

INTER-COUNTRY ABDUCTIONS AND PRIVATE INTERNATIONAL LAW

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*This paper discusses the problem of international child abduction by parents, a growing phenomenon owing to several reasons. It discusses the attempts made through the Hague Convention and points out the shortcomings of the Convention in dealing with the problem. It is argued that the ambiguity in and varying interpretations accorded to the treaty provisions, undue delays in enforcement of judgments and the limited acceptance of the Convention largely undermine the effectiveness of the Convention.***

I. INTRODUCTION

Perhaps no dispute is more spirited than that for custody of a child. The desire to obtain custody of a child, for love of the child or simple spite toward the other spouse, can cause parents to pursue detrimental means to retain or regain custody. One such means is the actual abduction of the child or parental kidnapping.

The number of international abductions by parents has risen in recent years. Between 1989 and 1992, the annual number of children abducted from the United States rose from 314 to 515.¹ This problem is not unique to the United States. Many other western nations report similar statistics.²

International child abduction was sought to be addressed by the Hague Conference on Private International Law through its Convention on the Civil Aspects of International Child Abduction (“Hague Convention” or “Convention”)³ This Comment is limited to the inherent problems of the Convention, namely the enumerated exceptions and the limited number of nations to which it applies. The focus is on a hypothetical abduction of a child by a parent from the United States to a foreign country. In addition, the Comment will consider whether re-abduction is a viable option when the Hague Convention cannot be utilized.

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** Abstract supplied by the Editors.

¹ Lynne Marek, *Finding Kids, Parental Abductions Know No Boundaries*, CHICAGO TRIBUNE, December 12, 1993.

² Sharon Adams, *Looking for Missing Kids*, CALGARY HERALD, April 6, 1993 (Approximately 400 Canadian children are abducted by a parent to a foreign nation each year.); Tessa Boase, *You and Your Family: Who is the victim in a tug of love?*, DAILY TELEGRAPH, November 12, 1993 (In 1992, 1200 to 1400 British children were abducted by a parent to a foreign country).

³ The Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, 19 I.L.M. 1501 (1980); Senate Advise and consent on the Hague Convention, October 9, 1986, 132 Cong. Rec. 515, 773-74; International Child Abduction Remedies Act, Pub. L. No.100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. § 1601 (1988)).

This paper tries to highlight the problem of inter-country abductions and its solution through the Hague Convention. The paper focuses on aspects like jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children. The paper will discuss in detail scope, salient feature, and background of the Convention, and some other important aspects relating to inter-country abductions.

II. HISTORICAL BACKGROUND: A PRELUDE TO INTERNATIONAL ABDUCTIONS

Parental child abduction is defined as the kidnapping and/or concealment of a child without the consent of the other parent; and each year 350,000 cases of child abduction occur in the United States.⁴

One theory about the rise in parental child abduction to foreign states over the past few years is that there has been an increase in bi-national marriages. Thus, unforeseen consequences of the increase in the rate of marriages and divorces between couples with different nationalities, and the accessibility of international transport, is the ease with which one parent can take a child to another country and then either refuse to return the child or refuse the other parent access. These marriages can be troubled with cultural, ethnic, and religious differences, leading to disputes between the parents. A study conducted in 1994 indicated that 15.9% of child abductions in the United States took place in marriages in which the spouses were born in different countries.⁵ The primary legal remedy for parents of children abducted to foreign nations stems from the Hague Convention.⁶

In 1982, The French Ministry of Justice estimated there were some 1000 cases of abduction from France per year, involving 41 states. The emotions of abducting parent could be complex, including a mixture of love, hate, fear, jealousy and deprivation. According to the International Social Services,⁷ it is even regarded as a final attempt to pull the family back together. Whatever the

⁴ Laura C. Clemens, *International Parental Child Abduction: Time for the United States to Take a Stand*, 30 SYRACUSE J. INT'L. L. & COM. 151, 153 (2003). (In the international sphere, it is defined as the removal of a child from the state or the retention of a child outside a state with the intent to obstruct the lawful exercise of parental rights. In this latter definition, a child is considered to be a person under the age of sixteen, and parental rights include joint and sole custody, as well as visitation rights).

⁵ PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 16-23 (1999).

⁶ See Marisa Leto, *Whose Best Interest? International Child Abduction Under The Hague Convention*, 3 CHI. J. INT'L L. 247 (2002).

⁷ ISS promotes and protects the rights and welfare of children and vulnerable adults across international borders.

reasons, abductions are contrary to the child's best interests as they entail a complete change of environment for the child.⁸ Since the act of removing children from their usual place of residence to another country will most likely have harmful effects,⁹ the law is expected to take cognizance of such an act of removal. A child is likely to feel uprooted from a familiar environment, especially in circumstances where the child loses contact with friends and relatives. The move may disrupt not only the child's relationships, but also his or her education and general sense of security, particularly if such a move is conducted in the context of parental dispute.

In many countries, child abduction is regarded as a sufficiently serious matter to require the attention of the criminal law. For example, the English Common Law developed a criminal law offence of 'kidnapping', defined by the House of Lords as the taking or carrying away of one person by another, by force or by fraud, without the consent of the person taken or carried away and without lawful excuse.¹⁰ There is also an increasing trend to provide more comprehensive international protection where deliberate "trafficking" in children for sexual economic and other forms of exploitation can be identified. However, where parents often claim right of custody over the child criminal law might not be of relevance.

It is to be noted that, parents who abduct are unlikely to be subject to international trafficking laws and may be outside the reach of the national criminal jurisdiction. Where child abduction occurs in the context of a parental dispute, it is likely that the parent left behind will find a more practical remedy in civil law to secure the return of the child. Some national jurisdictions provide civil regulation of child abduction carried out within their own borders. In the UK, for example, the Family Law Act, 1986 provides for the mutual recognition and enforcement of custody orders in each county of the UK.

Before analyzing the law on the point at some length, it is important to understand the causes and background of child abduction. This would help us place the vice and its legal remedy in context.

As said earlier, in an increasingly globalized world, more and more people are marrying or cohabiting with persons of different nationality. When the relationship falls apart, there may be well-founded pressures on the couple to return to their respective countries of origin. It may appear to be the obvious course of action for the primary caretaker to return home with the children. It is also possible, all other things being equal, those children who are unlawfully abducted by the primary caretaker as less affected by the experience than those abducted by the other parent. There could also be variations, culturally and in terms of family arrangement/relationship which could affect the upbringing of the child.

⁸ GERALDINE VAN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 92 (1990).

⁹ TREVOR BUCK, *INTERNATIONAL CHILD LAW* 131 (2005).

¹⁰ *R v. D* [1984] 2 All ER 449.

In 1982, Economic and Social Council (ECOSOC) called the attention of States to the proliferation of cases of removal and retention of children and invited them to cooperate to prevent such occurrences and to resolve them speedily. In response to this call the Convention on the Rights of the Child, 1989 (CRC)¹¹ included a provision on abduction and trafficking in children.¹² Thus, the impact of reformed child custody law emanating from the CRC is noticeable in the context of child abduction. The greater recognition of fathers' parental responsibilities has precluded the need for some fathers to resort to abduction.

III. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The 1980 Convention is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. Despite the reference to "abduction" in its title, the Convention actually more accurately covers violations of custody rights, encompassing wrongful removals and wrongful retentions of children.¹³ Twenty-two countries have ratified the Convention.

The Convention prohibits a parent from removing the child below the age of 16¹⁴ from his/her place of habitual residence when it is in violation of the other parent or guardian's custodial rights.¹⁵ It applies whenever there is a "breach

¹¹ 1577 UNTS 3.

¹² The Convention on the Rights of Child is discussed in greater length in subsequent chapters. The Principle of the non-separation of children from their parents is set out in Article 9 of the CRC in respect of domestic situations, and Article 10 in respect of separations between children and parents that involve different countries. State parties are obliged to respect the right of the child who is separated from one or both parents 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. Children have a right under Article 10(2) to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. This latter provision resonates with the and was in part based upon the recognition given in the Hague Convention of 1980 to the maintenance of relations between children and both parents, in particular where the parents are of different nationalities. Notably, Article 11 of the CRC places an obligation on the state parties to take measures to combat the illicit transfer and non-return of children abroad. This expression is a reference to international child abduction by a parent. It is to be distinguished from the specific form of exploitation of children which is referred to in Article 35 as the "abduction of children".

¹³ William Duncan, *Action In Support Of The Hague Child Abduction Convention: A View From The Permanent Bureau*, 33 N.Y.U. J. INT'L L. & POL. 103 (2000); Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 271 (2002)

¹⁴ Article 4, 1980 Convention.

¹⁵ *Id.*, Article 3.

of rights of custody” of one of the parents, which means that it can be used even when there is no formal custody order in effect.¹⁶

A. FUNCTIONING OF THE CONVENTION

In a typical case of abduction, the parent or legal guardian takes the child away from the family and geographical area in which his or her life has developed, i.e. habitual environment, to another country. Secondly, the abductor hopes to obtain a right of custody from the authorities in the country of refuge. However, if the abductor is uncertain about the potential outcome of proceedings for custody, he or she is likely to opt for inaction, leaving it to the dispossessed party to take the initiative.

The Convention seeks to plug these attempts by ensuring that the child is immediately returned to his or her country of origin. Since the abductor usually claims that his or her action has been rendered lawful by the authorities of the state of refuge, the Convention states that all subsequent actions taken by the abductor will be rendered inconsequential. This is achieved by declaring *status quo*, by means of the prompt return of children ‘wrongfully removed to or retained in any Contracting State’. While the Convention never contemplated a return remedy for violation of access rights, Article 21 of the Convention does contain a provision for the protection of access rights.¹⁷ However, the provision has been narrowly interpreted in courts world over, holding that that they do not even have jurisdiction to hear a claim for enforcement of access rights.¹⁸

Thus, the Convention avoids all jurisdictional issues, and ensures that the question of custody will be decided in the place of the child’s habitual residence (prior to his/her removal). The Convention does not seek to regulate the problem of the award of custody rights. On this matter, the convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal. This applies irrespective of whether the removal occurred prior to any decision on custody being taken, in which case, the violated custody rights were exercised *ex lege* or whether the removal was in breach of a pre-existing custody decision.

¹⁶ *Id.*

¹⁷ Article 21, 1980 Convention: “An application to make arrangements for organizing 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. The Central Authorities are bound by the obligations of cooperation 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.”

¹⁸ See Linda Silberman, *Patching Up The Abduction Convention: A Call For A New International Protocol And A Suggestion For Amendments To ICARA*, 38 TEXAS INT’L L.J. 41, 49 (2003).

B. THE PROCEDURE UNDER THE CONVENTION

Any person claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence, which has to be constituted as per Article 7 of the 1980 Convention, or to the Central Authority of any other Contracting state for assistance in securing the return of the child.¹⁹ This time limit is prescribed to account for the possibility that the child may get settled in the new environment with passage of time and a return to the previous habitual environment may amount to a second uprooting.²⁰

If the Central Authority receives such an application, and has reason to believe that the child is in another Contracting State, it is required as per the Convention to directly and without delay transmit the application to the Central Authority of that State. After such intimation, it is the sole responsibility of the Central Authority to ensure that the child voluntarily returns to the place of his/her habitual residence. Once the procedure has been set into motion, the Convention requires that the judicial or administrative authorities of Contracting States act expeditiously in the relevant proceedings for the return of children.

C. INTERPRETING "BREACH OF RIGHTS OF CUSTODY"

Article 5 of the Convention specifically defines "rights of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The term "custody rights" has been interpreted to include joint custody, joint responsibility, and joint guardianship.²¹ The Convention however draws a distinction between the right of custody and the right of access. The breach of the former will trigger return of the child, while a breach of the latter will not.²²

The courts in many countries have been faced with the question of whether such a restriction on removal of a child, would give an otherwise non-custodial parent "rights of custody" within the meaning of Article 5. Many foreign courts have determined that custody rights are created by clauses restricting the removal of a child, *ne exeat* clauses, and therefore an order of return is appropriate even in favour of the non-custodial guardian.²³

¹⁹ Article 8, 1980 Convention.

²⁰ Article 12, 1980 Convention.

²¹ PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 261 (1999); See Silberman, *supra* note 18.

²² Articles 5 and 21, 1980 Convention.

²³ See, e.g., Thomson v. Thomson, [1994] 119 D.L.R. (4th) 253, 276-81 (Can.); D.S. v. V.W., [1996] 134 D.L.R. (4th) 481 (Can.) (in which the Canadian Supreme Court determined that an implicit restriction on movement was insufficient to confer "custody rights" although return was nonetheless ordered under the relevant domestic provincial law); *Thorne v. Dryden-Hall*, [1997] 148 D.L.R. (4th) 508 (the British Columbia Court of

IV. THE 1996 CONVENTION

A. BACKGROUND OF THE 1996 CONVENTION:

The Hague Conference has, for more than a century, concerned itself with the protection of children under civil law who are at risk in cross-frontier situations. During the last part of the 20th century, the opening up of national borders, ease of travel and the breaking down of cultural barriers have, with all their advantages, considerably increased those risks. The cross-border trafficking and exploitation of children and their international displacement from war, civil disturbance or natural disaster have become major problems. There are also the children caught in the turmoil of broken relationships within transnational families, with disputes over custody and relocation, with the hazards of international parental abduction, the problems of maintaining contact between the child and both parents, and the uphill struggle of securing cross-frontier child support. There has also been an upsurge in the cross-border placement of children through inter-country adoption or shorter term arrangements, with the risks inherent in a situation where some countries find it difficult to ensure family care for all of children while in others the demand for children from childless couples grows.

B. SCOPE AND OBJECTIVES OF THE 1996 CONVENTION:

The contracting parties to the earlier Conventions felt the need to improve the protection of children in international situations, wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children. Recalling the importance of international cooperation for the protection of children, confirming that the best interests of the child are to be a primary consideration, the parties to the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors felt

Appeal ruled that a permanent *ne exeat* clause in an English court order was sufficient to create “custody rights” under the Convention); *C. v. C.* [1989], 1 W.L.R. 654, 658 (Eng. C.A. 1988) (holding that an Australian decree granting “custody” to the mother and joint guardianship to both parents created “custody rights” because the order gave the father the right to determine the child’s place of residence); *Foxman v. Foxman* (Isr.) C.A. 5271/92 (H.C. 1992) (concluding that a parent whose consent was required before the child could be removed from the country had “custody rights” within the meaning of the Convention); In the Marriage of Jose Garcia Resina and Muriel Ghislaine Henriette Resina, Appeal No. 52, 1991 (Fam. Austl.) (holding by Australian court that a custody order providing reciprocal *ne exeat* rights for both parents created “rights of custody” in the otherwise non-custodial father). See also *Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997), where a U.S. court, dealing with subsequent litigation after a child removed from the United States had been ordered returned to the United States by a German court, quoted from the German court’s opinion: “[E]ven one who has only the right to object to the taking of the child to a foreign country has custody rights as per Article 3 and 5 of the Hague Convention.”; Silberman, *supra* note 18.

that there is need for revision of the provisions of this Convention. Hence with the objective of establishing common provisions to this effect, taking into account the CRC,²⁴ the Contracting States²⁵ agreed to ratify the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Convention).²⁶

The third of the Hague Conventions is much broader in scope than the first two, covering a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property. This Convention has the potential to bring justice and relief to parents and children dispersed all over the world including countries from the Islamic tradition.²⁷ The 1996 Hague Convention seeks to accomplish the following objectives:²⁸ a) To determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child; b) To determine which law is to be applied by such authorities in exercising their jurisdiction; c) to determine the law applicable to parental responsibility;²⁹ d) to provide for the recognition and enforcement of such measures of protection in all Contracting States; e) To establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

C. SALIENT FEATURES OF THE CONVENTION:

The following are some of the salient features of the Convention which are particularly helpful for the protection of the rights of the child at international level:

1. Parental disputes over custody and contact

The Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in

²⁴ Preamble, Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996.

²⁵ As of 15 November 2006, the Convention is in force for the following States: Australia, the Czech Republic, Ecuador, Estonia, Hungary, Latvia, Lithuania, Monaco, Morocco, Slovakia and Slovenia. It has been signed by all other EU States (except Malta), Switzerland and Romania; Bulgaria acceded to the Convention on 8 March 2006.

²⁶ Though the Convention was concluded on 19th October 1996, the actual enforcement and implementation of the Convention began from 1st January 2002.

²⁷ For instance Morocco is already a party to the 1996 Convention.

²⁸ Article 1(1), 1996 Convention.

²⁹ Article 1(2) *Id.*, "For the purpose of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parent, guardians or other legal representative in relation to the person or the property of the child."

different countries. The Convention avoids the problems that may arise if the courts in more than one country are competent to decide these matters. The recognition and enforcement provisions avoid the need for re-litigating custody and contact issues and ensure that decisions taken by the authorities of the country where the child has his or her habitual residence enjoy primacy.³⁰ The cooperation provisions provide for any necessary exchange of information and offer a structure through which, by mediation or other means, agreed solutions may be found.³¹

2. Reinforcement of the 1980 Child Abduction Convention

The 1996 Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term.³² It also adds to the efficacy of any temporary protective measures ordered by a judge when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.

3. Unaccompanied minors

The co-operation procedures within the Convention can be helpful in the increasing number of circumstances in which unaccompanied minors cross borders and find themselves in vulnerable situations in which they may be subject to exploitation and other risks. Whether the unaccompanied minor is a refugee, an asylum seeker, a displaced person or simply a teenage runaway, the Convention assists by providing for co-operation in locating the child, by determining which country's authorities are competent to take any necessary measures of protection, and by providing for cooperation between national authorities in the receiving country and country of origin in exchanging necessary information and in the institution of any necessary protective measures.

³⁰ Article 23 *Id.* mandates that measure taken by the authorities of a contacting state shall be recognized by operation of law in all other Contracting States except for the reasons contained in the same provision. In addition Article 26 mandates that if measures taken in one Contracting State and enforceable there require enforcement in another contracting State, they shall. Upon request by an interest party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the later state and they are required to declare enforceability or registration by way of simple and rapid procedure.

³¹ Chapter V (Articles 29 – 39) *Id.*

³² Article 50 *Id.* "This convention shall not affect the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, as between Parties to both Conventions. Nothing however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of child who has been wrongfully removed or retained or of organizing access rights."

4. Cross-frontier placements of children:

The Convention provides for cooperation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for instance under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *Kafala*,³³ which is a functional equivalent of adoption but falls outside the scope of the 1993 Inter-country Adoption Convention.³⁴

5. An integrated system

The Convention is based on a view that child protection provisions should constitute an integrated whole. This is why the Convention's scope is broad, covering both public and private measures of protection or care. The Convention overcomes the uncertainty that otherwise arises if separate rules apply to different categories of protective measure when both may be involved in the same case.

6. An inclusive system

The Convention takes account of the wide variety of legal institutions and systems of protection that exist around the world. It does not attempt to create a uniform international law of child protection; the basic elements of such a law are already to be found in the CRC.³⁵ The function of the 1996 Convention is to avoid legal and administrative conflicts and to build the structure for effective international cooperation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems having diverse cultural or religious backgrounds. It is of great significance that one of the first States to ratify the Convention was Morocco, whose legal system is set in the Islamic tradition.

³³ Global Legal Information Network, *Subject term index – Kafala*, available at [http://www.glin.gov/subjectTermIndex.action?search&searchDetails.queryType=BOOLEAN&searchDetails.queryString=mt:%5E%22Kafala%22\\$](http://www.glin.gov/subjectTermIndex.action?search&searchDetails.queryType=BOOLEAN&searchDetails.queryString=mt:%5E%22Kafala%22$) (Last visited on September 13, 2010) “Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until the child reaches majority. *Kafala* is considered a form of unilateral contract, and is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption. But unlike adoption, *Kafala* neither conveys inheritance rights nor any right to use the grantor's family name. Although *Kafala* is not identical with adoption, because of its close functional similarity, the term adoption should also be entered as a finding aid in any record to which *Kafala* is entered as a Subject Heading.”

³⁴ Article 3 (e), 1996 Convention “the placement of the child in a foster family in institutional care, or the provisions of care by *kafala* or an analogous institution”.

³⁵ The Convention on the Rights of Children was adopted by the United Nations General Assembly on 20th November 1989 and ratified by all Nations except the United States and Somalia. The United Nations General Assembly agreed to adopt the Convention into international law as an advisory resolution on November 20, 1989 and it came into force on

7. Monitoring and review

The Hague Conference has developed a unique system of “Post-Convention Services” in respect of its Children’s Conventions. The aim is to promote widespread ratification, to assist Contracting States to implement the Conventions effectively and to promote consistency and the adoption of good practices in the daily operation of the Conventions. Contracting States are both beneficiaries and partners in this continuing enterprise.

V. EXISTING LOOPHOLES IN THE 1996 CONVENTION

Our arguments under this section shall be advanced in a three pronged manner. We will discuss the “subjective best interest” criterion and how the same has led to the ineffective functioning of the Convention. We shall then suggest some reasons for the non-execution of the mandate of the Convention. We then discuss how the utility of the Convention is limited by the fact that only State-parties to the Convention are bound by it.

A. BEST INTEREST CRITERION – EXAMPLES OF SUBJECTIVITY AND IMPROPER IMPLEMENTATION

Article 13(b) of the Child Abduction Convention provides for a defence against return when there is “grave risk” that return would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” The position of law in USA reflects that this section has to be narrowly interpreted and therefore only in extreme cases of grave risk should the return be rejected. It is our submission that this important term “grave risk” has been subjectively interpreted by different courts to ensure that the right of return is not vested with non-citizens who moved the municipal courts for relief. This clearly shows national bias and how subjective best interest standard is being used to suppress the overarching objective of the Convention.

In *Friedrich v. Friedrich*,³⁶ the United States Court of Appeals for the Sixth Circuit captured the essence of the inquiry that should be made by a court faced with an Article 13(b) defence on a return application:

“We believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—

September 2, 1990, after it was ratified by the required number of nations. United Nations Convention on the Rights of Children, 1989, available at <http://www.crin.org/resources/treaties/CRC.asp?catName=International+Treatie> (Last visited on September 13, 2010).

³⁶ 78 F.3d 1060 (6th Cir. 1996).

e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”

This interpretation adopted by the court is strict and narrow. It would be surprising for us to note that another US court in another case has supported a different interpretation thereby suggesting that the best interest standards are vague and open to subjectivity.

In *Blondin v. Dubois*³⁷ the court held that since the children had become deeply rooted in the United States, sending them to the country in which they suffered abuse would present a grave risk of mental harm or place them in a painful situation. The court conceded that “France could shield the children from further problems” but insisted that France could not “protect them from the ordeal of being alienated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance.” By equating a ruling of “traumatic stress disorder” ensuing from return for further custody proceedings with “risk of psychological harm,” the court greatly extended the possibilities for non-return under the Convention. In addition, the Court of Appeals provided additional ammunition for would-be abductors by permitting consideration of whether the children were settled in their new environment following the abduction as an additional factor in the Article 13(b) “grave risk” analysis. This is a clear example of how one particular interpretation of the term “grave risk” under the Convention has been completely nullified by another decision.

B. AMBIGUITY SURROUNDING THE DEFINITION OF CUSTODIAL RIGHTS.

Another major issue that has come before various national courts is whether to regard a parent, who has visiting rights under a custody order that clearly restricts removal of the child, as having “custody rights” adequate to give a right of return. Most courts have interpreted Convention language providing that “rights of custody” include the “right to determine the child’s place of residence” to include a parent who has visiting rights along with the right to control relocation.³⁸ However, a few courts, including the decision of the Second Circuit in *Croll v. Croll*,³⁹ have held otherwise.

³⁷ *Blondin v. Dubois*, *supra* note 27.

³⁸ See e.g., *C v. C*, [1989] 1 W.L.R. 654, 658 (Eng. C.A. 1989) (where mother had custody but father and mother remained “joint guardians” and neither parent could remove the child from Australia without the other’s consent, the father possessed “custody” rights within the meaning of the Child Abduction Convention); *Foxman v. Foxman*, 92(3) P.D. 2272 (Isr.) (“custody rights” under the Child Abduction Convention include situations

In *Croll*, a custody order was allowed by the Hong Kong court and the same granted custody to the mother while the father was given the right of “reasonable access”. The same judgment also said that the child cannot be removed until she attains the age of 18. Without respecting this, the mother removed the child to the United States and refused to return to Hong Kong. The father then filed a petition in the United States for return of the child to Hong Kong. Because only a violation of “custody rights” (and not “rights of access” alone) is sufficient to trigger the return remedy under the Convention, the issue facing the court was whether a non-custodial parent’s right of access together with a *ne exeat* clause conferred “custody rights” within the meaning of the Child Abduction Convention.

The majority in the decision found that the *ne exeat* clause conferred only a veto power upon the father and did not give him a “right to determine a child’s place of residence”. The majority found corroboration in one early article written shortly after the Diplomatic Session opining that breach of a non-removal clause should not be interpreted as a breach of custody rights. The court disregarded more compelling authority in the other direction, with respect to both the precedents and scholarship as well as to the construction ratified by the Special Commissions that review the operation of the Convention.

In *Thomson v. Thomson*,⁴⁰ the first Child Abduction Convention case to come before the Supreme Court of Canada, a mother with a provisional order of temporary custody was restricted from removing the child from Scotland until the last hearing. Although an order of return was upheld, the Canadian Supreme Court believed that it was the Scottish court that had the “rights of custody” that were breached.

In a later case, *D.S. v. V.W.*,⁴¹ the Canadian Supreme Court continued from *Thomson* to decide that an implicit restriction on travel was insufficient to convert a non custodial parent’s “access rights” into “custody rights,” and hence a father who had a final custody order from Maryland was free to travel without any apprehension of an order of return under the Child Abduction Convention. Moreover, Justice L’Heureux-Dubé, writing the opinion in *D.S. v. V.W.*, also expressed the view that even a clear non-removal clause would not give the non-custodial parent “rights of custody.” This ruling was in concurrence with her view that custodial parents have all the rights and responsibilities with respect to the child, including the right to decide the child’s home.⁴²

where parental consent is required before a child is taken out of the country); David S. v. Zamira S., 574 N.Y.S. 2d 429, 432 (N.Y. Fam. Ct. 1991) (custody order containing a *ne exeat* clause creates custody rights in father);

³⁹ JT 2000 (7) SC 450.

⁴⁰ AIR 1984 SC 1224.

⁴¹ AIR 1987 SC 3.

⁴² (1998) 1 SCC 112.

C. NON-ENFORCEMENT OF JUDGMENT/ ORDERS PASSED BY THE COURTS UNDER THE CONVENTION AND THE PROBLEM OF DELAY

A major impediment lies in the growing number of return orders, which have remained unenforced. In several Convention countries, parental child abduction is not considered a criminal act. Return orders are not enforceable. In Germany, for example, appeal courts have no power of execution. A higher court order can only be executed by the *Amtsgericht's* judge who had heard the case initially. This enforcement procedure can take several months and does not always end in a return order being made. In 1994 in the *Nusair case*,⁴³ the appeal court in Cologne had ordered the child's return, but the local *Amtsgericht* refused to enforce it.⁴⁴

The U.S State Department, in its 2005 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, expressed concern about enforcement problems in Germany, stating that:⁴⁵

“Since 2000, Germany has demonstrated strong performance regarding applications for the return of children to the U.S. Despite this, we continue to observe unwillingness on the part of some judges, law enforcement personnel and others within the child welfare system in Germany to vigorously enforce some German orders granting parental access in both Convention and non-Convention access cases. American parents often obtain favorable court judgments regarding access and visitation, but the German courts' decisions can remain unenforced for years.”

One of the intended merits of the Convention was the speed of its proceedings. But, some countries are patently slower in dealing with Hague applications than others. This is particularly the case where, as described above, court proceedings become in reality an argument over custody. (The problem of delay is compounded when cases are first heard in lower courts and appeals can then be lodged in higher courts). Once again citing the example of Germany, the involvement of the Youth Authority, plays a major role in proceedings in that country. Local judges tend to rely on evidence, and hold up matters by demanding the production of welfare reports and the children. While in principle this could give a more complete picture of the children's condition, it is nonetheless an important factor resulting in delay.⁴⁶

⁴³ JT 2000 (2) SC 258.

⁴⁴ 2004 (1) HLR 212.

⁴⁵ 2004 (1) HLR 468.

⁴⁶ 2005 (1) HLR 428.

D. LIMITED ACCEPTANCE OF THE CONVENTION

“We need an alternative source, when dealing with countries who are non-signatories to the Hague Child Abduction Convention. I’m not a diplomat or law-enforcement officer. I am just a mom. But I had to learn how to talk to foreign authorities. It becomes an obsession. You want to know your child is safe.”⁴⁷

The Middle Eastern and North African countries, other than Israel, are not parties to the Hague Convention. This situation concurrently provides a safe refuge for the abducting parent and a legal black hole for the child and the other parent. Thus, there is a wide hole in the overall ability to protect the rights of internationally abducted children. These countries are ‘protected harbours’ that have traditionally allowed abducting Muslim fathers to escape international authority and get away with the kidnapping. Therefore, if a child is abducted to a country relying upon *Shari’a* in family law matters by his or her father, there is little legal recourse available to the mother. Women and children in Muslim-majority countries have harshly limited legal rights, particularly as applicable to divorce, custody, visitation, and travel.⁴⁸ It is doubtful that these countries will consent to the Hague Convention as it currently stands since adhering to the Convention would potentially force these countries to breach their own laws.

The child which is born to a Muslim parent is, under *Shari’a*, a Muslim. The father of the Muslim child has the legal obligation to guarantee that the child is raised as a good Muslim along with his education. Therefore, one of a child’s interests is being raised a good Muslim, which the father must ensure. Muslim countries decide the best interests of the child according to religious and social values, and this generally leads them to conclude that the best interests of the child demands that the child be raised in the Muslim nation concerned. These cultural biases and laws in Islamic countries raise problems for non-Muslim foreign parents.⁴⁸ It would therefore be uncommon that a court in a Muslim-majority country relying on *Shari’a* for matters of family law would grant custody or demand the return of a child to a non-Muslim mother over a Muslim father.

VI. INDIAN POSITION – APEX COURT DECISIONS RELATING TO HAGUE CONVENTION

*India is not a signatory to the Hague Convention. The Supreme Court has observed in the case of Sumedha Nagpal v. State of Delhi*⁴⁹ as under:

“No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. No court

⁴⁷ Mandy Jane Collins v. James Michael Collins, (2006) 2 HLR 446.

⁴⁸ (1999) 2 SCC 228.

⁴⁹ (1998) 1 SCC 112.

welcomes such problems or feels at ease in deciding them. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child.”

The Supreme Court in *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu*⁵⁰ and *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*⁵¹ exercised summary jurisdiction in returning the minor children to the country of their parent. In a later case of *Dhanwanti Joshi v. Madhav Unde*⁵², the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters and India being a country which is not a signatory to the Hague Convention, the law is that the Court within whose jurisdiction the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance. It was in this case the Supreme Court changed the earlier view and did not exercise summary jurisdiction in returning children to its parent and observed that the welfare and best interest of the child or children must be of paramount consideration. This observation by the Supreme Court was followed in a later decision by the Supreme Court in the case of *Sarita Sharma v. Sushil Sharma*.⁵³

In 2004, the Supreme Court, in the case of *Sahiba Ali v. State of Maharashtra*⁵⁴ declined to grant the custody of her children to the mother but at the same time issued directions for visitation rights in the interest and welfare of the minor children. In another case of *Kumar v. Jahgirdar v. Chethana Ramatheertha*⁵⁵, the Supreme Court came to the conclusion that a female child of growing age needs company more of her mother compared to the father and remarriage of the mother is not a disqualification in safeguarding interest of the child. Further, in a contemporary case of *Paul Mohinder Gahun v. State of NCT of*

⁵⁰ Report No. 218, March 2009, Government of India, Law Commission of India, Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980).

⁵¹ *Croll v. Croll*, *supra* note 24 (quoting *Croll v. Chiu*, No. 7211 of 1998, Order at 1 [Dist. Ct. H.K. Spec. Admin. Reg., Feb. 23, 1999]).

⁵² *Thomson v. Thomson*, *supra* note 23.

⁵³ *D.S. v. V.W.* *supra* note 23.

⁵⁴ *Per* Justice L’Heureux-Dubé, *Id.*, “Rights of custody within the meaning of the Act cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child’s place of residence, but, on the contrary, must be interpreted in a way that protects their exercise.”

⁵⁵ *Child Abduction Uses and Abuses of the Hague Convention*, Statement of Lady Catherine Meyer, 152nd Session, October 1, 1998.

*Delhi*⁵⁶ the Delhi High Court refused to grant custody of the child to the father and observed that the question of conflict of laws and jurisdictions must take a back seat in preference to what lies in the interest of the minor. In a contemporary decision dated March 3, 2006 of the High Court of Bombay, at Goa, the Court declined to issue a writ of habeas corpus thereby not allowing the custody of a girl child to her mother while relegating the parties to normal civil proceedings in Goa for a decision on the point of the custody of the child without disturbing the custody with the father in Goa. The High Court clearly declined the return of the child to Ireland in exercise of its writ jurisdiction and held that this question requires analysis of disputed question of facts.⁵⁷

Indian laws that deal with the principles of custody of children are not too many. To name a few:

- The Hindu Marriage Act, 1955
- The Hindu Minority and Guardianship Act, 1956
- The Guardians and Wards Act, 1890

Section 26 of the Hindu Marriage Act, 1955, states that a court can pass orders and make such provisions in the decree in any proceedings under the Act with respect to the custody, maintenance and education of minor children upon an application for that purpose as expeditiously as possible. Section 4(a) of the Hindu Minority and Guardianship Act, 1956 defines “minor” to mean “a person who has not reached the age 18 years”. And, under the Act, the custody of a child is given to any person, be it the child’s natural parents or guardian (appointed by the court) with the prime importance given to the welfare of the child.

A landmark case that decided the same was *Githa Hariharan v. Reserve Bank of India*.⁵⁸ The High Court by way of the writ of habeas corpus can order custody of a minor at the behest of a parent applying for the same, with predominant focus placed on the welfare of the child. In *Dhanwanti Joshi v. Madhav Unde*⁵⁹, the Supreme Court referred to the Hague Convention on the Civil Aspects of International Child Abduction and observed as follows:

“In this connection, it is necessary to refer to the Hague Convention of 1980 on “Civil Aspects of International Child Abduction”. As of today, about 45 countries are parties to this Convention. India is not yet a signatory. Under

⁵⁶ *Id.*

⁵⁷ As quoted in The Law Office of Jeremy D. Morley, *Notes on the Enforcement of Child Abduction Law in Germany*, available at <http://www.international-divorce.com/Enforcement-germany.htm> (Last visited on September 13, 2010).

⁵⁸ Catherine Meyer, *supra* note 57.

⁵⁹ Timothy W. Maier, *Kids Held Hostage*, INSIGHT MAGAZINE, March 9, 1998, available at <http://www.insightmag.com/main.cfm?include=detail&storyid=215281> (Last visited on September 13, 2010) (citing Maureen Dabbagh, mother of Nadia Dabbagh, abducted at the age of 3 to Syria, and later to Saudi Arabia, by her father, Hisham Dabbagh).

the Convention, any child below 16 years who had been “wrongfully” removed or retained in another contracting State, could be returned back to the country from which the child had been removed, by application to a central authority.”

From the above, it can be observed that, the Indian Courts while deciding cases pertaining to minor children have not followed a uniform pattern. There also is an absence of progressive development in the subject. If some matters are decided with prime importance placed on the welfare of the child, some are based on the technicalities of various provisions of law and jurisdictional tiffs. The reason cited for this can be the absence of any law that governs this aspect. This only will affect the condition both physical and emotional of the child, who is caught in the fire of shattered relationships. This situation only shows that the time has come for some international perspective in this regard. The fact of India not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction may have a negative influence on a foreign judge who is deciding on the custody of a child. Without the guarantee afforded by the Hague Convention to the effect that the child will be swiftly returned to the country of origin, the foreign judge may be reluctant to give permission for the child to travel to India. As a logical upshot, India must become a signatory to the Hague Convention and this will, in turn, bring the prospect of achieving the return to India of children who have their homes in India.⁶⁰

VI. CONCLUSION

The Hague Convention establishes that the law of the country in which the child was habitually resident governs decisions as to whether custody rights existed at the time of the wrongful retention, and further, permits judicial notice to be taken of that country’s law. Accordingly, the implementation of an international Convention will necessarily reflect certain national characteristics of the respective States. The structure of the court systems in various countries will obviously affect how the Convention is interpreted. It is of vital importance to the effective implementation of the Conventions and the deterrence of abductions that the judicial and other authorities considering these difficult cases recognize that similar authorities in other states are as competent as they are to decide the best interests of the child and in a better position to do so when they are the authorities with the closest connection to the child, the family, and the situation. Also, in view of the fact that the Convention is not self-executing, the implementing legislation itself will reflect details not expressly covered by the Convention, and in the implementation process, States may express views as to the meaning of the Convention.

⁶⁰ Lara Cardin, *The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One*, 20 HOUSTON J. INT’L L. 141, 157-158 (1997).

⁶¹ *Id.*

⁶² Silberman, *supra* note 18.

⁶³ Cindy Loose, *Indifference Adds To Parents’ Horror; U.S. Accused of Failing to Help in Abductions*, WASHINGTON POST, December 24, 2000.

In addition to “reversing” abductions that have taken place, the Convention helps deter future abductions because parties are made to understand that wrongfully removing a child to another country will not give the abductor a new forum in which to get the custody dispute resolved. One particular advantage of the Convention is that it applies whenever there is a “breach of rights of custody” -which means that it can be used even when there is no formal custody order in effect.⁶² However, according to a report in 1998 it was found that in cases in which Convention can be used, return of the child or a grant of visitation rights only occurs about 24% of the time.⁶³ Yet, the Convention’s record in its first twenty years should be applauded. The Convention has dramatically advanced both the deterrence of international abductions and the likelihood of having children returned. The crafting of the “return remedy” offers a real and pragmatic tool for redressing child abductions. Its application to pre-decree situations – that is, situations where a marriage is deteriorating but there is no formal custody order – has been critical. The Convention has also had an impact in securing voluntary returns and has deterred parents from unlawfully removing children in the first place. Combined with the institutionalization of Central Authorities through which to track children and route information, the Child Abduction Convention has made real headway to secure cooperation in returning children who have been wrongfully taken across national borders.⁶⁴

The intention behind the private international law treaties is not to take children permanently away from their abductors but to restore a situation in which children may have regular access to all the basic necessities of life. For these reasons, neither of the treaties focuses on the penal punishment for the abductor. This is not only because of the paucity of international criminal law⁶⁵ but also because international child abduction is a difficult situation criminalization of which may aggravate and drive the abductor and abducted child further into hiding. The difficulties of removal and possibility of return are regarded as sufficient deterrent and some even maintain that penal proceedings may be counterproductive. This results in a difficult situation. The Conventions rely upon their successes to act as a deterrent; but where the Conventions have not been significantly successful, they fail further, because their potency as instruments of deterrence has been weakened.⁶⁶

The purpose of the CRC was to establish minimum standards for the recognized human rights of children and to encourage governments to uphold and protect those rights. The above mentioned roadblocks in enforcement and

⁶⁴ Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics And Other Issues*, 33 N.Y.U. J. INT’L L. & POL. 221, 223 (2000); Carol S. Bruch, *The Central Authority’s Role Under The Hague Child Abduction Convention: A Friend In Deed*, 28 FAMILY L.Q. 35 (1994).

⁶⁵ The reference is to the lack of provisions against child abduction in International Criminal Law the investigation is not carried out by any International Criminal Law Agency, but at many levels, like - (1) Local Authorities (2) FBI (3) INTERPOL (4) Office of Children’s Issues—Department of State, etc.

⁶⁶ *Id.*, 91.

the low number of signatories considerably weakens the effectiveness of the Convention. To declare countries that do not return abducted children to the country from which they were taken to be violating human rights would allow the United States to take the necessary steps toward remedying the problem.⁶⁷

The success of the 1980 Convention depends on the interpretation and implementation by individual Convention States and the ability of those States to bring their own national laws and legal traditions into conformity with the obligations imposed by the Convention. The underlying issues raised both by the return remedy of the Convention and the eventual custody hearing are loaded with subjective notions of morality and sociology as well as nationalism, which are very contextual. The 1996 Convention eliminates the concept of continuing jurisdiction in international custody cases.

⁶⁷ Clemens, *supra* note 4.