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I. INTRODUCTION

Each year more than 200,000 children in the United States are abducted by family members.¹ When a child is abducted across international borders, the difficulties are compounded.² Since the late 1970s, The Department of State's Office of Children's Issues has been contacted in approximately 16,000 cases involving children who were either abducted from the United States or prevented from returning to the U.S. by one of their parents.³

At the Hague Conference on Private International Law in 1976, twenty three nations agreed to draft a treaty to deter international child abduction.⁴ The Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") was adopted on October 24, 1980 by the Fourteenth Session of The Hague Conference by a unanimous vote of the States which were present.⁵ Canada, France, Greece and Switzerland were the first four States to sign the Convention, immediately following the Conference.⁶ The Convention was incorporated into United States law and came into force in the U.S. on July 1, 1988.⁷

¹ See Press Release, White House, *Fact Sheet: Committed to Keeping America's Children Safe* (Aug. 6, 2002), available at <http://www.whitehouse.gov/news/releases/2003/08/print/20020806.html> (last visited Oct. 9, 2005) [hereinafter White House Fact Sheet].

² See U.S. Dep't State, *International Child Abduction*, available at http://travel.state.gov/family/abduction/abduction_580.html (last visited Oct. 9, 2005).

³ See *id.*

⁴ See U.S. Dep't State, *Hague Convention Abduction Issues One Possible Solution – The Hague Convention* available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html (last visited Oct. 9, 2005) [hereinafter One Possible Solution].

⁵ See Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, ¶ 1 (Apr. 1981), available at <http://hcch.e-vision.nl/upload/expl28.pdf> (last visited Oct. 9, 2005) [hereinafter Pérez-Vera]. The states present and voting for the adoption of the Convention were: Australia, Austria, Belgium, Canada, Czechoslovakia, Finland, France, Germany, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela and Yugoslavia.

⁶ See *id.*

⁷ See One Possible Solution, *supra* note 4.

The Convention reflects a worldwide concern about the harmful effects that parental kidnapping has on children and a strong desire for an effective deterrent to such conduct.⁸

Currently, there are seventy-five international states contracting with the Convention.⁹

This article will discuss the issue of international child abduction, where a petition for return has been brought under The Hague Convention, and the respondent contends that the abduction was a result of domestic violence and/or child abuse. First, Part II of the article will provide extensive background on the provisions of The Hague Convention and relevant United States laws. Next, Part III will discuss cases where the courts have heard evidence of domestic violence and/or child abuse and their outcomes. Third, the article will discuss some of the advantages and challenges of the Convention as it is currently adopted. Finally, some recommendations for improvement will be made.

II. BACKGROUND

A. The Hague Convention on the Civil Aspects of International Child Abduction

The intent of the Convention is “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt

⁸ See Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494 (March 26, 1986).

⁹ See Hague Conference on Private International Law: Status Table Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (June 2005), *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last visited Jan. 4, 2006) [hereinafter Convention Status Table]. The contracting states are: Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Republic of Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Serbia and Montenegro, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela, Zimbabwe.

return to the State of their habitual residence.”¹⁰ Thus, the Convention has two objectives. First, it seeks to prevent the international removal of children by creating a system of close cooperation among the judicial and administrative authorities of the Contracting States and is not concerned with the law applicable to the custody of children.¹¹ Second, it has the purpose to secure the immediate reintegration of the child into his or her habitual environment.¹² While each of these objectives corresponds to a specific idea of what constitutes the best interest of the child,¹³ this is not the primary concern of the Convention, which is to secure the prompt return of a child to their State of habitual residence.

The Convention assumes that questions of custody rights, including consideration of what is in the best interest of the child, should take place before competent authorities in the State where the child had their habitual residence prior to removal.¹⁴ It may be argued that the Convention’s object in securing the return of the child ought to be subordinate to a consideration of the child’s best interests,¹⁵ however, “a legal standard for the best interests of the child is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than

¹⁰ The Hague Convention on the Civil Aspects of International Child Abduction, (25 Oct. 1980) *available at* <http://patriot.net/~crouch/hague.html> (last visited Oct. 9, 2005) [hereinafter Hague Convention].

¹¹ *See* Pérez-Vera, *supra* note 5, at ¶ 35.

¹² *See id.* at ¶ 25.

¹³ *See id.*

¹⁴ *See id.* at ¶ 19.

¹⁵ *See id.* at ¶ 20.

a concrete juridical standard.”¹⁶ This view has been followed by courts in a number of countries, including the United States.¹⁷

The Convention applies only to wrongful removals or retentions between Contracting States occurring after its entry into force in those States.¹⁸ The removal or retention of a child is considered wrongful where it is in breach of rights of custody, which were actually exercised, under the law of the State in which the child was habitually resident immediately prior to the removal or retention.¹⁹ The Convention provides for four situations where a court in a Contracting State may at their discretion refuse to order the return of a child:²⁰

1. a period of more than one year has elapsed since the date of the wrongful removal or retention;²¹
2. the person claiming that the child was wrongfully removed or retained was not actually exercising custody rights or has subsequently acquiesced to the child’s removal or retention;²²

¹⁶ See *id.* at ¶ 21 citing *Questionnaire and Report on International child abduction by one parent*, prepared by Mr. Adair Dyer, Prel. Doc. No. 1, 22-23 (Aug. 1977).

¹⁷ See *Thompson v. Thompson*, [1994] 119 D.L.R. 4th 253 (Can.) (The Supreme Court of Canada held that “it was not the function of a Court of the requested state to concern itself with the best interests of the child as the Convention anticipated that that decision would be made by the home state); see also *B v. El-B*, [2003] Fam. 299 (U.K.) (The court held that whether it was in the children's best interests to return to Lebanon for their future was to be decided under the Sharia law); see also *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) citing Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,510 (the exceptions under the convention were not intended to be used by defendants as a vehicle to litigate, or relitigate, the child’s best interests).

¹⁸ See Hague Convention, *supra* note 10, at art. 35.

¹⁹ See Hague Convention, *supra* note 10, at art. 3.

²⁰ See Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,509; see also Pérez-Vera, *supra* note 5, at ¶ 113.

²¹ See Hague Convention, *supra* note 10, at art. 12. This provision was an attempt to acknowledge that, even after a wrongful removal or retention, a child will at some point become “settled in its new environment.” See Pérez-Vera, *supra* note 5, at ¶ 107. Once this has occurred, a return should take place “only after an examination of the merits of the custody rights exercised over it – something outside of the scope of the Convention.” See *id.*

3. there is a grave risk that returning the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;²³ or
4. the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.²⁴

The burden of proving the necessary facts is imposed on the person who opposes the return of the child.²⁵ A finding that one or more of the exceptions are applicable does not, however, make refusal of a return order mandatory.²⁶ The courts retain discretion to order the child returned even if they consider that one or more of the exceptions apply.²⁷

Following a long-established tradition of the Hague Conference, the Convention avoided defining many of its terms,²⁸ leaving them to the courts of the Contracting States to interpret.²⁹ This includes terms such as habitual residence, removal, retention, and grave risk of harm. Also not clearly stated, are the burdens of proof required to find one or more of the exceptions to be applicable. Not surprisingly, the result is inconsistencies in the application of the Convention

²² See Hague Convention, *supra* note 10, at art. 13(a).

²³ See *id.* at art. 13(b).

²⁴ See *id.* at art. 20.

²⁵ See Pérez-Vera, *supra* note 5, at ¶ 114.

²⁶ See Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,509.

²⁷ See *id.*

²⁸ See Pérez-Vera, *supra* note 5, at ¶ 53 (The only terms defined in the Convention are those in article 5 concerning custody, where it was absolutely necessary to establish the scope of the Convention's subject matter).

²⁹ See Nigel Lowe, *International Forum on Parental Child Abduction: Hague Convention Action Agenda Held Sept 15-15, 1998* (1999), available at http://www.missingkids.com/en_US/publications/NC84.pdf (last visited Oct. 9, 2005) [hereinafter Lowe–Action Agenda].

both between Contracting States and within courts of Contracting States, such as the United States.³⁰

There is agreement that the exceptions are to be interpreted narrowly.³¹ It was generally believed that the courts in the Contracting States would understand and fulfill this objective and allow exceptions only in clearly meritorious cases, and only when the person opposing the return had met the burden of proof.³²

The relatively small number of return applications that have been refused on the basis of Articles 13(b) and 20 appear to confirm this.³³ An analysis of the applications made in 1999 under the Convention showed that only eleven percent of the 954 return applications involving 1,394 children resulted in judicial refusal to return the child.³⁴

³⁰ See Office of Juvenile Justice and Delinquency Prevention (OJJDP), *A Family Resource Guide on International Parental Kidnapping*, 50 (2002), available at <http://www.ncjrsorg/pdffiles1/ojjdp/190448.pdf> (last visited Oct. 9, 2005) [hereinafter OJJDP Family Resource Guide].

³¹ See Pérez-Vera, *supra* note 5, at ¶ 34 (exceptions are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter); see also Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,509 (any exception must be drawn narrowly lest their application undermine the express purpose of the Convention – to effect the prompt return of abducted children).

³² See Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,509.

³³ See Hague Conference on Private International Law, Conclusions and Recommendations of the Fourth Meeting of the Special Committee to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001) (20 Apr. 2001), available at http://hcch.e-vision.nl/upload/concl28sc4_e.pdf (last visited Oct. 9, 2005). Article 13(b) provides that a court in a Contracting State may, at their discretion, refuse to order the return of a child if there is a grave risk that returning the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; Article 20 provides for similar discretion where the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. See The Hague Convention on the Civil Aspects of International Child Abduction, arts. 13(b), 20 (25 Oct. 1980), available at <http://patriot.net/~crouch/hague.html> (last visited Oct. 9, 2005).

³⁴ See Nigel Lowe et al., *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 10, 12 (Rev. Mar. 2002), available at <http://hcch.e-vision.nl/upload/abd2001pd3e.pdf> (last visited Oct. 9, 2005) [hereinafter Lowe–Statistical Analysis].

While Article 13(b) was the reason most often relied upon for refusal to return, only twenty-one judicial refusals were granted on this basis.³⁵ In order for a person opposing a child's return to show that the return would place the child in an "intolerable situation" the person opposing the return must show that the risk to the child is "grave" and not merely serious.³⁶ It is interesting to note that while thirty percent of the parents removing a child were male and sixty-nine percent female,³⁷ ninety percent of the applications refused on the basis of Article 13(b) involved female taking persons.³⁸ Since the overwhelming number of victims of domestic violence are female,³⁹ this may provide one explanation for the high percentage of female taking persons opposing the return of their child on this basis.

Article 20 was not relied upon in any case studied as a reason for refusing a return application.⁴⁰ This may be attributed to the fact that this rule was incorporated into the Convention as a "public policy clause,"⁴¹ which has a difficult burden to meet. The intent of Article 20 was to include a provision "that could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court and offend all notions of due process."⁴²

Whereas the Convention is only enforceable between Contracting States it does not seek to establish a system for the return of children that is exclusively for the benefit of the

³⁵ *See id.* at 17.

³⁶ *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,510.

³⁷ *See* Lowe-Statistical Analysis, *supra* note 34, at 8 (numbers do not total 100% due to incomplete data available).

³⁸ *See id.* at 18.

³⁹ *See* ABA Comm'n on Domestic Violence, *available at* <http://www.abanet.org/domviol/stats.html> (last visited Nov. 10, 2005) (90 - 95% of domestic violence victims are women).

⁴⁰ Lowe-Statistical Analysis, *supra* note 34, at 18.

⁴¹ *See* Pérez-Vera, *supra* note 5, at ¶ 31.

⁴² *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,510.

Contracting States.⁴³ It is put forward rather as an additional means for helping persons whose custody or access rights have been breached.⁴⁴ The Convention has begun to influence some non-Hague countries where courts now look for guidance to the non-hostile pattern of resolution employed in Hague cases.⁴⁵ The Convention's increasing success is also encouraging more countries to become party to the convention.⁴⁶

B. International Child Abduction Remedies Act

The International Child Abduction Remedies Act ("ICARA")⁴⁷ was enacted to establish procedures for the implementation and enforcement of The Hague Convention in the United States.⁴⁸ ICARA does not provide any substantive rights; it is merely a procedural mechanism allowing access to the remedies provided in the Convention in the United States.⁴⁹ The provisions of ICARA are in addition to and not in lieu of the provisions of the Convention.⁵⁰ Courts must therefore look to the Convention as well as ICARA when determining claims brought under ICARA.⁵¹

⁴³ See Pérez-Vera, *supra* note 5, at ¶ 139.

⁴⁴ See *id.*

⁴⁵ See U.S. Dep't State Bureau of Consular Affairs, *International Child Abduction* (1995), available at <http://dosfan.lib.uic.edu/ERC/population/children/9501.html> (last visited Oct. 9, 2005) [hereinafter Consular Affairs].

⁴⁶ See *id.*

⁴⁷ International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-1161 (2005).

⁴⁸ See *id.* at § 11601(b)(1).

⁴⁹ Scott M. Smith, J.D., Annotation, *Construction and Application of International Child Abduction Remedies Act* (44 U.S.C. §§ 11601 ET SEQ.), 125 A.L.R. FED 217 (2005) [hereinafter Smith].

⁵⁰ See International Child Abduction Remedies Act § 11601(b)(2).

⁵¹ Smith, *supra* note 49.

An action brought under the Convention is a civil action brought by the person seeking the return of a child (petitioner) in any court authorized to exercise jurisdiction in the place where the child is located at the time the petition is filed.⁵² ICARA provides that the courts of the States and the United States district courts shall have concurrent original jurisdiction over actions arising under the Convention.⁵³

A petitioner must establish by a preponderance of the evidence that a child has been wrongfully removed or retained, within the meaning of the Convention, to bring an action for the return of the child under the Convention.⁵⁴ A respondent who opposes the return of the child has the burden of establishing:

- (A) by clear and convincing evidence that one of the exceptions set forth in article 13(b) or 20 of the Convention applies; and
- (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.⁵⁵

Following the example set forth in the Convention, ICARA also does not define what would constitute a “grave risk of harm” or a “violation of fundamental principles relating to the protection of human rights and fundamental freedoms” in the United States for the exceptions provided for in Articles 13(b) or 20 of the Convention to be applicable. While providing some additional standards and guidance over that which is provided in the Convention, ICARA continues to leave significant discretion in the hands of the courts.

⁵² See International Child Abduction Remedies Act § 11603(b).

⁵³ See *id.* at § 11603(a).

⁵⁴ See *id.* at § 11603(e)(1)(A).

⁵⁵ *Id.* at § 11603(e)(2).

C. International Parental Kidnapping Crime Act

In addition to the civil actions and remedies provided under the Convention, the United States has enacted the International Parental Kidnapping Crime Act (“IPKCA”),⁵⁶ making international parental kidnapping a federal felony crime.⁵⁷

IPKCA provides that:

whoever removed 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.⁵⁸

International parental kidnapping is also a crime under state law, although the provisions of state laws vary.⁵⁹

IPKCA provides three affirmative defenses. First, the defendant was acting within the provisions of a valid custody or visitation order;⁶⁰ second, the defendant was fleeing an incidence or pattern of domestic violence;⁶¹ and third, the defendant failed to return the child because of circumstances beyond his or her control, notified or made reasonable attempts to notify the other parent within twenty four hours, and returned the child as soon as possible.⁶²

⁵⁶ International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (Apr. 30, 2003).

⁵⁷ See OJJDP Family Resource Guide, *supra* note 30, at 73.

⁵⁸ International Parental Kidnapping Crime Act § 1204(a).

⁵⁹ See OJJDP Family Resource Guide, *supra* note 30, at 69.

⁶⁰ See International Parental Kidnapping Crime Act § 1204(c)(1).

⁶¹ See *id.* at § 1204(c)(2).

⁶² See *id.* at § 1204(c)(3).

IPKCA is not intended to detract from The Hague Convention,⁶³ but rather provide an additional or alternative remedy. The civil and criminal justice systems serve different purposes with respect to child abduction.⁶⁴ The former serves to return the child, while the latter serves to punish the abductor.⁶⁵ Criminal charges are aimed at the wrongdoer and do not address child recovery.⁶⁶ Although a child may be located and recovered in the course of a criminal investigation, a parent cannot rely on the criminal process for a child's return.⁶⁷ Ordinarily a parent must pursue civil means to locate and recover a child at the same time as a prosecutor is pursuing a criminal investigation.⁶⁸

IPKCA expresses Congress' sense that, where applicable, the Convention should be the option of first choice for a parent who seeks the return of a child who has been removed.⁶⁹ Where The Hague Convention is not applicable, because the child has been removed to or retained in a non-Contracting State, a parent may be criminally charged under IPKCA and if the abductor has fled the country to avoid prosecution extradition may be sought for federal and state violations.⁷⁰ Further, criminal prosecution of an individual may be pursued under IPKCA after a child has been returned pursuant to Hague Convention proceedings.⁷¹

⁶³ See International Parental Kidnapping Crime Act § 1204(d).

⁶⁴ See Patricia N. Hoff, *Family Abduction: Prevention and Response*, 99 (2002), available at http://www.missingkids.com/en_US/publications/NC75.pdf (last visited Oct. 9, 2005) [hereinafter Hoff].

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.* at 100.

⁶⁹ See OJJDP Family Resource Guide, *supra* note 30, at 74.

⁷⁰ See Hoff, *supra* note 64, at 99.

⁷¹ See *United States v. Ventre*, 338 F.3d 1047, 1054 (9th Cir. 2003), *cert. denied*, *Ventre v. U.S.*, 540 U.S. 1085 (2003).

It is important to note that IPKCA is the only United States statute that makes a specific reference to domestic violence in connection with international parental abduction.⁷²

III. DISCUSSION

A. When is There a Grave Risk of Harm?

Under the Convention, a Court may deny a request to return a child if 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.”⁷³ Article 13(b) has been cited as a defense to not returning a child to their country of habitual residence in forty-nine cases⁷⁴ of Hague Convention petitions brought in the United States. The courts have found that the standard required under Article 13(b) has been met in only ten of these cases.⁷⁵ In the remaining thirty-nine cases, the court either ordered the child(ren) returned to the Hague petitioner or dismissed the petition and refused the return of the child(ren) on other grounds.⁷⁶

⁷² See International Parental Kidnapping Crime Act § 1204(c)(2).

⁷³ Hague Convention, *supra* note 10, at art. 13(b).

⁷⁴ See Hague Conference on Private International Law: The International Child Abduction Database (INCADAT) Case Law Search, available at <http://212.206.44.26/index.cfm?fuseaction=convtext.showDetail&lng=1> (last visited Jan. 5, 2006) [hereinafter INCADAT Database].

⁷⁵ See *id.* The cases where the courts found that the standard under article 13(b) had been met and refused the return of the child(ren) are: *D'Assignes v. Escalante*, No. BD 051876 (Cal. Super. Ct. 1991), *Steffen F. v. Severina P.*, 966 F. Supp. 922 (D. Ariz. 1997), *In re K. v. K.*, No. C 97-0021 SC (N.D. Cal. 1997), *Dietschi v. Dietschi*, No. 98-2-14797-1 KNT (Wash. Super. Ct. 1998), *T. v. F.*, (Conn. Super. Ct. 1998), *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999), *Dimer v. Dimer*, No. 99-2-03610-7SEA (Wash. Super. Ct. 1999), *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000), *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001), *Danaipour v. McLarey* 386 F.3d 289 (1st Cir. 2004).

⁷⁶ See *id.* In most of the cases where the courts refused the return of the child(ren) to the Hague petitioner, the court found that the Hague petitioner had not demonstrated that the child had been a habitual resident of the state from which they had been removed and therefore the petitioner could not rely on the remedies of The Hague Convention.

Friedrich v. Friedrich,⁷⁷ is viewed as a foundational case in the United States for defining a “grave risk of harm.” In *Friedrich*, the Sixth Circuit Court of Appeals stated (in dicta) that they believed

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--*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.⁷⁸

The United States Department of State stated that an “example of an ‘intolerable situation’ is one in which a custodial parent sexually abuses the child.”⁷⁹ If a parent removes or retains the child to “safeguard it against further victimization” the court may deny the petition of an abusive parent to return the child.⁸⁰ “Such an action would protect the child from being returned to an intolerable situation and subjected to a grave risk of psychological harm.”⁸¹ Once again, the discretion left to the courts should be noted. There is no clear requirement that a petition be denied in the situation where there is evidence of child abuse.

In *Nunez-Escudero v. Tice-Menley*, the plaintiff father (Nunez-Escudero) appealed the order of the United States District Court for the District of Minnesota denying his petition, under The Hague Convention, for the return of his six-month-old son to Mexico after the child’s

⁷⁷ *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996).

⁷⁸ *See id.* at 1069.

⁷⁹ *See* Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,510.

⁸⁰ *See id.*

⁸¹ *Id.*

mother (Tice-Menley) had brought the child to the United States.⁸² Tice-Menley provided affidavits from her parents and a psychologist.⁸³ She alleged that Nunez-Escudero “physically, sexually and verbally abused her, and that she was ‘treated as a prisoner’ by her husband and father-in-law.”⁸⁴ She stated that she had seen her father-in-law hit his youngest son with a wooden plunger and she feared for her baby’s safety.⁸⁵ The District Court “determined that there was a grave risk that the return of the child would expose him to physical and psychological harm and place him in an intolerable situation.”⁸⁶ The Eighth Circuit Court of Appeals, while not stating what evidence would be sufficient, found that the evidence was too general and that the District Court had improperly considered the impact of separating the baby from his mother.⁸⁷ The case was remanded to the District Court with instructions that for Tice-Menley to prevail, “she must present clear and convincing evidence that the return of the child to Mexico would subject him to a grave risk of harm or otherwise place him in an intolerable situation.”⁸⁸

In *Ciotola v. Fiocca*,⁸⁹ the plaintiff mother came to the United States from Italy with the party’s fifteen-month-old daughter.⁹⁰ Approximately one month later the defendant began to suspect that the plaintiff might not return to Italy and subsequently filed a petition under the

⁸² See *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995).

⁸³ See *id.* at 376.

⁸⁴ *Id.*

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ See *id.* at 377.

⁸⁸ *Id.* at 378.

⁸⁹ *Ciotola v. Fiocca*, 684 N.E.2d 763 (Ohio Ct. Com. Pl. 1997).

⁹⁰ See *id.* at 766-67.

Convention for the return of his daughter.⁹¹ The plaintiff objected, and alleged, *inter alia*, that the defendant had an explosive temper, that she had been a victim of domestic violence during the marriage, and therefore returning the child to Italy would pose grave psychological harm to the child.⁹² The Magistrate hearing the case found that the plaintiff had failed to establish that returning the child to Italy would expose the child to physical or psychological harm.⁹³ On appeal, the Court of Common Pleas of Ohio found that the facts surrounding the incidents of alleged abuse during the marriage were seriously contested.⁹⁴ The plaintiff had neither reported any situations of abuse to the local authorities nor sought medical attention as a result of domestic violence.⁹⁵ A social report was made concerning the defendant and his extended family in their home town in Italy, however, the report concluded that neither the defendant nor anyone in his family presented any significant problems that might prove detrimental or harmful to the normal physical and psychological development of the minor child.⁹⁶ Based on the record, the court found that the evidence presented at trial did not establish any serious risk that either the defendant or any one associated with him would jeopardize the child's welfare or place her in grave risk of physical or psychological harm.⁹⁷ The minor child was ordered to be immediately returned to her father in Italy pursuant to the Hague Convention.⁹⁸

⁹¹ *See id.*

⁹² *See id.* at 769.

⁹³ *See id.* at 766.

⁹⁴ *See id.* at 769.

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.* at 771.

In the Matter of L.L.,⁹⁹ the petitioner father, a Dutch citizen, sought the return of his two children and their half-sister to the Netherlands after they had been removed by the respondent mother to New York City.¹⁰⁰ Although the testimony of the mother and father was “sharply divergent,” testimonies by a New York City Administration for Children’s Services (“ACS”) caseworker, a pediatrician at New York Presbyterian Hospital (“NYPH”), a psychiatrist at NYPH, and a social worker for the children’s law guardian, regarding their evaluations of the children, were consistent “that all three children were fearful of their father; that their father threatened to harm them if they disclosed to their mother that he hit them; that their mother treated them well; and that they wanted to be cared for by their mother.”¹⁰¹ The psychiatrist testified that “all three children had post traumatic stress disorder (“PTSD”) . . . the cause of the PTSD was the excessive corporal punishment and domestic violence and the overall chaotic discord in the home.”¹⁰²

The Family Court of New York found that it was highly likely that the father engaged in a pattern of excessive “corporal punishment” with respect to all the children and domestic violence towards the mother; however, the court stated that the most important interpretive principle with regard to the exceptions under the Convention was that they be interpreted narrowly.¹⁰³ During the course of the proceedings, the court received a letter from the Dutch Ministry of Justice which noted that steps would be taken by the Child Protection Board to place

⁹⁹ *In the Matter of L.L.* (N.Y. Fam. Ct. 2000), available online at <http://www.hcch.net/incadat/fullcase/0273.htm>.

¹⁰⁰ *See id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*

the children in foster care pending an investigation.¹⁰⁴ In light of this the Family Court concluded that the grave risk exception had not been satisfied.¹⁰⁵ The court accepted that psychological disturbance could result from the children returning, but while it acknowledged that this risk could be considered serious, it did not warrant being described as grave.¹⁰⁶ The court stated that

the problem with most “post-traumatic stress” claims of psychological harm in a Convention Article 13(b) context is that the claim is too broad. Familial domestic violence and excessive corporal punishment are not infrequent, and are commonly accompanied by associated psychological disturbances in the affected children. Were all such claims to be routinely granted Article 13(b) exception status . . . exception [would] begin to swallow the rule.¹⁰⁷

The two younger children were ordered to be returned to the Netherlands subject to the conditions referred to in the letter from the Dutch Ministry of Justice.¹⁰⁸

The United States District Court for the Northern District of California adopted a less narrow standard in the case of *In re K. v. K.*¹⁰⁹ In this case, the court refused the return of the child where it found that there was “compelling evidence establishing the potential for serious psychological harm.”¹¹⁰

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* The court held that the third child (J) had attained an age and degree of maturity at which it is appropriate to take into account her view that she does not want to return to the Netherlands, and to give that view virtually conclusive weight. *See id.* Accordingly the Court did not order her return to the Netherlands, although explicitly stating that it nonetheless had the discretion to do so. *See id.*

¹⁰⁹ *In re K. v. K.*, No. C 97-0021 SC (N.D. Cal. 1997) available online at <http://www.hcch.net/incadat/fullcase/0127.htm>.

¹¹⁰ *Id.*

Mr. K. and Ms. K. resided in Australia with their thirty-two-month-old child.¹¹¹ According to the report of the Australian police, Mr. K. slapped Ms. K. across the face and threatened her with a knife and belt.¹¹² Mr. K. was taken into custody, and when he returned home the next day, he discovered that Ms. K. had left with their child.¹¹³ Ms. K. departed from Australia, with the child, to California.¹¹⁴

The evidence of Mr. K.'s abuse of Ms. K. was relatively limited and there was only one statement by Ms. K. alleging any direct threat to the child.¹¹⁵ Nevertheless, the court held that "in light of the prior history of alleged abuse and discord that has existed between the parties, . . . the return of the child to Australia would pose a grave risk to the child's well being,"¹¹⁶ and denied Mr. K.'s request for the return of the child.

Steffen F. and Severina P. were married and living in Germany, with their two children - Jaime F. and Tricia P.¹¹⁷ Approximately two years later, Severina left Germany with the two children for the United States.¹¹⁸ Steffen filed a petition for the return for the children pursuant to The Hague Convention.¹¹⁹

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *See Steffen F. v. Severina P.*, 966 F. Supp. 922, 923 (D. Ariz. 1997) (Jaime was the child of both Severina and Steffen, however, Tricia was not Steffen's natural child).

¹¹⁸ *See id.*

¹¹⁹ *See id.* at 925.

Evidence was presented at trial indicating that Tricia had been sexually abused, including testimony that she had engaged in “inappropriately sexualized conduct” and testimony of a clinical psychologist that she had been sexually molested.¹²⁰ Steffen denied that he had abused Tricia and testified that Severina had threatened him with sexual abuse allegations if he contested Jaime’s custody.¹²¹

Further testimony was presented as to the psychological status of both children.¹²² The clinical psychologist testified that both children were attached and bonded to their mother.¹²³ The doctor testified that removal of Jaime from his mother for any period of time longer than a few weeks would likely result in un-bonding and un-attachment, constituting a grave risk of psychological harm.¹²⁴

The United States District Court for the District of Arizona held that Severina had failed to prove by clear and convincing evidence that Steffen sexually abused Tricia.¹²⁵ However, citing *Rydder v. Rydder*¹²⁶ the court stated that “‘specific evidence of potential harm’ to a child may constitute grave risk of harm under The Hague Convention.”¹²⁷ The court held that Severina had “‘established by clear and convincing evidence that Jaime’s return would expose

¹²⁰ *See id.* at 924.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.* at 927.

¹²⁵ *See id.* at 930.

¹²⁶ *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995).

¹²⁷ *Steffen F. v. Severina P.*, 966 F. Supp at 927; *see also* *B. v. B.*, Family Court of Westerberg (1992) (A German court found that a grave risk of harm existed should a German child abducted from Texas and taken to Germany be returned to Texas, because of the “intensive bond between [German] mother and child”).

him to grave risk of psychological harm . . . because Jaime ha[d] bonded and attached to his mother”¹²⁸ and refused the return of the children to Germany.

In the case of *T. v. F.*, the mother filed an action in the Dutch courts seeking the dissolution of her marriage to the father, and seeking temporary custody of their child.¹²⁹ Prior to this time, the mother had made claims and allegations to the Dutch police that the father had sexually abused the child.¹³⁰ The allegations were based on statements made to her by the child that his father “hurt him” and her discovery of the child in the father’s bed with his pajama bottoms removed and buried in the sheets.¹³¹ The Dutch court awarded temporary custody to the father, and declined to investigate and/or make any findings in connection with the mother’s allegations.¹³² Shortly thereafter the mother left Holland, with the child, for the United States.¹³³

The father filed a petition for the return of the child under The Hague Convention.¹³⁴ The mother asserted that “the return of the child to the Netherlands would present a grave risk to the child and would expose the child to physical and psychological harm, and place him in an intolerable situation.”¹³⁵

¹²⁸ *See id.* at 930.

¹²⁹ *See T. v. F.*, (Conn. Super. Ct. 1998) available online at <http://www.hcch.net/incadat/fullcase/0307.htm>.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *Id.*

The child was interviewed by a psychiatric social worker and examined by a pediatrician at Yale University Medical School.¹³⁶ The doctor testified that, although he could not say with medical certainty that the child had been sexually abused, based on reasonable medical probability, the child had been subjected to anal sexual abuse.¹³⁷

The Superior Court of Connecticut held that, based upon all the evidence presented, it had been established “in total, by clear and convincing evidence” that the father had sexually abused the child.¹³⁸ The court, therefore, concluded that a return of the minor child to Holland would cause “grave risk of physical and psychological harm” to him and refused to return the child.¹³⁹

In *Walsh v. Walsh*,¹⁴⁰ the First Circuit Court of Appeals reversed the decision of the United States District Court for the District of Massachusetts,¹⁴¹ holding that the return of the children (M.W. and E.W.) to Ireland would expose them to a grave risk of physical or psychological harm, barring their return under The Hague Convention.¹⁴²

For five years, John Walsh beat his wife Jacqueline.¹⁴³ Jacqueline was advised by her doctor to seek protection and to get a barring order from a court.¹⁴⁴ After one beating, Jacqueline

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000), *cert. denied*, *Walsh v. Walsh*, 531 U.S. 1159 (2001).

¹⁴¹ *In re Walsh*, 31 F. Supp. 2d 200 (D. Mass. 1999) (Walsh I).

¹⁴² *See Walsh v. Walsh*, 221 F.3d at 204.

¹⁴³ *See id.* at 209.

¹⁴⁴ *See id.* at 209-10.

reported John to the local police who told her that domestic abuse was not uncommon in their town.¹⁴⁵ Despite a protection order and agreement that John would vacate their house and let Jacqueline and the children stay there, John continued to threaten harm.¹⁴⁶ Afraid for the safety of her children and herself, Jacqueline left Ireland with the children and flew to the United States.¹⁴⁷

John filed a petition in the United States District Court of Massachusetts for the return of M.W. and E.W. to Ireland pursuant to The Hague Convention.¹⁴⁸ Jacqueline's defense was that returning the children would pose a grave risk of physical or psychological harm.¹⁴⁹ At trial, Jacqueline offered testimony of three witnesses testifying, *inter alia*, that "John slapped, hit, berated, and spit at M.W. . . . he would lock the children in their rooms, . . . and M.W. was often present when he abused"¹⁵⁰ Jacqueline. Medical testimony was also offered that M.W. was suffering from post-traumatic stress disorder and although she had gone into remission since being brought to the United States, she would likely suffer a relapse if she were returned to Ireland.¹⁵¹ Although John presented no witnesses at trial, and simply denied that he was abusive in papers filed with the court, the district court entered an order in John's favor and ordered the children to be returned to Ireland.¹⁵² The court concluded that "the evidence does not reveal an

¹⁴⁵ *See id.* at 210.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.* at 211.

¹⁴⁸ *See id.* at 212.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 211.

¹⁵² *See id.* at 212, citing Walsh I, 31 F. Supp. 2d at 208.

immediate, serious threat to the children’s physical safety that cannot be dealt with by the proper Irish authorities.”¹⁵³

On appeal, the First Circuit Court of Appeals determined that the district court “raised the Article 13(b) bar higher than the Convention requires. . . . The Convention does not require that the risk be ‘immediate;’ only that it be grave.”¹⁵⁴ The court found that given John’s clear and long history of spousal abuse, violence directed at his own children, and chronic disobedience of court orders, the risk of both physical and psychological harm was high.¹⁵⁵

In *Tsarbopoulos v. Tsarbopoulos*,¹⁵⁶ the United States District Court for the Eastern District of Washington found that although the petitioner had not met the requirement for a Hague petition, (there was no habitual residence in Greece when the mother removed the children to the United States), assuming Greece was the children’s habitual residence, their return to Greece “would pose a grave risk of physical and psychological harm or would be an intolerable situation.”¹⁵⁷

In January 2000, Kristi Tsarbopoulos (“Ms. T.”) removed her three children from Greece.¹⁵⁸ Anthony Tsarbopoulos (“Mr. T.”) commenced an action for the return of the children under The Hague Convention.¹⁵⁹ Mt. T. had been physically abusive towards his wife while they

¹⁵³ *See id.* at 217, citing Walsh I, 31 F. Supp. 2d at 206.

¹⁵⁴ *Id.* at 218.

¹⁵⁵ *See id.* at 220-21.

¹⁵⁶ *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001).

¹⁵⁷ *Id.* at 1047.

¹⁵⁸ *See id.* at 1049.

¹⁵⁹ *See id.* at 1046.

were dating and after they married.¹⁶⁰ At trial, undisputed testimony was presented that the youngest child had suffered night tremors since birth, and seldom, if ever slept through the night.¹⁶¹ The court found testimony offered by a child therapist that the middle child had been physically and sexually abused and associated this abuse with her father to be credible and reliable.¹⁶² A licensed child mental health therapist concluded that the oldest child had also been subjected to significant physical and emotional abuse which he associated with his father.¹⁶³ Additionally, all three children were diagnosed with post-traumatic stress disorder.¹⁶⁴

Although denied by Mr. T., the Court found the evidence of physical and emotional abuse of the children to be persuasive, and that the children would face a grave risk of physical and psychological harm if they were returned to Greece.¹⁶⁵ The Court found that although Ms. T.'s return to the United States was not actionable under the Hague Convention, in the alternative, the court concluded that as a matter of law, the exception under Article 13(b) of The Hague Convention applied.¹⁶⁶ The petition for the return of the children was denied.¹⁶⁷

These cases exemplify the inconsistencies in the courts application of the “grave risk” standard. This is due to the lack of clear definition of what constitutes a “grave risk of harm,”

¹⁶⁰ *See id.* at 1050.

¹⁶¹ *See id.* at 1059.

¹⁶² *See id.*

¹⁶³ *See id.* at 1060.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 1060-61.

¹⁶⁶ *See id.* at 1062.

¹⁶⁷ *See id.*

and the fact that even where the court does find that the standard has been met, the court maintains discretion to return the child.

B. What Constitutes a Violation of human rights and fundamental freedoms?

Article 20 of The Hague Convention provides that a Contracting State may refuse to order the return of a child if the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.¹⁶⁸ Article 20 has been cited as a defense to not returning a child to their country of habitual residence in nine cases of Hague Convention petitions brought in the United States.¹⁶⁹ The courts have found that the standard required under Article 20 has not been met in any of these cases.¹⁷⁰ It should be noted, however, that in two of these cases¹⁷¹ the return of the child(ren) was refused on other grounds. Most of the arguments made with regard to Article 20 defenses relate to the rights of the parent challenging the request for the return of the child be denied, not the rights of the child.

In *Ciotola v. Fiocca*, the rights of the child were the basis for the Article 20 claim.¹⁷² The Court of Common Pleas of Ohio, however, rejected the mother's arguments that the court's failure to apply a “best interest” test in determining whether the child should be returned violated the child's constitutional rights to due process and equal protection.¹⁷³ In *Freier v. Freier*,¹⁷⁴ the

¹⁶⁸ See Hague Convention, *supra* note 10, at art. 20.

¹⁶⁹ See INCADAT Database, *supra* note 74.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* The two cases where the return of the child was refused on other grounds were *Steffen F. v. Severina P.*, 966 F. Supp. 922 (D. Ariz. 1997), where the court refused the return of the child based on article 13(b) and *Journe v. Journe*, 911 F. Supp. 43 (D.P.R. 1995), where the court refused the return of the children based on article 13(a).

¹⁷² *Ciotola v. Fiocca*, 684 N.E.2d 763.

¹⁷³ See *id.* at 35.

United States District Court for the Eastern District of Michigan rejected the mother's argument that a temporary injunction prohibiting her from leaving Israel, until the divorce and custody proceedings were settled, violated her human rights and fundamental freedoms.¹⁷⁵ The Court specifically noted that the argument focused primarily on the mother's rights even though it is not clear that The Hague Convention's focus under Article 20 is on the parents' rights as opposed to the child's rights.¹⁷⁶ Similarly, in *Fabri v. Pritikin-Fabri*,¹⁷⁷ the United States District Court for the Northern District of Illinois rejected the mother's argument that a return order would violate her right to travel under the U.S. Constitution and violate her right to privacy in her family relationships.¹⁷⁸ The court reasoned that an order for the child to return to Italy was not an order for the mother to return, she was free to remain in the United States.¹⁷⁹ The court also noted that the mother had not offered any evidence that the Italian courts would not treat her custody claims fairly.¹⁸⁰

Although included in The Convention as a "public policy clause,"¹⁸¹ no court has found that a petitioner has been able to meet this standard. Further definition, supported by examples, would enable petitioners to appropriately assert Article 20 as a defense to the return of a child and enable courts to make consistent and appropriate findings. Forcing a child to return to an

¹⁷⁴ *Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996).

¹⁷⁵ *See id.* at 443.

¹⁷⁶ *See id.* at 444.

¹⁷⁷ *Fabri v. Pritikin-Fabri*, 221 F. Supp. 2d 859 (N.D. Ill. 2001).

¹⁷⁸ *See id.* at 873.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See Pérez-Vera, supra* note 5, at ¶ 31.

abusive environment should be recognized as a violation of the “fundamental principles of human rights and fundamental freedoms”¹⁸² of the child.

IV. ANALYSIS

A. Advantages and Challenges of the Convention

The Convention is an international treaty that provides a mechanism to bring about the prompt return of children who have been wrongfully removed or retained outside their country of habitual residence in violation of rights of custody existing and actually exercised in the child’s country of habitual residence.¹⁸³ The Convention is an important tool for reuniting families across international borders and in deterring potential abductions.¹⁸⁴ In the United States, Hague cases constitute about thirty percent of the total volume of abduction cases handled by the Department of State and represent over fifty percent of the children returned.¹⁸⁵

Article 6 of the Convention requires that each Contracting State designate a Central Authority to discharge the duties imposed by the Convention upon such authority.¹⁸⁶ Central Authorities, amongst the Contracting States, “are to cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt

¹⁸² See Hague Convention, *supra* note 10, at art. 20.

¹⁸³ See U.S. Dep’t State, *2005 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction*, available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_2537.html (last visited Oct. 9, 2005) [hereinafter US 2005 Report].

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* During the period from October 1, 2003 – September 20, 2004, the Department of State assisted in the return to the United States of 292 children abducted or wrongfully retained overseas. See *id.* Of this number, 154 children were returned in cases in which a Hague application was filed. See *id.*

¹⁸⁶ See Hague Convention, *supra* note 10, at art. 6.

return of children”¹⁸⁷ and to achieve the objectives of the Convention. Any person or institution claiming that a child has been wrongfully removed or retained may apply to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.¹⁸⁸ The Assistant Secretary of State for Consular Affairs has been designated as the Central Authority for the United States under the Hague Convention and the International Child Abduction Remedies Act.¹⁸⁹

The Hague Convention was designed to address the fact that because every country has its own judicial system, there was a need for uniform legislation which would help recover children abducted across international borders, return them promptly to their place of habitual residence, and ensure custody and access are respected between Contracting States.¹⁹⁰ One of the most frustrating elements for parents whose child has been abducted is that laws and court orders of one country are not usually recognized in a foreign country and therefore not directly enforceable abroad.¹⁹¹ The Hague Convention provides a basis for dealing with this exact issue.

¹⁸⁷ *See id.* at art. 7. Responsibilities of the Central Authority include: a) to discover the whereabouts of a child who has been wrongfully removed or retained; b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; d) to exchange, where desirable, information relating to the social background of the child; e) to provide information of a general character as to the law of their State in connection with the application of the Convention; f) to initiate or facilitate the institution of juridical or administrative proceedings with a view to obtaining the return of the child and, in proper case, to make arrangements for organizing or securing the effective exercise of rights of access; g) where the circumstances so require, to provide or facilitate the provisions of legal aid and advice, including the participation of legal counsel and advisors; h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; and i) to keep each other informed with respect to the operation of the Convention and, as far as possible, to eliminate any obstacles to its application. *See id.*

¹⁸⁸ *See id.* at art. 8 (Generally, a petition for return is filed in the Contracting State to which the child has been taken, and it is the Central Authorities of the Contracting States of the child’s habitual residence and where the child has been taken to that provide the majority of the assistance).

¹⁸⁹ *See* Exec. Order No. 12,648, 34 Fed. Reg. 30,637 (Aug. 11, 1988) Relating to the Implementation of the Convention on the Civil Aspects of International Child Abduction.

¹⁹⁰ *See* Lowe-Action Agenda, *supra* note 29 at iv.

¹⁹¹ *See* Consular Affairs, *supra* note 45.

The Convention applies only to wrongful removals between Contracting States occurring after its entry into force in those States.¹⁹² Although there are currently seventy-five countries which are party to the Convention, the United States has a treaty relationship under the Convention with only fifty-five other countries.¹⁹³ When a new country accedes to the Convention, the United States Department of State will review that country's accession to determine whether the necessary legal and institutional mechanisms are in place to fully implement the Convention.¹⁹⁴ It is only when the Department of State concludes that a country has the capability to be an effective treaty partner that the United States will recognize their accession and the Convention will come into force between the two countries.¹⁹⁵ While the potential effectiveness of the Convention in resolving cases of international parental child abduction and deterring future abductions has been recognized,¹⁹⁶ the actual impact is limited until there is more universal adoption and effective implementation of the Convention.

¹⁹² See Hague Convention, *supra* note 10, at art. 35.

¹⁹³ See US 2005 Report, *supra* note 181; see also U.S. Dep't State, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Party Countries and Effective Dates with U.S.*, available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html (last visited Jan. 9, 2006). The countries with which the U.S. has a treaty relationship are: Argentina, Australia, Austria, Bahamas, Belgium, Belize, Bosnia & Herzegovina, Brazil, Bulgaria, Burkin Faso, Canada, Chile, China, Columbia, Croatia, Czech Republic, Cyprus, Denmark, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Former Yugoslav Republic of Macedonia, Malta, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovak Republic, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, Turkey, United Kingdom, Uruguay, Venezuela, Yugoslavia (Federal Republic of), and Zimbabwe.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

Although it is clear that the intent of the drafters of the Convention was that any exceptions be interpreted narrowly,¹⁹⁷ another challenge with the Convention is the lack of definition of terms used in the exceptions, in particular: what constitutes a grave risk of harm? As previously discussed, this has resulted in inconsistent interpretation and application of the Convention both between Contracting States and within courts of contracting States, including the United States.¹⁹⁸ Without further clarification and definition as to what constitutes a “grave risk of harm” the inconsistencies will continue to be pervasive and likely lead to “forum shopping,” particularly in a country such as the United States where the State Courts and the United States district courts both have original jurisdiction.

According to the International Forum on Parental Child Abduction held in September 1998, on average, about forty-five percent of all Hague applications for the return of a child end with a court order for return.¹⁹⁹ Rates for return in individual countries, however, range from a low of five percent to a high of ninety-five percent.²⁰⁰ Further, while an average of twenty-three percent of applications end with a judicial refusal, fluctuations from country to country range from six percent to seventy-five percent.²⁰¹ This data is further evidence of the inconsistent interpretation and application of The Convention by the Contracting States.

¹⁹⁷ See Pérez-Vera, *supra* note 5, at ¶ 34 (exceptions are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter); see also Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. at 10,509 (any exception must be drawn narrowly lest their application undermine the express purpose of the Convention – to effect the prompt return of abducted children).

¹⁹⁸ See OJJDP Family Resource Guide, *supra* note 30 at 50. See also Walsh v. Walsh, 221 F.3d 204 overturning *In re Walsh*, 31 F. Supp. 2d 200, Blondin v. Dubois, 238 F.3d 153 overturning *Blondin v. Dubois*, 189 F.3d 240.

¹⁹⁹ See Lowe–Action Agenda, *supra* note 29 at 7.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 8.

The need for clear definition of terms and uniformity of application, with regard to the Article 13(b) exceptions, is particularly critical since under the terms of the Convention, courts are not permitted to consider the merits of the case when making a determination with regard to the return of a child, and must respect the decision of the court having jurisdiction controlling custody. Following a strict interpretation of the Convention, a child should be returned despite domestic violence, abuse and other severe family law matters, only when there is no other alternative available. It is imperative that a balance be struck between respect for the laws and court orders of Contracting States and recognition that ongoing exposure to incidents of domestic violence and abuse presents empirical evidence of a situation which would subject the child to “grave risk of physical or psychological harm” or “otherwise place the child in an intolerable situation.” While the Convention is clearly concerned with protecting children against the harmful effects of international abduction, the harmful effects of returning a child to an abusive parent must also be considered.

There is also no obligation, under the terms of the Convention, for Contracting States to take responsibility for the safety of children returned to their country of habitual residence under the Convention.²⁰² Under the Convention a potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of “undertakings” and sufficient guarantees of performance of those undertakings by the respective parties,²⁰³ resulting in a child’s return. This approach allows courts to evaluate the placement options and legal safeguards in the country of habitual residence to preserve the child's safety.²⁰⁴ While this approach may best allow for the

²⁰² *See id.* at iv.

²⁰³ *See* Walsh v. Walsh, 221 F.3d at 219.

²⁰⁴ *See id.*

achievement of the goal of the Convention of returning the child to their country of habitual residence, there is no provision in the Convention for the country of habitual residence to monitor and ensure compliance with these undertakings.

B. Recommendations

Although the Convention has been in force since 1976, there are currently only seventy-five Contracting States to the Convention.²⁰⁵ There are many countries in large parts of the world that are not signatories to the Convention.²⁰⁶ Outgoing abduction cases to non-Hague countries are the most difficult to resolve largely because courts do not automatically honor custody orders made by judges in other countries.²⁰⁷

The United States has actively encouraged countries to accede to the Convention, recognizing its potential effectiveness not just in resolving cases of international parental child abduction, but also in deterring future abductions.²⁰⁸ International pressure must be asserted to expand membership of the Hague Convention.²⁰⁹ Additionally, countries that are members of the United Nations Convention on the Rights of the Child need to be reminded of their obligations to promote accessions.²¹⁰

The basic issue of custody rights is not within the scope of The Convention, therefore the Convention must necessarily “coexist with the rules of each Contracting State on applicable law

²⁰⁵ See Convention Status Table, *supra* note 9.

²⁰⁶ See Lowe-Action Agenda, *supra* note 29 at vi.

²⁰⁷ See Hoff, *supra* note 64, at 100.

²⁰⁸ See US 2005 Report, *supra* note 181.

²⁰⁹ See Lowe-Action Agenda, *supra* note 29 at vi.

²¹⁰ See *id.*

and on the recognition and enforcement of foreign decrees.”²¹¹ While it is imperative that the judicial and administrative authorities of the Contracting States are respected, it is also important that there be consistency with regard to the application of the Convention. There must be a more common approach to the application of the exceptions provided in The Convention.

In 1990, the United States Congress passed a resolution expressing their sense that “for purposes of determining child custody, credible evidence of physical abuse of one’s spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.”²¹² While this resolution dealt explicitly with the issue of custody, which is out of the scope of the Convention, it clearly reflects the belief that credible evidence of spousal abuse presumptively presents a grave risk of harm to the child. Credible evidence of domestic violence and/or child abuse should be included in the definition of a “grave risk of harm” in the Convention and, therefore, be considered as meeting the standard for an exception under Article 13(b) of the Convention by all courts in all Contracting States.

Additionally, courts in Contracting States need to recognize the significant impact of domestic violence and child abuse on children. The courts must recognize that forcing a child to return to an abuse environment violates the “fundamental principles of human rights and fundamental freedoms”²¹³ of the child. International standards regarding fundamental principles of human rights and fundamental principals must be established. These standards must effectively co-exist with local law and be applied consistently to protect the interests of the children.

²¹¹ See Pérez-Vera, *supra* note 5, at ¶ 39.

²¹² H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5184 (Oct. 9, 1990) (Expressing the sense of the Congress that, for purposes of determining child custody, credible evidence of physical abuse of one’s spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse).

²¹³ See Hague Convention, *supra* note 10, at art. 20.

Where the courts determine that there is not clear and convincing evidence for an exception under Article 13(b) or Article 20 of the Convention, and the child is returned, the Convention must provide that judges and central authorities work closely together to ensure that the child is properly safeguarded and protected.²¹⁴ This is particularly true in the case where the child has been returned subject to acceptance of undertakings applicable to either the party seeking the return or the party responsible for the wrongful removal. The Central Authority of each Contracting State should have an obligation to protect the welfare of children returned to that country under the Convention.²¹⁵ This obligation could be easily incorporated into Article 7(h) of the Convention requiring that central authorities “provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child.”²¹⁶

V. CONCLUSION

Each year more than 200,000 children are abducted by family members and 58,000 by non-family members in the United States alone.²¹⁷ While the abduction of a child by a parent may be traumatic for the child, as well as one or both of the parents, the return of the child to an abusive home may be more traumatic or even deadly. The Hague Convention on the Civil Aspects of International Child Abduction is an attempt to address the increasing incidence of international parental child abduction, and secure the prompt return of the child to their country of habitual residence. This return must not, however, be at the expense of the child’s welfare and must more effectively and consistently consider what is “*In the Best Interest of the Child.*”

²¹⁴ See Lowe-Action Agenda, *supra* note 29 at vi.

²¹⁵ See *id.*

²¹⁶ See Hague Convention, *supra* note 10, at art. 7(h).

²¹⁷ See White House Fact Sheet, *supra* note 1.