 (2010), and the appellate court’s listing of elements in *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001)). To similar effect, see, e.g., *Chafin v. Chafin*, \_\_\_ F.3d \_\_\_, \_\_\_, 2013 WL 6654389, at \*2 (11th Cir. Dec. 18, 2013); *Gitter v. Gitter*, 396 F.3d 124, 130-31 (2d Cir. 2005), cited in *In re D.T.J.*, 956 F.Supp.2d 523, \_\_\_, 2013 WL 3866636, at \*2 (S.D.N.Y. July 26, 2013); Hague Conf. on Private Int’l L., *Outline: Hague Abduction Convention 2* (July 2012), available at <http://www.hcch.net/upload/outline28e.pdf>; Barbara Stark, *The Internationalization of American Family Law*, 24 J. Am. Acad. Matrimonial L. 467, 470-71 (2012).

This formulation tracks both the International Child Abduction Remedies Act and provisions of the Hague Abduction Convention that the Act incorporates. To be precise, 42 U.S.C. § 11603(e)(1) states:

A petitioner shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; ...<sup>25</sup>

<sup>24</sup> As explained *supra* § III.B.3.a, the foreign country must have a reciprocal Convention relationship with the United States.

<sup>25</sup> The Act further specifies that

the terms ‘wrongful removal or retention’ and ‘wrongfully removed or retained’, as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child ....

42 U.S.C. § 11603(f)(2).

*See also id.* § 11603(d) (providing that courts “shall decide the case in accordance with the Convention”), *discussed supra* § III.B.3.d. Setting forth the definition of wrongful removal or retention is Article 3 of the Hague Abduction Convention, which provides in full:

The removal or the retention of a child is to be considered wrongful where –

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

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Evaluation of the prima facie case thus depends on interpretation of terms such as:

- Child
- Habitual residence
- Rights of custody
- Exercise of custody rights

Each is discussed below.

### **i. First Element of Prima Facie Case: Child’s Habitual Residence**

The first element of the petitioner’s prima facie case, detailed *supra* § III.B.3.g, requires a court to determine what – for purposes of Hague Abduction Convention litigation – is a “child” and what is a “habitual residence.” Each is discussed in turn below.

#### **i.1. Child**

The return remedy is available only with respect to children fifteen years old or younger. Article 4 of the Convention, incorporated domestically via 42 U.S.C. § 11603(e)(1), states:

The Convention shall cease to apply when the child attains the age of 16 years.

## **i.2. Habitual Residence**

Whether the left-behind parent's rights of custody have been breached is to be determined according to the law of the country where "the child was habitually resident immediately before the removal or retention." Hague Abduction Convention, art. 3(a); 42 U.S.C. § 11603(e)(1) (incorporating the Convention's meaning of wrongful removal). This principle is repeated in Article 4, which states: "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody ... rights."

Neither the Convention nor federal implementing laws define "habitual residence." See Barbara Stark, *The Internationalization of American Family Law*, 24 J. Am. Acad. Matrimonial L. 467, 471 (2012). Given the statutory mandate in favor of uniform interpretation, courts should endeavor to apply an "autonomous" interpretation; that is, one tailored to the Convention, and not simply borrowed from a domestic legal source. See Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1065 (2005).

In particular, the Convention term "habitual residence" is not to be equated with a term used in other U.S. family law contexts, "domicile." See *Valenzuela v. Michel*, 736 F.3d 1173, 1176 (9th Cir. 2013) (quoting Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, para. 66, at 433, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980), available at <http://www.hcch.net/upload/expl28.pdf>, discussed *supra* § III.B.3.d.i.3.d). See also, e.g., *Kijowska v. Haines*, 463 F.3d 583, 586-87 (7th Cir. 2006).

### **i.2.a. Federal Courts' Different Approaches to Habitual Residence Question**

In the United States, most federal courts have agreed that determination of a child's habitual residence before the challenged removal or retention entails a fact-intensive inquiry. See *Nicolson v. Pappalardo*, 605 F.3d 100, 104 & n.2 (1st Cir. 2010) (citing cases)). Looking to the interpretive sources and methodology discussed *supra* § III.B.3.d, U.S. Courts of Appeals have divided on how to structure this inquiry:

- Several circuits have emphasized parental intent. This approach asks, first, whether the parents shared an intention to abandon the previous habitual residence; and second, whether the change in location has lasted long enough for the child to have become acclimatized. See *Nicolson v. Pappalardo*, 605 F.3d 100, 104-05 (1st Cir. 2010); *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir. 2006); *Gitter v. Gitter*, 396 F.3d 124, 132-34 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 1247, 1253 (11th Cir. 2004); *Mozes v. Mozes*, 239 F.3d 1067, 1975-78 (9th Cir. 2001).
- Other circuits have placed focus on the degree of settlement, in a determination that takes into greater account the child's experience and perspectives. See *Stern v. Stern*, 639 F.3d 449, 451-53 (8th Cir. 2011); *Robert v. Tesson*, 507 F.3d 981, 988-945 (6th Cir. 2007); *Karkkainen v. Kovalchuck*, 445 F.3d 280, 292-98 (3d Cir. 2006).

## ii. Second Element of Prima Facie Case: Breach of Custody Rights

The second element of the petitioner’s prima facie case requires proof by a preponderance of evidence that respondent’s removal to or retention of the child in the United States breached petitioner’s rights of custody under the laws of the country of habitual residence. *See supra* § III.B.3.g. This element derives from the first prong of the Convention’s definition of wrongful removal or retention; that prong states:

The removal or the retention of a child is to be considered wrongful where –

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention  
....

Hague Abduction Convention, art. 3(a) (incorporated domestically via 42 U.S.C. § 11603(e)(1)); *see supra* § III.B.g (quoting Article 3 of the Convention in full).

The sections immediately following discuss how federal courts have determined custody rights in Hague Abduction Convention litigation; in particular, how the Supreme Court addressed whether an order labeled “*ne exeat*” in some countries is, or is not, a right of custody.

### ii.1. Rights of Custody

The last paragraph of Article 3 of the Hague Abduction Convention makes clear that “rights of custody” – rights the breach of which may trigger the remedy of prompt return – “may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.” A subsequent article further defines the term, as follows:

For purposes of this Convention –

- a) “rights of custody” shall include rights relating to the care of the person and, in particular, the right to determine the child’s place of residence ....

Hague Abduction Convention, art. 5 (incorporated domestically via 42 U.S.C. § 11603(e)(1)); *see supra* § III.B.3.f.i (discussing *id.*, art. 5(b), which defines rights of access).

In light of these articles, one scholar has observed: “Notwithstanding the reference to ‘Abduction’ in its title, the Convention covers violations of custody rights more generally ....” Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1053 (2005).

In particular, the Article 3 reference to “operation of law” means that “rights of custody” may arise even if there is no formal custody order. *See id.* at 1054. Thus the U.S. Court of Appeals,

taking care not to “impos[e] American legal concepts on another legal culture,” concluded that Mexican law accorded custody rights under the Convention to an unwed father. *Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000).

### **ii.1.a. Determining Foreign Law**

Determining whether a right asserted is a “right of custody” for purposes of the Convention necessarily entails consideration of a foreign country’s laws. Pursuant to Article 14 of the Hague Abduction Convention, a court

may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

In turn, Rule 44.1 of the Federal Rules of Civil Procedure, entitled “Determining Foreign Law,” states:

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

Courts have accepted as evidence of foreign law, *inter alia*:

- A letter from an official in the foreign country’s Central Authority. *Abbott v. Abbott*, 560 U.S. 1, 10 (2010), *discussed supra* § III.B.d.i. *See* Hague Abduction Convention, art. 7(e) (stating that Central Authorities shall “provide information of a general character as to the law of their State in connection with the application of the Convention”).
- An affidavit from an attorney in the foreign country. *Whallon v. Lynn*, 230 F.3d 450, 458 (1st Cir. 2000)

### **ii.2. *Ne Exeat* Orders and “Rights of Custody”**

Frequently litigated is whether a “*ne exeat* order,” used in some civil law countries, confers a “right of custody” for purposes of the Hague Abduction Convention. One federal court recently elaborated on this term:

A *ne exeat* clause is ‘An equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction. A *ne exeat* is often issued to prohibit a person from removing a child or property from the jurisdiction....’ Black’s Law Dictionary (8th ed. 2004). In the United States, these orders are

routinely referred to as ‘restraining orders,’ which prohibit removal of a child from a state or local jurisdiction.

*East Sussex Children Services v. Morris*, 919 F. Supp. 2d 721, 730 n.9 (N.D. W.Va. 2013).

The sections immediately following discuss, first, the Supreme Court’s ruling on such an order, and second, federal decisions in the wake of that ruling.

### **ii.2.a. Supreme Court in *Abbott*: *Ne Exeat* Order Requiring Both Parents’ Consent Is a “Right of Custody”**

In its first-ever consideration of the Hague Abduction Convention, the Supreme Court held that the “*ne exeat* right” at issue – the left-behind parent’s “authority to consent before the other parent may take the child to another country” – constitutes one of the “rights of custody” the breach of which may trigger the civil remedy of prompt return. *Abbott v. Abbott*, 560 U.S. 1, 5, 15 (2010). The opinion for the Court by Justice Anthony M. Kennedy, in which five other Justices joined, resolved a circuit split on the question. *Id.* at 4, 7.

The decision in *Abbott* turned on a court order issued in Chile, the foreign country where the child and his parents resided from his birth in 1995 until 2005, when his mother removed him to the United States and soon filed for divorce. *See id.* at 5-6. Examining the Chilean law, Kennedy’s opinion for the Court construed the *ne exeat* order to grant both parents a “right to determine the child’s place of residence”<sup>26</sup> – a right expressly included among the “rights of custody” protected in the Convention. *See id.* at 10-12 (quoting Hague Abduction Convention, arts. 3, 5(a), *quoted infra* §§ III.B.3.g, III.B.3.g.ii.i). The Court then followed the additional interpretive steps detailed *supra* § III.B.3.d, eventually ruling, by a six-to-three vote, that a breach of the *ne exeat* right was subject to the Convention’s return remedy. *See Abbott*, 560 U.S. at 9-22.

### **ii.2.b. Federal *Ne Exeat* Decisions Post-*Abbott***

As described in the section immediately above, the decision in *Abbott v. Abbott*, 560 U.S. 1 (2010), held that a *ne exeat* order granting both parents the right to determine the country where their child lives constituted a custody right protected by the Hague Abduction Convention. One scholar observed that the opinion did not resolve all issues respecting such orders:

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<sup>26</sup> “Place” means “country,” the Supreme Court wrote:

The phrase ‘place of residence’ encompasses the child’s country of residence, especially in light of the Convention’s explicit purpose to prevent wrongful removal across international borders.

*Abbott*, 560 U.S. at 11 (citing Hague Abduction Convention, preamble). *Cf.* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005) (writing in the context of exceptions, discussed *infra* § III.B.3.h, that “[r]eturn of the child is to the country – not to a particular parent”).



There can, of course, be various types of *ne exeat* rights, and the majority left open the question of whether a *ne exeat* restriction would be considered a ‘right of custody’ in the absence of a requirement of parental consent.

Linda J. Silberman, *International Decision: Abbott v. Abbott*, 105 Am. J. Int’l L. 108, 111 (2011).

Federal decisions issued since the Court’s judgment in *Abbott* have held that absent such a consent requirement, a court order does not grant “rights of custody” within the meaning of the Convention. *See, e.g., White v. White*, 718 F.3d 300, 304 n.4 (4th Cir. 2013) (ruling against a father who relied on a court order that did not require his consent, on ground that in the cases on which the father sought to rely, “the petitioning parent had a *ne exeat* right to *prohibit* the other parent from removing the child”) (emphasis in original)); *Radu v. Toader*, 463 Fed. Appx. 29, 31 (2d Cir. 2011) (construing a court order according to the laws of the foreign country where it was issued, and holding that the father possessed “no *ne exeat* right” to block the mother from changing their child’s place of residence). *Cf. Chafin v. Chafin*, \_\_\_ U.S. \_\_\_, \_\_\_ n.2, 133 S. Ct. 1017, 1025 n.2 (2013) (noting that a *ne exeat* order constrained only one, not both, parents).

Indeed, notwithstanding the passage block-quoted above, there is a post-*Abbott* tendency to equate the term “*ne exeat*” with a requirement of both parent’s consent. *See, e.g., Font Paulus ex rel. P.F.V. v. Vittini Cordero*, 2012 WL 2524772, at \*4 (M.D. Pa., June 29, 2012).

### **iii. Third Element of Prima Facie Case: Exercise of Custody Rights**

The third and final element of the prima facie case requires proof by a preponderance of evidence that when the removal or retention occurred, petitioner was exercising rights of custody with respect to the child. *See supra* § III.B.3.g. This element derives from the second prong of the Convention’s definition of wrongful removal or retention; that prong states:

The removal or the retention of a child is to be considered wrongful where –

....

- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Abduction Convention, art. 3(b) (incorporated domestically via 42 U.S.C. § 11603(e)(1)); *see supra* § III.B.3.g (quoting Article 3 of the Convention in full). The Convention makes clear that if the left-behind parent “was not actually exercising the custody rights at the time of removal or retention,” the court need not return the child. Hague Abduction Convention, art. 13(a); *see infra* § III.B.3.h.ii (discussing defenses; that is, exceptions to return).

In the United States, federal courts have tended to interpret this element of the prima facie case “liberally”; that is, in favor of the left-behind parent. The quoted word is drawn from this oft-cited passage, in which a federal appellate court took note of the international character of Convention terms:

Enforcement of the Convention should not to be made dependent on the creation of a common law definition of ‘exercise.’ The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find ‘exercise’ whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.

*Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996), *quoted in*, e.g. *Baxter v. Baxter*, 423 F.3d 363, 370 (3d Cir. 2005); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 345 (5th Cir. 2004). *See infra* § III.B.3.d (discussing interpretative methodology).

#### **h. Defenses: Exceptions to Return**

If the petitioner establishes all the elements of the prima facie case detailed *supra* § III.B.3.g, return is generally appropriate, within the bounds of time-contingent provisions detailed *infra* § III.B.3.i. Nevertheless, a court has the discretion to refuse to order the child’s return if the respondent establishes one of the exceptions to return enumerated in the Hague Abduction Convention.<sup>27</sup>

Pursuant to the U.S. implementing legislation, the respondent must adduce proof by preponderance of evidence in order to prevail on two of the enumerated exceptions; specifically, that the:

- (1) Petitioner consented to or acquiesced in the removal or retention; or
- (2) Child objects to return and is of sufficient age and maturity to do so.

*See* International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B) (incorporating Hague Abduction Convention, arts. 13(a), 13 para. 2, *quoted infra* §§ III.B.3.h.ii, III.B.3.h.iii).<sup>28</sup>

In contrast, the respondent must adduce clear and convincing evidence in order to prevail on two other enumerated exceptions; specifically, that return would:

- (3) Expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; or
- (4) Contravene human rights deemed fundamental in the United States.

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<sup>27</sup> *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005) (stating with regard to the Article 13(b) “grave risk” exception, discussed *infra* § III.B.h.iv, that the provision “does not mandate non-return”).

<sup>28</sup> This subsection of the International Child Remedies Abduction Act, 42 U.S.C. § 11603(e)(2)(B), also imposes the preponderance of evidence burden with respect to a respondent’s claim that the removed “child is now settled in its new environment” – a potential ground for refusing return, if the petition was filed more than a year after the date of the contested removal or retention. Hague Abduction Convention, art. 12. This means of avoiding the return of the child is addressed in the *Benchbook* section entitled “Nature and Timing of the Return Remedy,” *infra* § III.B.3.i.

See International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A) (incorporating Hague Abduction Convention, arts. 13(b), 20, *quoted infra* §§ III.B.3.h.iv, III.B.3.h.v).

In determining all but the last of the four exceptions above, the Convention specifies that the court

shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Hague Abduction Convention, art. 13 (final paragraph). See *supra* § III.B.3.a.iii (discussing “Central Authority”).

### **i. Narrow Construction of Exceptions**

As a general rule, “numerous interpretations of the Convention caution that courts must narrowly interpret the exceptions lest they swallow the rule of return.” *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009); see *Acosta v. Acosta*, 725 F.3d 868, 875 (8th Cir. 2013); *Nicolson v. Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010); *Baran v. Beaty*, 526 F.3d 1340, 1345 (11th Cir. 2008); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 271 (3d Cir. 2007); *de Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996). This interpretation of the Hague Abduction Convention comports with the International Child Remedies Abduction Act, in which Congress found that wrongfully removed children should “be promptly returned unless one of the narrow exceptions set forth in the Convention applies.” 42 U.S.C. § 11601(a)(4), *quoted in Blondin v. Dubois*, 238 F.3d 153, 156 (2d Cir. 2001).

With that rule of construction in mind, each of the four exceptions listed *supra* § III.B.3.h is discussed in turn below.

### **ii. Exception Based on Petitioner's Consent or Acquiescence**

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B), proof by a preponderance of evidence that the petitioner consented to or acquiesced in the child's removal constitutes an exception to return. This statutory provision expressly incorporates Article 13(a) of the Hague Abduction Convention, which states that a court

is not bound to order the return of the child if the person, institution or body which opposes its return establishes that –

- a) the person, institution or body having the care of the person of the child ... had consented to or subsequently acquiesced in the removal or retention  
.....<sup>29</sup>

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<sup>29</sup> Omitted from this quote is an alternative factor, that the petitioner “was not actually exercising the custody rights at the time of removal or retention.” Hague Abduction Convention, art. 13(a). This ground for refusal of return is discussed within the context of the petitioner's prima facie case *supra* § III.B.3.g.iii.

Evaluating assertions of this exception in the United States, courts have considered evidence of statements and conduct in order to determine the left-behind parent's intent before the removal or retention of the child. *See Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010); *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005); *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 793-94 (9th Cir. 2001).

Evidence that the left-behind parent agreed to let the child stay in the United States with the other parent, without specifying a time limit on the stay, was held to amount to consent or acquiescence. In re *Kim*, 404 F. Supp. 2d 495, 516-17 (S.D.N.Y. 2005). In contrast, evidence that a left-behind parent placed conditions on the child's removal to the United States, but the other parent disregarded those conditions, will defeat an assertion of this exception. *Tsai-Yi Yang v. Fu-Chiang Tsui*, 2006 WL 2466095, at \*14 (W.D. Pa. Aug. 25, 2006), *aff'd on other grounds*, 499 F.3d 259, 271 (3d Cir. 2007).

### iii. Exception Based on Child's Objection

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B), proof by a preponderance of evidence that the child, when sufficiently mature, objects to return constitutes an exception to return. This statutory provision expressly incorporates the middle paragraph of Article 13 of the Hague Abduction Convention, which states that a court

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

The provision applies to a child fifteen years and younger, given that the Convention does not cover children who have reached their sixteenth birthday. *See supra* § III.B.3.g.i.1 (quoting Convention, art. 4).

A report prepared when the 1980 Hague Abduction Convention was adopted explained the rationale behind this provision:

[T]he fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.

Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, para. 30, at 433, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980), available at <http://www.hcch.net/upload/expl28.pdf>, *discussed supra* § III.B.3.d.i.3.d. *See, e.g.*, In re *D.T.J.*, 956 F. Supp. 2d 523, \_\_\_2013 WL 3866636, at \*13-\*16 (S.D.N.Y., July 26, 2013) (following "several hours" of conversation with child described, *id.* at \*8, as "just a few weeks shy of 15 years old," ruling that her objections constituted an independent ground for nonreturn).

Notwithstanding this statement, a number of federal courts have ordered return despite objections from children in their midteens. *E.g., England v. England*, 234 F.3d 268, 272-73 (5th

Cir. 2000) (holding, by a vote of two to one, that a thirteen-year-old child who had “four mothers in twelve years” and took medication for an attention deficit disorder did not meet the maturity standard); *Trudrung v. Trudrung*, 686 F. Supp. 2d 570, 576-79 (M.D.N.C. 2010) (concluding after an *in camera* examination that a fifteen-and-a-half-year-old child was of sufficient age and maturity to register his objections, yet ordering return nevertheless); *Barrera Casimiro v. Pineda Chavez*, 2006 WL 2938713, at \*5-\*7 (N.D. Ga. 2006) (ruling, after hearing in-chambers testimony from a fifteen-year-old child, in the presence of her guardian *ad litem*, that the child was “mature and intelligent,” yet ordering return based on other factors).

Indeed, research indicates that regardless of the child’s age, the respondent parent seldom prevails if this is the only exception that he or she has asserted in his or her defense. One federal decision attributed what it called “a demonstrated disinclination among courts to defer to a child’s objection as a basis to deny a petition” to a variety of factors, including the:

- Rule of narrow construction discussed *supra* § III.B.3.h.i;
- Frequency with which examination reveals that the child simply prefers the United States, rather than truly objecting to the other country; and
- Fact that denying return undercuts the Hague Abduction Convention’s purpose, “to preserve the status quo of the ‘habitual residence’ rather than to reward the wrongful retention.”

*Trudrung*, 686 F. Supp. 2d at 578-79 (internal quotations and citations omitted).

#### **iv. Exception Based on Grave Risk of Harm**

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A), proof by clear and convincing evidence that return would expose the child to a grave risk of harm constitutes an exception to return. This statutory provision expressly incorporates Article 13(b) of the Hague Abduction Convention, which states:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

- b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Note that the inquiry focuses on the country to which the child would be returned; courts concerned about a left-behind parent will examine child-protective measures that may be put in place in the country of return. See Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1073-79 (2005)

(discussing cases, and stressing, on page 1074 that “the obligation of the 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”).

Key terms in Article 13(b), “grave risk” and “intolerable situation,” are discussed below.

#### **iv.1. Defining “Grave Risk” and “Intolerable Situation”**

No definition of “grave risk” or “intolerable situation” appears either in the Convention or in the implementing legislation.

Federal courts have construed “grave risk” to apply to situations in which the:

- “[P]otential harm to the child” is “severe, and the level of risk and danger” is “very high.” *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013), *quoted in West v. Dobrev*, 735 F.3d 921, 931 (10th Cir. 2013).
- “[C]hild faces a real risk of being hurt, physically or psychologically, as a result of repatriation” – but not to “those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child’s preferences.” *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001), *quoted in Baxter v. Baxter*, 423 F.3d 363, 373 (3d Cir. 2005).

In interpreting “intolerable situation,” meanwhile, courts have consulted the views of the U.S. Department of State, designated the country’s Central Authority on Convention matters. *E.g.*, *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008); *Baxter v. Baxter*, 423 F.3d 363, 373 n.7 (3d Cir. 2005). *See supra* §§ III.B.3.a.iii, III.B.3.d.i.2 (discussing, respectively, the State Department’s role as Central Authority and courts’ use of State Department views in interpreting Hague Abduction Convention).

#### **iv.2. Federal Adjudication of Grave Risk Exception**

Courts frequently have concluded that the high threshold of the Article 13(b) exception – a threshold created by words like “grave” and “intolerable,” by the statutory requirement of proof by clear and convincing evidence, and by the overall rule that Convention exceptions be narrowly construed. *E.g.*, *West v. Dobrev*, 735 F.3d 921, 931 (10th Cir. 2013) (holding that a proffered psychologist’s letter recounting a young child’s nonspecific account of “what may or may not amount to child abuse”); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067-68 (6th Cir. 1996) (determining that the grave risk threshold was not established by evidence of “nothing more than *adjustment* problems that would attend the relocation”) (emphasis in original).

Nevertheless, courts have accepted the grave risk exception in the following circumstances:

- (1) Return would place the child in “a zone of war, famine, or disease”; or
- (2) “[I]n cases of serious abuse or neglect, or extraordinary emotional dependence,” on return, “the country of habitual residence for whatever reason may be incapable or unwilling to give the child adequate protection.”<sup>30</sup>

*West*, 735 F.3d at 931 n.8; see *Baxter v. Baxter*, 423 F.3d 363, 373 (3d Cir. 2005) (same); *Blondin v. Dubois*, 238 F.3d 153, 163 (2d Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (same). Cf. Jeremy D. Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers* 167 (Am. Bar Ass’n 2012) (citing these two fact patterns, and adding, “[h]owever, there is no bright-line definition of grave risk beyond these extreme examples”).

Denying return based on the second circumstance, the U.S. Court of Appeals for the Seventh Circuit wrote that a “court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser’s custody.” *Van De Sande v. Van De Sande*, 431 F.3d 567, 571 (7th Cir. 2005) (refusing return). See *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008) (upholding district court’s refusal to return); *Simcox v. Simcox*, 511 F.3d 594, 609-11 (6th Cir. 2007) (rejecting order of district court as insufficient to protect children on return). See also *supra* § III.B.3.h.iv (noting that a requested state’s obligation to return pertains to the requesting state, and not to the left-behind parent).

Additional federal appellate decisions denying return on this ground include: *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002); *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001).

### **iv.3. Whether Proof of Harm to Parent Satisfies Grave Risk Exception**

By its terms, the exception under review concerns “a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Hague Abduction Convention, art. 13(b), *quoted in full supra* § III.B.h.iv. Federal appellate courts have split on whether the exception applies absent evidence of harm to the specific child, as opposed to the child’s parent, caregiver, or other family member. Specifically, courts have held:

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<sup>30</sup> One scholar explained the rationale behind the second prong:

[T]he 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.

- On the one hand, that evidence of harm to the child’s parent or sibling is insufficient to establish the Article 13(b) exception. *E.g., Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376-77 (8th Cir. 1995); *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000).
- On the other hand, that proof one parent had beaten the other in front of the child’s siblings, along with other evidence of violence and law-breaking, did establish the grave risk exception. *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000).

Some courts have skirted this divide. For example, the Eleventh Circuit in *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008), cited evidence that a child’s father had abused the pregnant mother, thus putting the unborn child “in harm’s way,” and that the father had verbally abused the mother in the newborn child’s presence, and thus affirmed a finding of grave risk. The court’s reasoning appeared to turn on the term “risk”; it stressed that the issue was not whether the child “had previously been physically or psychologically harmed,” but rather whether return “would expose him to a present grave risk of physical or psychological harm, or otherwise place him in an intolerable situation.” *Id.* See also *Simcox v. Simcox*, 511 F.3d 594, 609 (6th Cir. 2007).

#### **iv.4. Additional Resources on the Grave Risk Exception**

Respecting a newly launched project on the grave risk exception, intended as an aid to judges, see *infra* § III.B.5.b.ii.

#### **v. Exception Based on Contravention of Fundamental Human Rights Principles**

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A), proof by clear and convincing evidence that return would run counter to human rights principles deemed fundamental in the United States constitutes an exception to return. This statutory provision expressly incorporates Article 20 of the Hague Abduction Convention, which states that return

may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Research revealed no federal decision declining to return the child on this ground. Indeed, the U.S. Court of Appeals for the Second Circuit wrote in 2013:

We note that this defense has yet to be used by a federal court to deny a petition for repatriation.

*Souratgar v. Lee*, 720 F.3d 96, 108 (2d Cir. 2013) (citing James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 85 (Fed. Judicial Ctr. 2012)), available at [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf). In keeping with this trend, the Second Circuit in *Souratgar* rebuffed an assertion of this exception. See *id.* at



108-09 (concluding that the court below “did not err in rejecting” the contention that the existence of Islamic courts in a foreign country, to which the child would be returned if the challenged court order were given effect, meant that adjudication of the custody dispute in that country would violate fundamental due process principles).

### **i. Nature and Timing of the Return Remedy**

Subject to consideration of the exceptions discussed *supra* § III.B.3.h, return of the child is required for any petition filed within a year of a wrongful removal. To be precise, the first paragraph of Article 12 of the Convention states:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

A different rule applies after the lapse of one year, as stated in the second paragraph of Article 12.<sup>31</sup>

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.<sup>32</sup>

These provisions raise a number of issues, among them:

- When proceedings commence;
- Whether equitable tolling applies to the time period; and
- How to determine whether the child is settled in his or her new environment.

Each is discussed in turn below.

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<sup>31</sup> The final paragraph applies when a child alleged to have been removed to the United States is transported to another country:

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

1980 Hague Abduction Convention, art. 12, para. 3.

<sup>32</sup> The final paragraph of this article states:

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Hague Abduction Convention, art. 12, para. 4.

### **i. Commencement of Proceedings**

As quoted in the section immediately above, prompt return is mandatory if “the commencement of proceedings” occurred within a year of the removal or retention; if that time period was exceeded, however, return may be avoided by application of the additional exception discussed *infra* § III.B.i.iii. U.S. implementing legislation equates “commencement of proceedings” with the filing of the requisite petition, discussed *supra* § III.B.3.e. *See* International Child Abduction Remedies Act, 42 U.S.C. § 11603(f)(3).

### **ii. No Equitable Tolling**

Neither the Hague Abduction Convention nor the U.S. implementing statute addresses whether the one-year time period discussed in the sections above should be subject to equitable tolling when, for example, concealment of the child by the taking parent precluded the left-behind parents from filing the petition in a timely fashion. In *Lozano v. Montoya Alvarez*, \_\_ U.S. \_\_, 2014 WL 838515 (Mar. 5, 2014), the Supreme Court interpreted the Convention and implementing legislation to bar such tolling. *See supra* III.B.3.d. A concurrence maintained that judges retain “equitable discretion” to grant or deny return at any time in Convention proceedings. *Lozano*, \_\_ U.S. at \_\_, 2014 WL 838515, at \*12-\*15 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring); *cf. id.* at \*9 n.5 (stating that the question was not presented in the case at bar). *See also infra* III.B.3.i.iii.2.

### **iii. Whether Child Is Settled in New Environment**

Even if the petition was filed more than a year after the date of wrongful removal or retention, return is appropriate if the respondent fails to establish one of the enumerated exceptions discussed *supra* § III.B.3.h – unless, that is, the respondent proves by a preponderance of evidence that the child has become settled. *See* 42 U.S.C. § 11603(e)(2)(B). This statutory provision expressly incorporates Article 12 of the Convention, the middle paragraph of which provides:

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

As with many other terms, neither the Convention nor the U.S. implementing legislation defines what it means for a child to be “settled” in his or her “new environment.” A number of federal courts have given weight to an interpretation put forward by the U.S. Department of State, designated the country’s Central Authority on Convention matters, *see supra* § III.B.3.a.iii; to be precise, courts have quoted the following passage:

To this end, nothing less than substantial evidence of the child’s significant connections to the new country is intended to suffice to meet the respondent’s burden of proof.

U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10509 (1986), *quoted in, e.g., Lozano v. Alvarez*, 697 F.3d 41, 56 (2d Cir. 2012), *aff'd sub nom. Lozano v. Montoya Alvarez*, \_\_\_ U.S. \_\_\_, 2014 WL 838515 (Mar. 5, 2014), *discussed infra* § III.B.3.i.ii; *In re B. Del C.S.B.*, 559 F.3d 999, 1003 (9th Cir. 2009). *See supra* § III.B.3.d.i.2 (discussing use of State Department views in interpreting Hague Abduction Convention).

Furthermore, federal courts have articulated an array of factors to be taken into account in determining whether the “now settled” exception has been met. Factors include, but are not limited to:

- Age of the child
- Stability of the child’s residence in the new environment
- Presence or absence of regular attendance at school or day care
- Presence or absence of regular attendance at a religious establishment
- Degree to which the child has friends and relatives in the new environment

*See In re D.T.J.*, 956 F. Supp. 2d 523, \_\_\_, 2013 WL 3866636, at \*8 (S.D.N.Y., July 26, 2013) (setting forth a version of the list above, quoting *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001)) *See also* James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 69 (Fed. Judicial Ctr. 2012) (setting forth additional factors in elaboration of the stability issue, and citing cases in support), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf).

As have others, the court in *D.T.J.* decided whether the child was sufficiently settled based on its analysis of all factors in combination. *See* 956 F. Supp. 2d at \_\_\_, 2013 WL 3866636, at \*8-\*14.

### **iii.1. Immigration Status**

Two U.S. Courts of Appeals have rejected the contention that the absence of lawful immigration status precludes holding that a child is “now settled” in the United States for purposes of Article 12 of the Convention. *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012), *aff'd on other ground sub nom. Lozano v. Montoya Alvarez*, \_\_\_ U.S. \_\_\_, 2014 WL 838515 (Mar. 5, 2014); *In re B. Del C.S.B.*, 559 F.3d 999, 1001-02 (9th Cir. 2009). The Second Circuit explained:

While courts have consistently found immigration status to be a factor when deciding whether a child is settled, no court has held it to be singularly dispositive.

*Lozano*, 697 F.3d 57; *Demaj v. Sakaj*, 2013 WL 1131418, at \*22-\*23 (D. Conn. Mar. 18, 2013) (following *Lozano*); *Aranda v. Serna*, 911 F. Supp. 2d 601, 614 (M.D. Tenn., 2013) (same). *Accord In re D.T.J.*, 956 F. Supp. 2d 523, \_\_\_, 2013 WL 3866636, at \*11-\*13 (S.D.N.Y., July 26, 2013) (considering immigration status as just one factor pursuant to *Lozano*, ruling that the factor cut in favor of return, but that on the whole, factors compelled conclusion that child was “settled” and should not be returned).

### **iii.2. Discretion of the Court**

As noted *supra* III.B.3.i.ii, concurring Justices in *Lozano v. Montoya Alvarez* stated that judges retain “equitable discretion” to grant or deny return at any time in Convention proceedings. \_\_\_ U.S. \_\_\_, \_\_\_, 2014 WL 838515 at \*12-\*15 (Mar. 5, 2014) (Alito, J., joined by Breyer and Sotomayor, JJ., concurring). The Court’s majority considered the question not to have been presented. *See id.* at \*9 n.5. The position of the concurrence is consistent with that of other authorities. *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005) (“Even when a child is found to be so settled, the authorities appear to have discretion to order return.”) (citing Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention* 426, 460, in 3 Hague Conf. on Private Int’l L., *Acts and documents of the Fourteenth Session* (1980), available at <http://www.hcch.net/upload/exp128.pdf>), *discussed supra* § III.B.3.d.i.3.d).

### **j. Final Civil Remedy Considerations**

Final considerations respecting Hague Abduction Convention litigation include issues relating to fees and appeals. Each is discussed in turn below.

#### **i. Fees in Civil Remedy Proceedings**

The International Child Abduction Remedies Act, 42 U.S.C. § 11607(b), states that travel, counsel, and court costs are petitioner’s responsibility, unless the court orders the child’s return, in which case the court shall order respondent to pay reasonable expenses of that nature. This provision tracks a U.S. reservation to ratification of the Hague Abduction Convention, quoted *supra* § III.B.3.a.i. Decisions applying the provision include:

- *Aldinger v. Segler*, 157 Fed. Appx. 317 (1st Cir. 2005) (reducing fee request as excessive)
- *Cuellar v. Joyce*, 603 F.3d 1142 (9th Cir. 2010) (approving fee request)

#### **ii. Appeal of District Court Order: Question of Mootness**

The return of a child to a foreign country, pursuant to a U.S. District Court order in Hague Abduction Convention litigation, does not preclude appeal of that order. *Chafin v. Chafin*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1017, 1028 (2013). In so ruling, the Supreme Court explained in *Chafin*:

The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties’ respective claims.

*Id.*; *see id.* at 1023-24 (describing dispute over return order and order that father pay mother \$94,000 in fees). On remand, the U.S. Court of Appeals for the Eleventh Circuit affirmed the return order on the ground that the finding below, with regard to the child's place of habitual residence, was not clearly erroneous. *Chafin v. Chafin*, \_\_\_ F.3d \_\_\_, \_\_\_, 2013 WL 6654389, at \*2 (11th Cir. Dec. 18, 2013).

Having concluded discussion of the civil return remedy, this chapter now turns to a criminal sanction made available by a federal statute.

#### **4. Criminal Aspects of Cross-Border Child Abduction: Federal Prosecution**

In the United States, parental child abduction may be subject not only to the civil return remedy discussed *supra* § III.B.3, but also to felony prosecution. The federal criminal sanction for the cross-border abduction of a child by a parent first was enacted in 1993, via the International Parental Kidnapping Crime Act, Pub. L. 103-173, § 2(a), 107 Stat. 1998, codified as amended at 18 U.S.C. § 1204 (2006).

The ensuing sections discuss this statute, as follows:

- Interrelation of U.S. civil and criminal laws respecting child abduction
- Text of the International Parental Kidnapping Crime Act
- Elements of the offense
- Defenses
- Penalties

The Supreme Court has not reviewed any case arising out of this 1993 Act. This discussion relies on jurisprudence in the lower federal courts and other authorities.

##### **a. Interrelation of the United States' Civil and Criminal Laws on Child Abduction**

Numerous sources indicate that the federal criminal sanction for child abduction is intended to complement the civil return remedy.

According to a legislative report on H.R. 3378, the bill that would become the International Parental Kidnapping Act, in 1993 parental child abduction was a crime in all fifty states of the United States, but it was not a federal offense. H. Rep. 103-390, 103d Cong., 1st Sess., at 2 (Nov. 20, 1993). The report maintained that only the enactment of a federal criminal prohibition would “in international practice provide an adequate basis for effective pursuit and extradition.” *Id.*

The report recognized that the Hague Convention on the Civil Aspects of International Child Abduction and federal implementing laws, discussed *supra* § III.B.3, provided a civil remedy for many cross-border abductions. It noted, however, that as of 1993 many countries had not ratified the Convention, “thus leaving individual countries to take whatever legal unilateral action they can to obtain the return of abducted children.” H. Rep. 103-390, *supra*, at 3. (On the countries now party to the Convention, see *supra* § III.B.3.a.)

Section 2(b) of the 1993 Act, Pub. L. 103-373, set forth “the sense of the Congress” that the Hague Abduction Convention “should be the option of first choice for a parent who seeks the return of a child who has been removed from the parent.” The phrase was repeated in the Presidential statement issued when the bill was signed into law.<sup>33</sup>

Congress’ intent that the criminal sanction should complement the federal civil remedies also is reflected in the text of the statute: 18 U.S.C. § 1204(d) expressly provides that the 1993 Act “does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.”

A Justice Department guide stresses that “[t]he return of internationally kidnapped children is often settled through negotiation,” particularly when both countries involved are states parties to the 1980 Hague Abduction Convention. U.S. Dep’t of Justice, *Citizens’ Guide to U.S. Federal Law on International Parental Kidnapping*, [http://www.justice.gov/criminal/ceos/citizensguide/citizensguide\\_parentalkidnapping.html](http://www.justice.gov/criminal/ceos/citizensguide/citizensguide_parentalkidnapping.html) (last visited Mar. 13, 2014).

Despite these statements of preference for civil resolution, the fact that a child was returned pursuant to the Hague Abduction Convention has been held not to preclude prosecution under the International Parental Kidnapping Crime Act. *United States v. Ventre*, 338 F.3d 1047, 1048-49, 1052 (9th Cir.) (affirming a conviction in such an instance, on the ground that criminal prosecution “does not detract from” the Convention’s civil remedial framework, and thus does not violate 18 U.S.C. § 1204(d)), *cert. denied*, 540 U.S. 1085 (2003).<sup>34</sup> See “Instruction 42-16 The Indictment

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<sup>33</sup> The statement read in full:

H.R. 3378 recognizes that the international community has created a mechanism to promote the resolution of international parental kidnapping by civil means. This mechanism is the Hague Convention on the Civil Aspects of International Child Abduction. H.R. 3378 reflects the Congress’ awareness that the Hague Convention has resulted in the return of many children and the Congress’ desire to ensure that the creation of a Federal child abduction felony offense does not and should not interfere with the Convention’s continued successful operation.

This Act expresses the sense of the Congress that proceedings under the Hague Convention, where available, should be the “option of first choice” for the left-behind parent. H.R. 3378 should be read and used in a manner consistent with the Congress’ strong expressed preference for resolving these difficult cases, if at all possible, through civil remedies.

William J. Clinton, *Statement on Signing the International Parental Kidnapping Crime Act of 1993* (Dec. 2, 1993), 29 WEEKLY COMP. PRES. DOC. 2493 (1993).

<sup>34</sup> Discussing the interrelation of civil and criminal remedies at an international meeting the same year that the International Parental Kidnapping Crime Act took effect, experts affirmed the preference for the civil remedy, although several “experts recognized that criminal proceedings might be appropriate where the crime went further than simple abduction.” Hague Conf. on Private Int’l L., *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention (18-21 January 1993)*, reprinted at 33 I.L.M. 225, 249 (1994), cited in James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 98 & n.376 (Fed. Judicial Ctr. 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf).

and the Statute,” in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013) (discussing *Ventre* in commentary following instruction), available in Lexis. Cf. International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11603 (providing, in statute described *supra* § III.B.3.a.ii, that civil remedy is “not exclusive”).

**b. Text of the International Parental Kidnapping Crime Act**

Codified as amended at 18 U.S.C. § 1204 (2006), the International Parental Kidnapping Crime Act of 1993 states in full:

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

(b) As used in this section—

(1) the term “child” means a person who has not attained the age of 16 years; and

(2) the term “parental rights”, with respect to a child, means the right to physical custody of the child—

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be an affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence; or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant’s control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

Discussed in turn below are the elements of the offense, defenses, and penalties.

### **c. Elements of the Parental Kidnapping Offense**

To secure conviction under the International Parental Kidnapping Act, the prosecution must prove beyond a reasonable doubt three elements; specifically, that the:

- Child previously had been in the United States;
- Defendant either
  - Took the child out of the United States; or
  - Kept the child from returning to the United States from another country; and
- Defendant acted with the intent to obstruct the left-behind parent’s lawful exercise of parental rights.

*See* “Instruction 42-17 Elements of the Offense,” in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), available in Lexis, cited in *United States v. Miller*, 626 F.3d 682, 687 (2d Cir. 2010), cert. denied, 132 S. Ct. 379 (2011). *See also* *United States v. Huong Thi Kim Ly*, 798 F. Supp. 2d 467, 473 (E.D.N.Y. 2011) (listing same three elements), *aff’d*, 507 Fed. Appx. 12 (2d Cir. 2013).

Aspects of each of these three elements are discussed in turn below.

#### **i. “Child”**

By the terms of the statute, quoted in full *supra* § III.B.4.b, the child must not yet have reached his or her sixteenth birthday at the time of removal from the United States. *See* 18 U.S.C. § 1204(b)(1); “Instruction 42-19 Second Element – Taking Child From United States,” in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), available in Lexis.

#### **ii. Removal or Retention of Child**

The offense “is complete as soon as a child is removed from the United States or retained outside the United States with an intent to obstruct the law”; the subsequent return of the child does not preclude prosecution. *United States v. Dallah*, 192 Fed. Appx. 725, 728 n.3 (10th Cir. 2006).



### iii. Intent to Obstruct Parental Rights

Analysis of the third statutory element, that the defendant acted with the intent to obstruct the left-behind parent's lawful exercise of parental rights, has included determination of two components:

- What constitutes the requisite intent; and
- What are "parental rights" within the meaning of 18 U.S.C. § 1204.

Each is discussed in turn below.

#### iii.1. Requisite Intent

In *United States v. Sardana*, 101 Fed. Appx. 851, 854 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004), the U.S. Court of Appeals for the Second Circuit held that the requisite intent to obstruct was established by proof that a defendant father removed his child to a country other than the United States because he expected that the latter country would accord the left-behind mother fewer rights than she enjoyed in the United States. The Second Circuit further held that the defendant's post-removal initiation of custody proceedings in the foreign country was not a defense to prosecution under the U.S. statute. *Id.*

As long as the evidence at trial supports an inference that the defendant acted with the requisite statutory intent, proof that a defendant also had other intentions presents no bar to prosecution. *See United States v. Shabban*, 612 F.3d 693, 696 (D.C. Cir. 2010) (rejecting the defendant's argument that the removal of his child from the United States was justified because his "intention was to place the child in an environment" where the child "could improve his speech by hearing only one language").<sup>35</sup>

A district court wrote that the requisite intent to obstruct may exist even if the defendant's conduct did not amount to a violation of family law:

[W]henever a parent with physical custody rights is unwillingly cut off from her child, that parent's rights to physical custody are 'obstructed.'

*United States v. Homaune*, 898 F. Supp. 2d 153, 162 (D.D.C. 2012).

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<sup>35</sup> In *Shabban*, jurors had received the following instruction, which the defendant did not challenge on appeal:

'[Y]ou may infer the defendant's intent from the surrounding circumstances. You may consider any statement made or acts done or omitted by the defendant [a]nd all other facts and circumstances received in evidence which indicate the defendant's intent. You may infer, but are not required to, that a person intended the natural and probabl[e] consequences of acts knowingly done or omitted.'

612 F.3d at 696 n.2 (quoting trial transcript). A pattern instruction may be found at "Instruction 42-20 Third Element – Intent to Obstruct Parental Rights," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), available in Lexis.

### **iii.2. “Parental Rights”**

The 1993 Act, quoted in full *supra* § III.B.4.b, defines “parental rights” as “the right to physical custody of the child.” 18 U.S.C. § 1204(b)(2). This right to physical custody may be “joint or sole (and includes visiting rights).” *Id.* § 1204(b)(2)(A). The right may “aris[e] by operation of law, court order, or legal binding agreement of the parties.” *Id.* § 1204(b)(2)(B).

Given that family law is largely adjudicated in state courts, the statutory term “parental rights” may “be determined by reference to state law ...” H. Rep. 103-390, *supra*, at 4, *quoted in U.S. v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 45 (1st Cir.), *cert. denied*, 543 U.S. 856 (2004). *See also United States v. Sardana*, 101 Fed. Appx. 851, 853-54 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004).

Nevertheless, a defendant may be convicted under the federal criminal statute even if the state that has accorded parental rights has not made the violation of those rights a crime. *Fazal-Ur-Raheman-Fazal*, 355 F.3d at 45-46 (affirming father’s conviction for removing children from the United States notwithstanding mother’s right of custody by operation of state law).

### **iv. Rights-Holder Other Than a Parent**

A person other than a parent has “parental rights” under the statutory definition if, by applicable law, that person enjoys custodial or visiting rights. *See United States v. Alahmad*, 211 F.3d 538, 541 (10th Cir. 2000) (holding that the Act applied to a defendant who had removed a child from the United States in contravention of visiting rights accorded the child’s grandmother by state court order), *cert. denied*, 531 U.S. 1080 (2001).

### **d. Defenses**

As discussed below, the 1993 Act enumerates three affirmative defenses; additionally, defendants have attempted to assert defenses not stated in the Act.

#### **i. Enumerated Affirmative Defenses**

The International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2006), explicitly provides:

(c) It shall be an affirmative defense under this section that—

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act<sup>36</sup> and was in effect at the time of the offense;

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<sup>36</sup> The Uniform Child Custody Jurisdiction and Enforcement Act (1997) – text available at [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf) – was promulgated by the

(2) the defendant was fleeing an incidence or pattern of domestic violence;  
or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant’s control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

Only two reported cases have mentioned a defendant’s assertion of one of these statutory defenses. The earlier reported case stated only that “[t]he jury rejected those defenses.” *United States v. Miller*, 626 F.3d 682, 687 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 379 (2011). The later reported case, which granted a new trial based on a faulty jury charge respecting the domestic violence defense, is discussed in the section immediately following.

For further discussion of the other two statutory defenses, see “Instruction 42-21 Affirmative Defense – Acting Under Valid Court Order” and “Instruction 42-23 Affirmative Defense – Circumstances Beyond Defendant’s Control,” in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), available in Lexis.

### **i.1. Domestic Violence**

The second affirmative defense enumerated in the 1993 Act applies when “the defendant was fleeing an incidence or pattern of domestic violence.” 18 U.S.C. § 1204(c)(2).

In *United States v. Huong Thi Kim Ly*, 798 F. Supp. 2d 467, 480 (E.D.N.Y. 2011), the court granted a motion for a new trial, finding error in its own rejection of a proffered supplemental jury instruction that would have “advised the jury that domestic violence involves more than physical injury, including emotional and sexual violence.” The U.S. Court of Appeals for the Second Circuit affirmed on the ground that “failure to explain the term ‘domestic violence’ to the jury could well have prejudiced the defense.” *United States v. Huong Thi Kim Ly*, 507 Fed. Appx. 12, 13 (2d Cir. 2013).<sup>37</sup> But the appellate court cautioned:

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National Conference of Commissioners on Uniform State Laws, a group now known as the Uniform Law Commission. See Uniform L. Comm’n, *Acts: Uniform Child Custody Jurisdiction and Enforcement Act*, <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Mar. 13, 2014). In 2013, the Commission approved amendments to this uniform law, but it has not presented those amendments for enactment within the United States. See Uniform L. Comm’n, *Acts: Child Custody Jurisdiction and Enforcement Act* (2013), <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act%200%282013%29> (last visited Mar. 13, 2014).

<sup>37</sup> A pattern jury instruction does not define this term, either. See “Instruction 42-22 Affirmative Defense – Flight from Domestic Violence,” in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), available in Lexis.

It is by no means clear to us that Congress intended by § 1204 to make a spouse's flight from purely emotional abuse (such as, calling one's spouse 'stupid,' for example), unaccompanied by any incidence or threat of physical force, a defense to kidnapping.

*Id.* at n.1. The Second Circuit declined to decide the question, however, and research retrieved no further reported opinions on the matter.

## **ii. Other Defenses**

Courts generally have turned aside assertions of defenses other than those enumerated in the Act, *quoted supra* § III.B.4.d. Rejected were defenses alleging that the other parent was unfit, as well as defenses based on constitutional provisions.

### **ii.1. Rejected Defense Impugning the Left-Behind Parent**

Courts have refused to entertain defenses based on the asserted unfitness of the left-behind parent.

The U.S. Court of Appeals for the Second Circuit ruled that the defendant could not rely on a defense of grave risk to the child – a defense enumerated in the 1980 Hague Abduction Convention,<sup>38</sup> but not in the 1993 International Parental Kidnapping Crime Act. *United States v. Amer*, 110 F.3d 873, 880-82 (2d Cir.), *cert. denied*, 522 U.S. 904 (1997). Citing this holding in a subsequent case, the same court wrote that although evidence of unfitness might have a bearing on custody proceedings, such evidence did not justify the defendant father's removal of a child from the United States "in order to obstruct his wife's exercise of parental rights." *United States v. Sardana*, 101 Fed. Appx. 851, 855 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004).

### **ii.2. Rejected Defenses Based on the U.S. Constitution**

Numerous constitutional provisions have been asserted as defenses to prosecution under the International Parental Kidnapping Crime Act; research has revealed no such assertion that prevailed, however. Examples of rejected defenses are discussed below (omitted is any discussion of vagueness and overbreadth challenges, all of which were rejected based on domestic jurisprudential reasoning).

#### **ii.2.a. Foreign Commerce Clause**

The decision in *United States v. Cummings*, 281 F.3d 1046 (9th Cir.), *cert. denied*, 537 U.S. 895 (2002), affirmed a wrongful-retention conviction under the Act notwithstanding the defendant's argument that his prosecution violated the Foreign Commerce Clause, the constitutional provision that authorizes "Congress [t]o regulate Commerce with foreign Nations." U.S. Const., art. I, § 8[3]. The Ninth Circuit reasoned in *Cummings* that a wrongfully retained child

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<sup>38</sup> See *supra* § III.B.h.iv (discussing the grave risk exception set out in Article 13(b) of the Hague Abduction Convention).

both has traveled via foreign commerce and is hindered from traveling via foreign commerce back to the United States. 281 F.3d at 1048-51. *See also United States v. Homaune*, 898 F. Supp. 2d 153, 159-60 (D.D.C. 2012) (applying a similar rationale to deny a motion to dismiss based on the same asserted defense); *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 734-36 (E.D. Va. 2003) (same).

### **ii.2.b. Free Exercise of Religion**

A father's assertion that his conviction under the Act violated the Free Exercise Clause of the First Amendment was rejected in *United States v. Amer*, 110 F.3d 873 (2d Cir.), *cert. denied*, 522 U.S. 904 (1997). The court in *Amer* reasoned that the Act is neutral, does not target religious beliefs, and is aimed at the harm caused without concern for the absence or presence of a religious motive. *Id.* at 879 (applying a plain error standard because the issue had not been raised below).

### **ii.2.c. Equal Protection**

Opinions rejecting defenses grounded in the equal protection component of the Fifth Amendment include:

- *United States v. Alahmad*, 211 F.3d 538, 541-52 (10th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001), in which a federal appellate court sustained, under a rational-basis scrutiny, Colorado's decision to protect visitation rights shared by parents and grandparents "more forcefully" than it did rights held solely by grandparents.
- *United States v. Fazal*, 203 F. Supp. 2d 33, 35 (D. Mass. 2002), in which a federal district court upheld the International Parental Kidnapping Crime Act as "a rational tool" for assuring a federal remedy for the wrongful removal of children, even when the child is removed to a country not party to the 1980 Hague Abduction Convention, discussed *supra* § III.B.3.a.

### **e. Penalties**

A person convicted under the International Parental Kidnapping Crime Act may be punished by fines and up to three years in prison. 18 U.S.C. § 1204(a). Sentences upheld by appellate courts have included:

- Three years in prison and a year of supervised release. *United States v. Dallah*, 192 Fed. Appx. 725, 726-31 (10th Cir. 2006).
- Two years in prison, plus "a one-year term of supervised release with the special condition that he effect the return of the abducted children to the United States." *United States v. Amer*, 110 F.3d 873, 876 (2d Cir.), *cert. denied*, 522 U.S. 904 (1997); *see id.* at 882-85.
- An order that the defendant pay the left-behind mother restitution of more than \$14,000, the amount it cost her both to litigate a civil contempt proceeding in state court and to file,

pursuant to the 1980 Hague Abduction Convention, a return petition in a foreign country's court. *United States v. Cummings*, 281 F.3d 1046, 1051-55 (9th Cir.), *cert. denied*, 537 U.S. 895 (2002). *See United States v. Homaune*, 918 F. Supp. 2d 7 (D.D.C. 2013) (ordering restitution for similar costs).

- Five months in prison, plus five months of home detention. *United States v. Sardana*, 101 Fed. Appx. 851, 853, 855 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004).

## **5. Research Resources**

Many resources are available for additional research on cross-border legal matters involving families and children, as described below. For a general overview of all international law research and interpretive resources, see *infra* § IV.

### **a. Print Resources**

Print resources respecting the 1980 Hague Abduction Convention, as well as other aspects of international law respecting children and families, include:

- Trevor Buck, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, *International Child Law* 67 (2d ed. 2010)
- James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* (Fed. Judicial Ctr. 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf)
- Jeremy D. Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers* (Am. Bar Ass'n 2012)
- Rhona Schuz, *The Hague Child Abduction Convention* (2013)
- Barbara Stark, *International Family Law: An Introduction* (2005)

### **b. Online Resources**

As described below, primary online resources respecting the Hague Abduction Convention include the websites of the State Department, the U.S. agency charged with overseeing domestic application of the Convention, and of the Hague Conference, the intergovernmental organization that monitors the Convention.

#### **i. State Department's Office of Children's Issues**

In the United States, the Office of Children's Issues in the State Department's Bureau of Consular Affairs is responsible for implementing the 1980 Hague Abduction Convention. *See* 22 C.F.R. §§ 94.2-94.8 (2013) (describing functions of this office, designated the United States"

“Central Authority” respecting the Convention); *supra* § III.B.3.a.iii. The department’s online information may be found at:

- U.S. Dep’t of State, *International Parental Child Abduction*, <http://travel.state.gov/content/childabduction/english.html> (last visited Mar. 13, 2014).

## ii. Hague Conference on Private International Law

Hague Conference on Private International Law ([http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)), a century-old intergovernmental organization, promulgated the Hague Abduction Convention and other multilateral treaties respecting family law matters. *See supra* § III.B.1. Its website contains a trove of texts, reports, and other information. Of particular use may be these Hague Conference webpages:

- *Welcome to the Child Abduction Section*, [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21) (last visited Mar. 13, 2014), a portal to the organization’s documents on the Convention;
- *Welcome to INCADAT*, <http://www.incadat.com/index.cfm?act=text.text&lng=1> (last visited Mar. 13, 2014), the portal to the International Child Abduction Database, which, as described *supra* § III.B.3.d.i.3.a, compiles judicial decisions from many countries; and
- *Guides to Good Practices*, <http://www.incadat.com/index.cfm?act=text.text&id=9&lng=1> (last visited Mar. 13, 2014), listing all volumes of the *Guide to Good Practices* promulgated by the organization – some of which the Supreme Court has cited, as discussed *supra* § III.B.3d.i.3.c.

Judges will want to take note of two additional initiatives:

- In 2012, the Hague Conference established a Working Group on the “grave risk” exception to return, set forth in Article 13(b) of the Hague Abduction Convention and discussed *supra* § III.B.3.h.iv. Drawn from many countries, Working Group members include judges, Central Authority officials, and practitioners. The group is charged with producing a *Guide to Good Practice*, like those discussed immediately above, which includes “a component to provide guidance specifically directed to judicial authorities.” Hague Conf. on Private Int’l L., *Conclusions and Recommendations adopted by the Council*, para. 6 (2012), [http://www.hcch.net/upload/wop/gap2012concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2012concl_en.pdf). Upon completion, the guide will be available at the Hague Conference webpage.
- The Hague Conference also convenes an International Hague Network of Judges in order to make it easier for judges from different countries to communicate and cooperate on issues of child and family law. *See* Hague Conf. on Private Int’l L., *Direct Judicial Communications* 6 (2013), available at [http://www.hcch.net/upload/brochure\\_djc\\_en.pdf](http://www.hcch.net/upload/brochure_djc_en.pdf); see generally Philippe Lortie, *Background to the International Hague Network of Judges*, 15 Judges’ Newsletter on Int’l Child Protection (autumn 2009), available at

[http://www.hcch.net/upload/newsletter/JN15\\_Lortie.pdf](http://www.hcch.net/upload/newsletter/JN15_Lortie.pdf). The current list of judges appointed to this network – a list that includes four judges from state and federal courts in the United States – may be found at Hague Conf. on Private Int'l L., *International Hague Network of Judges* (Dec. 2013), <http://www.hcch.net/upload/haguenetwork.pdf>.