

The Future of Litigating an International Child Abduction Case in the United States

by

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Our world is shrinking. This was abundantly clear as we read the 2020 news feeds showing the speed with which the coronavirus spread between countries due to international travel and commerce. Not a day went by in 2018 where we had a reprieve from the constant news cycle about caravans of immigrants from South and Central America making their way to the Mexico-U.S. border. When the Amazon Rain Forest and the Australian brushfires burned uncontrollably in 2019, the news made daily headlines in the United States because of the impact those regional crises had on a global scale. With constant global movement, it is inevitable courts will see more international parental child abduction cases.

This article elaborates on the trends and challenges in the United States when litigating an international parental child abduction case, including additional expense and changes in the law. The article then discusses alternatives to using The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“1980 Convention”), including the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) and a new law on the horizon for the United States, signed in 2010 - the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (“1996 Convention”).¹ The 1996 Convention determines jurisdiction to issue custody orders and

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¹ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996 (entered into force Jan. 1, 2002), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70#ch3> [hereinafter 1996 Convention].

provides for recognition and enforcement of those orders between treaty partners.² It fills a void where other laws, including the 1980 Convention³ may have deficits, such as in enforcement of measures (often called undertakings) to allow the safe return of a child to her home country post-abduction and ensuring that a child abduction does not shift custody jurisdiction to the new country.⁴ With new challenges in litigating these complex cases, it benefits practitioners to recognize the options currently available and on the horizon to secure the return of children abducted by their parents.

I. International Parental Child Abduction (“IPCA”)

Child abduction is, in its simplest form, when a parent (or a person who has parental authority over a child) unilaterally relocates their child to another country. The most commonly referenced law when it comes to international parental child abduction is The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“1980 Convention”). This treaty only uses the word “abduction” in its title. The 1980 Convention actually breaks down these unilateral relocations into two more distinct situations –where a parent *removes* a child from that child’s home and takes that child to another country, and where a parent has permission to travel to another country for a limited duration and then overstays or *retains* that child away from the child’s home.⁵ Removals and retentions are treated the same under the law, but, as you can imagine, each situation presents different strategies in how you argue for the child’s return to her home. Perhaps a lesser legal remedy, IPCA from the United States to a foreign country is a federal crime under the International Parental Kidnapping Crime Act

² *Id.* at art. 1(1)(a), (c).

³ See generally Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Oct. 25, 1980 (entered into force Dec. 1, 1983), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> [hereinafter 1980 Convention].

⁴ See Robert G. Spector, *International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy Than the Abduction Convention*, 49 FAM. L.Q. 392 (2015).

⁵ 1980 Convention, *supra* note 3, at art. 3.

(“IPKCA”).⁶ This act criminalizes not just removing a child and retaining a child overseas, but also a parent’s attempts to remove or retain a child in a foreign country.⁷ This remedy is “lesser” only in that it requires a prosecutor to take up the case, and even if prosecuted, still depends on extradition of the offender parent for the particular offense, a remedy which may or may not exist under the law. Furthermore, prosecution and even extradition do not actually cause the child to be returned. A parent may choose to sit in jail in the United States while the child remains overseas.

Despite the significant media attention that some of these IPCA cases receive, there is a lack of concrete statistics outlining the true volume of abductions. The Hague Conference on Private International Law (“HCCH”) employs the help of a law professor approximately every five or six years to compile statistics on open cases from governments prior to a meeting of the Special Commission that examines the practical operation of the 1980 Convention. The most recent Special Commission met in the Netherlands in October 2017, and the statistics reported to the group were from 2015.⁸ As part of these statistics, the United States reported that in the calendar year 2015, it had received 313 applications (representing 461 children) seeking a child’s return from the United States to a foreign country (with 122 of those applications from Mexico alone).⁹ In that same year, the U.S. Central Authority¹⁰ facilitated transmission of applications seeking the return of children from foreign countries in 183 cases.¹¹

⁶ International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2020) (effective Dec. 2, 1993).

⁷ *Id.* at § 1204(a).

⁸ NIGEL LOWE & VICTORIA STEPHENS, PART I – A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION – GLOBAL REPORT – PROVISIONAL EDITION (Preliminary Document No. 11A of Feb. 2018 – revised).

⁹ *Id.* at iii.

¹⁰ A Central Authority is the designated government office under a Hague Convention that serves to function as a point of contact and provide assistance and resources for the practical operation of the treaty for which it is the Central Authority.

¹¹ LOWE & STEPHENS, *supra* note 8.

It should be noted that these statistics only include cases where the U.S. Central Authority for the 1980 Convention was directly involved. Parents may always bypass the Central Authority and seek recourse directly in the courts of the country where the child now sits.¹² Some parents never seek the return of their children. Some parents are unable to avail themselves of the remedies in the 1980 Convention, whether it is because the parent does not meet the legal burdens to seek the child's return, there is a valid and justifiable reason why a court will not order the child returned, or where the treaty is not in place between the two countries. For a variety of reasons, these numbers are likely low, but even if the numbers were inflated to a more realistic estimate of abduction cases, the overall number of IPCA cases is low in the grand scheme of cases that involve children in American court systems. The National Center for Missing and Exploited Children (NCMEC)¹³ completed a ten year analysis of its family abduction case statistics, from 2008 through 2017, and counted 4,213 family abduction cases with an international component (compared to 11,581 cases of family abductions of 16,264 children, and on par with the data obtained by the U.S. Central Authority).¹⁴ Traditionally, the international cases were more difficult and took more time to resolve.¹⁵

¹² In the United States, a parent must go to court and file a petition to seek the return of his or her child to her habitual residence. A left behind parent may go to the U.S. Central Authority and seek assistance, but that assistance is only in the form of information, help in locating the child, and help in finding a lawyer. The filing of a lawsuit is the act that begins the actual process of seeking a child's return.

¹³ The National Center for Missing and Exploited Children is a non-profit organization headquartered in Alexandria, Virginia that serves as a clearing-house and reporting center for all issues related to child victimization, abduction, abuse, and exploitation. Its website is www.ncmec.org; (last visited Mar. 5, 2020).

¹⁴ NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, FAMILY ABDUCTIONS: WHAT WE'VE LEARNED: AN IN-DEPTH ANALYSIS BY THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN 1 (2018), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewjxwNqUo9zoAhUWpp4KHQ2rCkQQFjAAegQIBRAB&url=https%3A%2F%2Fwww.missingkids.org%2Fcontent%2Fdam%2Fmissingkids%2Fpdfs%2Fncmec-analysis%2FFamily%2520Abductions%25202008-2017_EXTERNAL.pdf&usg=AOvVaw1JY8EjsbVbfML7mz5DzD_5.

¹⁵ *Id.* at 4.

II. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“1980 Convention”)

A. Provisions of the 1980 Convention

Many practitioners and judges misunderstand the 1980 Convention. The treaty has only one remedy – to return a child found to have been wrongfully removed or retained outside of her habitual residence. This treaty does not determine jurisdiction for a child custody lawsuit. It does not determine what outcome is in the best interest of a minor child. It does not mandate a court of one country to recognize or enforce a custody order from another country. This treaty only serves to return the child’s location to the status quo. After the status quo is restored, the parents can file lawsuits in the appropriate jurisdiction (or, sometimes, jurisdictions), make their arguments about what is best for their child, and then work toward ensuring their custody order is recognized country-to-country, if that is even possible.

Many parents misunderstand the treaty as well. If a parent “loses” a 1980 Convention case, the parent still moves forward, selects the appropriate court, files a custody lawsuit, and puts on the best arguments to persuade a judge to award that parent custody. The 1980 Convention does not preclude a parent from making *all* arguments to resolve custody of their child. It simply precludes that parent from making those arguments in a court of their choosing, without regard for the law. The treaty is intended to keep parents from shopping for a forum that will give them a better outcome in a custody lawsuit. It is also intended to put in place some consistency for a child who was just removed from her place of residence during the pendency of the inevitable custody litigation.

B. When a Left Behind Parent (“LBP”) May Use This Treaty to Seek a Child’s Return

There are three key elements that a LBP must prove to a court to seek the return of his or her child.¹⁶ The LBP must first

¹⁶ The 1980 Convention applies to children under the age of 16, and only between countries that are treaty partners. For a list of treaty partners, see Sta-

prove that the child was removed from or retained outside of that child's "habitual residence," a term that was left undefined in the 1980 Convention, and was only recently defined by the U.S. Supreme Court in the case of *Monasky v. Taglieri*,¹⁷ which will be discussed at greater length below. Second, the LBP must prove that he or she had a right of custody under the law of the child's habitual residence.¹⁸ Finally, that LBP must prove that he or she was actually exercising his or her right of custody over the child at the time of the removal or retention. Many of the parties' legal argument revolves around pinning down both the location designated as the child's habitual residence and the date on which the removal or retention occurred.

Even if the LBP meets the legal requirements to seek his or her child's return, the 1980 Convention does not always operate as intended.¹⁹ There are numerous situations where the United States has a treaty partnership with another country, yet the case languishes in the court system for far too long, the administrative processes fail to work, the processes are inaccessible to the LBP, the foreign government has allotted insufficient resources to returning abducted children, or there are ineffective or nonexistent laws to enforce a return order.

C. *Exceptions to Return for a Taking Parent ("TP") Arguing Against a Child's Return*

Assuming the LBP can avail him or herself of the treaty's remedy, and proves his or her case, the TP has certain arguments that he or she can make to persuade the judge against returning the abducted child. In brief summary, those six exceptions include: the LBP consenting to the child's removal or retention,²⁰ the LBP acquiescing after the removal or retention,²¹ a mature

tus, 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last accessed 4/23/2020).

¹⁷ *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

¹⁸ *Abbott v. Abbott*, 560 U.S. 1 (2010).

¹⁹ Peter J. Messitte, *Getting Tough on International Child Abduction*, 58 *FAM. CT. REV.* 195, 197 (2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/fcre.12467>. Judge Messitte cites to Brazil as "a good study of how ineffective the Hague [Abduction] Convention can be."

²⁰ 1980 Convention, *supra* note 3, at art. 13(a).

²¹ *Id.*

and un-influenced child objecting to a return,²² one year passes from the date of retention/removal and the child is now settled,²³ the other country's human rights principles would not allow for the child's return,²⁴ and returning the child would expose that child to a grave risk of harm.²⁵

The TP must prove each exception by the burden of proof outlined in the U.S. implementing legislation, the International Child Abduction Remedies Act ("ICARA"), and if the child is returned, the TP will be ordered to pay the LBP's fees and costs under ICARA, unless it would be clearly inappropriate.²⁶ The court still retains discretion under Article 18 to order the return of the child at any time, even if an exception is ultimately proven.

D. *Recent Trends in the United States Under the 1980 Convention*

1. *The issue of habitual residence and the Monasky²⁷ case*

A child can only be wrongfully removed or retained outside of her habitual residence. In other words, the habitual residence at the time of a child's abduction is the threshold determination that any LBP must prove to seek their child's return using this treaty. Over the years, different courts in the United States have used different definitions of "habitual residence," with some focusing more on the parents' last shared intent as to the child's habitual residence and others on the child's acclimatization in a residence sufficient to abandon any prior habitual residence.²⁸ Additional questions periodically arise, but have yet to be sufficiently resolved, including whether there are situations where a child may have *no* habitual residence or whether a child can have *more than one* habitual residence.

²² 1980 Convention, *supra* note 3, at art. 13.

²³ 1980 Convention, *supra* note 3, at art. 12; *Lozano v. Alvarez*, 572 U.S. 1 (2014).

²⁴ 1980 Convention, *supra* note 3, at art. 20.

²⁵ 1980 Convention, *supra* note 3, at art. 13(b); *Cuellar v. Joyce*, 596 F.3d 505 (9th Cir. 2010).

²⁶ International Child Abduction Remedies Act, 22 U.S.C.S. § 9007(b)(3) (2020). [hereinafter ICARA].

²⁷ *Monasky*, 140 S. Ct. 719 (2020).

²⁸ Brief for the United States as Amicus Curiae Supporting Neither Party at 4-5, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935) [hereinafter Brief for the United States].

In 2019, the U.S. Supreme Court finally granted certiorari in a case that presented a question about the habitual residence of an infant.²⁹ On February 25, 2020, just shy of eleven weeks after the oral arguments, the U.S. Supreme Court issued its opinion in the *Monasky v. Taglieri* case, and defined “habitual residence,” clarifying a split among circuits. The Supreme Court distilled habitual residence to its most fundamental definition saying, “[a] child ‘resides’ where she lives,” requiring that living situation to be “more than transitory.”³⁰ The Court further narrowed this definition by stating, “[t]he place where a child is *at home*, at the time of removal or retention, ranks as the child’s habitual residence.”³¹ The Court allowed for a flexible and fact-intensive analysis when deciding a child’s habitual residence, with judges using their “common sense” and discretion on how to weigh any given fact in the family’s situation. For the specific situation presented in *Monasky*, the Court rejected Ms. Monasky’s argument that an actual agreement needs to exist between parents to establish the child’s habitual residence. Despite the court finally defining habitual residence, it remains unseen whether the new totality-of-the-circumstances definition will cause 1980 Convention litigation to become more or less costly, complicated, and time-consuming.

In *Monasky*, the Court accepted, more or less, the U.S. Department of Justice’s proposed approach, which may inevitably increase 1980 Convention litigation in the United States.³² The U.S. government brief created a multi-factor, flexible, and fact-bound analysis for determining habitual residence with a key focus on the location where the child “usually” resided.³³ The multi-factor analysis accounted for both the parents’ last shared intent and indicia of the child acclimatizing – two factors that may ultimately cause a judge to reach opposite conclusions regarding the child’s habitual residence when examined separately. The U.S. Court of Appeals for the D.C. Circuit had the opportunity to address an issue of habitual residence in an opinion issued after the *Monasky* oral arguments but before its opinion, and re-

²⁹ *Monasky*, 140 S. Ct. 719 (2020).

³⁰ *Id.* at 726.

³¹ *Id.* (emphasis added).

³² Brief for the United States, *supra* note 28, at 10-11.

³³ Brief for the United States, *supra* note 28, at 14-15.

ferred to the government's proposed new standard as "relatively unguided."³⁴ The concern about the new, very flexible, very discretionary standard is that it will no doubt lead to new and additional litigation, may lengthen and complicate the case that both parties need to present to a court, and may prolong resolutions for minor children, working against the goal of a prompt resolution under the 1980 Convention.³⁵

Take, for example, a family, primarily residing in Country A. The father receives notice that he has a wonderful two-year job opportunity in the United States. It is a limited duration contract, and the family agrees that at the end of two years, the entire family will return to Country A. The family moves to the United States, and the children, both teens, register for school, make friends, and are doing well. The family also rents their house in Country A and stores their belongings, not wanting to move everything to the United States for a limited duration. The family enters the United States on the father's work visa, with the family members as dependents. At the end of two years, the father is offered another opportunity with the same U.S. employer and wishes to remain in the United States. The mother wishes to return to Country A according to the parents' original agreement. If the mother files a petition in the appropriate U.S. court, asking for the children to be returned to Country A under the 1980 Convention, where are the children "habitually resident"? Some hypothetical facts would lend a judge to determine the children are habitually resident in the United States. They have clearly acclimatized, and from their perspective, this is home – friends, school, activities. There are some facts that would lead a judge to conclude Country A remains the children's habitual residence based on the parents' clear agreement to return home no later than two years after their move. How would a judge weigh these facts? How long will this trial last? Can discovery be streamlined, or is it going to be open-ended to hash out all the details that would go to a habitual residence analysis? Will this new standard actually make it easier to retain a child overseas, as in the hypothetical above? How will this change affect the ways lawyers advise their clients?

³⁴ *Abou-Haidar v. Sanin Vazquez*, 945 F.3d 1208, 1220 (D.C. Cir. 2019).

³⁵ 1980 Convention, *supra* note 3, at preamble, art. 1, art. 11.

Furthermore, the United States, unlike many other countries, has not designated a centralized court to address petitions brought under the 1980 Convention. With potentially every single 1980 Convention case brought before a U.S. court being handled by a completely different judge than the last, will this fact intensive totality-of-the-circumstances analysis lead to inconsistencies, and difficulty advising clients on the potential outcome? Will it lead to more litigation, with a more flexible definition of habitual residence than existed in many circuits before *Monasky*? Or, will the totality-of-the-circumstances standard, and the clear-error appellate review of habitual residence lead to fewer appeals, with trial opinions that are exceptionally fact sensitive? Will parents who move to the United States with their children now choose to live in a state where judges may have a predisposition towards one or the other outcome? There remain no answers to these questions. At this juncture, only time will tell how judges will begin applying this new discretionary standard in 1980 Convention cases.

2. *The issue of Article 13(b)*

One of the most litigated exceptions that a TP argues against returning a child to her habitual residence is that, if the child were returned, a grave risk would expose the child to “physical or psychological harm or otherwise place the child in an intolerable situation.”³⁶ This issue may arise in many situations.³⁷ It is, however, most commonly argued in situations where the child could be exposed to violence or abuse upon her return. Given the frequency with which this exception is argued in contracting states,³⁸ the HCCH assembled a Working Group to draft a Guide

³⁶ 1980 Convention, art. 13b.

³⁷ See *Leonard v. Lentz*, 748 Fed. App’x 87 (8th Cir. 2019); *Eidem v. Eidem*, 382 F. Supp. 3d 285 (S.D.N.Y. 2019). See also Conclusions and Recommendations adopted by the Counsel, HCCH Council on General Affairs and Policy of the Conference ¶¶ 60-76, 17-20, Apr. 2012, <https://assets.hcch.net/docs/179adaaa-9417-40dd-9ee3-87de105dc3af.pdf> [hereinafter Guide to Good Practice on Article 13(b)].

³⁸ In 2015, of the cases where a judge refused to return a child, Article 13(b) was a cause in 26% of cases. This does not account for additional cases where a parent argued 13(b), but it was not a cause for refusing the child’s return. *LOWE & STEPHENS, supra* note 8.

to Good Practice elaborating on the “interpretation and application of” the grave risk exception.³⁹

There are divergent views on the application of this exception, and the burden that should be imposed on a parent arguing it. The U.S. implementing legislation, ICARA, establishes that a respondent parent must meet a clear and convincing burden of proof when arguing a grave risk exists.⁴⁰ Contrast this with Japan, which included a lower burden in its implementing legislation.⁴¹ The Guide to Good Practice went through several iterations, and the Working Group concluded its work in 2019. The Members of the Hague Conference had access to a non-public draft of the Guide, and the opportunity to provide additional comments during a “silence” period. When the silence period concluded on December 12, 2019, the draft became a final product, which was released by the HCCH on March 9, 2020.

Some attorneys in the international family law community expressed concerns prior to its March 2020 release, that the Guide would “be thin in substance as well as pages,” arguing that “attorneys should encourage courts to follow it [the Guide] when it aids survivors [of domestic violence], and to disregard it when it disadvantages survivors.”⁴² The International Society of Family Law forwarded an online petition in late January 2020 that urged the HCCH to re-visit the wording of one particular paragraph of a prior version of the Guide, prior to its publication, with a focus on that paragraph’s impact on survivors of domestic violence.⁴³

³⁹ Guide to Good Practice, *supra* note 37, at ¶ 6.

⁴⁰ ICARA, 22 U.S.C.S. § 9003(e)(2)(A) (2020).

⁴¹ Japan, despite having a lower threshold to prove an Article 13(b) grave risk in a 1980 Convention petition, has, statistically, not had any cases where a return was refused under this exception for the first five years after Japan’s ratification. Shuji Zushi, *Japan’s 5-year Experience in Implementing the 1980 Hague Abduction Convention*, 2 INT’L FAM. L. 80 (2019), <https://www.mofa.go.jp/files/100059988.pdf>.

⁴² Merle Weiner, *Article 13(b) Guide to Good Practice*, 25 DOMESTIC VIOLENCE REP. 7 (Oct./Nov. 2019).

⁴³ The petition referenced paragraph 58 of a prior version of the Guide to Good Practice on Article 13(b). The Guide, once published on March 9, 2020, did include language in paragraphs 33, 38, and 57 that appeared to clarify the concern about paragraph 58.

The Guide seems to accurately reflect Justice Ruth Bader Ginsburg's comments on Article 13(b) in the *Monasky* opinion, saying the treaty's "return requirement is a 'provisional' remedy that fixes the forum for custody proceedings," by making clear that Article 13(b) can be used in cases of domestic violence if the child would be exposed to harm or placed in an intolerable situation after being returned.⁴⁴ Justice Ginsburg also stated that "[d]omestic violence should be an issue fully explored in the custody adjudication upon the child's return."⁴⁵ The Guide itself confirms that the 1980 Convention is a mechanism to return the status quo ante and the child's habitual residence is the most appropriate, with presumably the greatest amount of evidence, to conduct a full best interest analysis and resolve the issue of that child's custody.⁴⁶

Given the frequency with which the Article 13(b) exception arises in 1980 Convention cases,⁴⁷ the concerns expressed prior to the HCCH's publication, and the U.S. Supreme Court's recent *Monasky* decision, this exception will likely only breed additional litigation moving forward, and more debate over its application and interpretation.

3. *The issue of Article 20*

Contrast Article 13(b) with Article 20 of the 1980 Convention, which permits refusal to return a child "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."⁴⁸ This article is perhaps the least argued exception under the treaty. There is no existing case law, to date, where this exception has been successfully argued. Without cases, this article is not even fully understood. The best explanation that exists comes from a Federal Register notice from 1986 after Ronald Reagan transmitted the treaty package to be ratified by the U.S.

⁴⁴ *Monasky*, 140 S. Ct. at 723.

⁴⁵ *Id.* at 729.

⁴⁶ Guide to Good Practice on Article 13(b), *supra* note 37, at ¶ 15.

⁴⁷ LOWE & STEPHENS, *supra* note 8.

⁴⁸ 1980 Convention, *supra* note 3, at art. 20.

Senate.⁴⁹ The notice seems to imply that the Special Commission of the HCCH adopted the Article 20 exception to pacify certain countries that were insisting on the inclusion of a “public policy exception” in the treaty’s text.⁵⁰ The language invoked during negotiations – “human rights” – was intended to limit what would have otherwise been an exception run amok, given that different countries have different public policies that can vary dramatically. By using “human rights,” the drafters understood the exception to apply in only the rarest of circumstances (which clearly holds true today) and only when the return of a child would “utterly shock the conscience of the court or offend all notions of due process.”⁵¹

While this exception has yet to gain traction, some parents argue that it should. On August 8, 2019, ten parents submitted a Complaint against Japan to the United Nations Human Rights Council, arguing that Japan engaged in a pattern of violating human rights in cases of international parental child abduction.⁵² Japan, a treaty party to the 1980 Convention and a country that has long had no notion of joint custody in its domestic custody laws, renders custody decisions that routinely have a child being primarily placed with one parent, and rarely seeing the other. In its Annual Report on International Child Abduction for 2018, Japan was found to be non-compliant, with the U.S. Department of State expressing concerns that Japan had “no effective means to enforce” orders under the 1980 Convention to return the children to their habitual residence.⁵³ In 2019, the U.S. Department of State removed Japan from this non-compliant list because Japan’s Diet had recently adopted an update to Japan’s implementing legislation under the 1980 Convention to allow for direct enforcement of these return orders in some circumstances.⁵⁴ The

⁴⁹ Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01, 1986 WL 133056 (FR), Pub. Notice 957 (Mar. 26, 1986).

⁵⁰ *Id.* at 21.

⁵¹ *Id.*

⁵² Complaint, Human Rights Council Resolution 5/1 of 18 June 2007, filed against the State of Japan (Sept. 8, 2019).

⁵³ U.S. DEPARTMENT OF STATE, ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 12 (2018).

⁵⁴ Shuji Zushi, *The 1980 Hague Convention and Japan*, PowerPoint (Mar. 2019).

changes went into effect in 2020, and it has yet to become clear whether these new provisions will help increase the return rate of children under the 1980 Convention from Japan. This gives way to a question as to whether a country's domestic custody laws or enforcement mechanisms could violate a child's human rights to the extent that an Article 20 action could be successfully invoked.

4. *Costs associated with "Hague Litigation" in the United States*

Litigation is increasingly expensive in the United States. Coupled with the fact that litigating a 1980 Convention case is only the first of several lawsuits, a parent who is embroiled in this type of court case can plan on expending significant sums of money. The United States took a reservation to Article 26 of the 1980 Convention and declared it would "not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program."⁵⁵ The U.S. Central Authority established a network of attorneys who agree to accept referrals of cases under the 1980 Convention, with the prerequisite of an active law license to be listed. Given the number of 1980 Convention cases filed in U.S. courts each year, most lawyers will never see a case in their careers, meaning that highly experienced litigators are difficult to find. Some courts and practitioners are more routinely seeking the guidance of experienced mediators to help resolve, in one fell swoop, not only the 1980 Convention case, but the underlying custody and parenting issues, to save time and money. There is a glut in the market for mediators who have sufficient experience handling these cases to make mediation a viable option for families in the United States. If the parties engage in mediation, they do so at their own peril if they have inexperienced mediators and lawyers, running the risk

⁵⁵ US Reservation to Article 26 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Oct. 25, 1980 (entered into force Dec. 1, 1983), <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=652&disp=resdn>, (last visited Feb. 18, 2020).

of the mediation delaying or prolonging the process and the outcome being unenforceable or impractical.

5. *The issue of immigration and the Hague Abduction Convention*

In recent memory, there have never been so many news reports of “immigrant caravans,” “border walls,” and asylum seekers. While, statistically, the trend had been primary caretaking mothers abducting their children to return to their home country, the United States is presently seeing an influx of asylum seekers from Central and South America who enter the United States, apply for asylum, and then get stuck in the cross-hairs of a parent who now claims their child was abducted.⁵⁶ In just the past five to seven years, there have been a handful of 1980 Convention cases that have risen through U.S. appellate courts where the issue of a person’s immigration status became fodder for an argument for or against returning a child to that child’s originating country.⁵⁷ How will a parent, and a child’s, claim for asylum impact a parallel return proceeding under the 1980 Convention?

Not only will the child’s legal status within the United States serve as evidence as to whether that child is settled, but it may also invoke concerns that a claim for asylum may mirror many of the legal arguments that make up a claim under Article 13(b).⁵⁸ Another issue includes whether a court order mandating the re-

⁵⁶ Case statistics show that in 2018, there were a total of 26 cases from Brazil, 21 from Colombia, 40 from the Dominican Republic, 15 from Ecuador, 25 from El Salvador, 18 from Guatemala, 171 from Honduras, 306 from Mexico, and 25 from Venezuela. See U.S. Dep’t of State, *Incoming Hague Convention Cases to the U.S. Central Authority: Applications Made for Return and Access in 2018 1-4* (2018), <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/Incoming%20Data%20Page%20-%202019%20Annual%20Report.pdf>. This is a large increase of cases, particularly from Honduras. Some of the other countries held at close to the 2017 case levels. See U.S. Dept. of State, *Incoming Hague Convention Cases to the U.S. Central Authority: Applications Made for Return and Access in 2017 1-4* (2017), <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/CY%202017%20New%20Reported%20Incoming%20Cases.pdf>.

⁵⁷ James D. Garbolino, *Intersecting Issues Involving Asylum in the United States and Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 57 *FAM. CT. REV.* 159 (2019).

⁵⁸ The burden of proof necessary to succeed on a claim under Article 13(b) of the 1980 Convention is by clear and convincing evidence, while the

turn of a minor child to her habitual residence trumps a grant of asylum. The Fifth Circuit in *Sanchez v. RGL*⁵⁹ says it will in some cases. Will a pending asylum claim make out an argument to stay a return order? *Chafin v. Chafin*⁶⁰ delineates the factors to warrant a stay, and courts have refused to find a pending asylum claim meets the standard.⁶¹ Would requiring a child with a pending asylum petition to leave the United States, all but abandoning her asylum claim, violate the child's fundamental human rights under Article 20? The answer is probably not.⁶² These cases will only increase with frequency, as executive orders and USCIS policy memoranda shift the landscape for immigrants seeking a new home.

6. *Including lawyers for children*

Foreign courts are more routinely appointing lawyers for children in 1980 Convention cases. IPCA cases are perhaps some of the highest conflict cases in all of family law. Children are routinely appointed their own independent advocate in high conflict cases in the United States.⁶³ The Article 13(b) Guide to Good Practice delineates that the 1980 Convention supports a mature child expressing his or her views in a return proceeding,⁶⁴ and suggests that courts should consider appointing a separate representative for a child in these cases.⁶⁵ With the U.S. Supreme Court's new definition of habitual residence, focusing on the location where the child is "at home," it may be advisable for a lawyer to be appointed for the child in every single 1980 Convention case to adequately flesh out the evidence from the child's perspective. Children's lawyers have a clear role in cases where a parent argues a mature child is objecting to her return to her

burden to prove the probable risk of harm necessary to be granted asylum is a lower preponderance of the evidence. *See* Garbolino, *supra* note 57, at 163.

⁵⁹ *See* *Sanchez v. R.G.L.*, 761 F.3d 495 (5th Cir. 2014).

⁶⁰ *Chafin v. Chafin*, 568 U.S. 165 (2013).

⁶¹ *See* *Mendoza v. Esquivel*, Case No. 16-CV-0001, May 12, 2016 WL 2757551 (S.D. Ohio 2016).

⁶² *See* *Uzoh v. Uzoh*, No. 11-cv-09124, May 2, 2012 WL 1565345 (N.D. Ill. 2012).

⁶³ *See* Linda D. Henry Elrod, "Please Let Me Stay": *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 633 (2011).

⁶⁴ Guide to Good Practice on Article 13(b), *supra* note 37, at ¶ 6.

⁶⁵ *Id.* at ¶ 88.

habitual residence. They have a further role in fleshing out evidence related to the grave risk experienced by a child or the child's settlement after having been retained in a location for one year. With *Monasky*, a child's lawyer now has a role in adducing evidence that can give the court information to make its fact-based analysis into where a particular child is "at home" from that child's point-of-view.

The real complication with including lawyers for children in the United States continues to center around a lack of education, experience, and training. It is difficult to find a lawyer to represent a parent in a 1980 Convention case. It will be more difficult to find a lawyer who can represent a child. In jurisdictions that have training and standards for children's lawyers, those jurisdictions will often focus on the lawyer representing the child's "best interests," which is far from the analysis needed in a 1980 Convention case. There are no standards for children's lawyers in 1980 Convention cases. Setting aside the difficulty in locating a skilled child's lawyer, it will also increase costs and possibly extend the time it takes to litigate the case to conclusion so that the child's lawyer can conduct his or her independent investigation that is traditionally required under most state requirements.

7. *Anticipatory retentions*

Still another legal issue rearing its ugly head in U.S. 1980 Convention litigation is the issue of an "anticipatory retention." It is generally clear-cut that a parent who unilaterally removes a child from one country to another is "abducting" that child. It is less clear when the child travels to a country with one or both parents for a limited period of time, with the intention that on a date certain that child will return to her home country, but then does not. Taking this analysis one step farther, what happens if a parent, short of that date certain, decides that they are not going to return to the home country with the child? This bleeds into the issue of an "anticipatory retention." When can a parent avail him or herself of the 1980 Convention's remedy to have his or her child returned when, mid-trip, one parent unilaterally expresses an intention to make that limited duration trip extend indefinitely?

This situation has been present in a few cases over the years, and most recently in the *Abou-Haidar*⁶⁶ case in the D.C. Circuit. In a case reminiscent of the *Mozes v. Mozes*⁶⁷ case in the Ninth Circuit, the mother, mid-term in the United States, filed a custody lawsuit seeking to alter the status quo, and secure judicial permission from a U.S. family court to retain the child in the United States past the originally agreed period of time. In both cases, the father filed his 1980 Convention lawsuit in the appropriate federal court shortly after learning of the lawsuit, instead of waiting until the originally agreed upon timeframe lapsed. In both cases, the federal court permitted the 1980 Convention case to proceed, ultimately returning the child to that child's habitual residence.⁶⁸

This situation raises additional issues, particularly since the U.S. Court of Appeals for the D.C. Circuit did not clearly pinpoint when, precisely, the mother began her wrongful retention of the child (was it when she filed the custody lawsuit, served the father, had her lawyer send him a letter excluding him from the family home, he filed his Answer, or even when he filed his 1980 Convention case?). If the father, who was residing part-time in France, were to withdraw his consent to the custodial arrangement, and demand the child's return to France *before* the agreed period of time lapsed, would that also be grounds for a 1980 Convention petition if the mother did not return the child? Should parents be required to wait out the remainder of the agreed timeframe before seeking recourse under the 1980 Convention? What if that timeframe is three months? Six months? A full year? Will the custody case that the mother initiated be stayed for that full year when no 1980 Convention petition is permitted to be filed? Will it be dismissed for lack of jurisdiction, with the U.S. state being a mere temporary absence from the actual home state? With the premise of the 1980 Convention being

⁶⁶ *Abou-Haidar*, 945 F.3d 1208.

⁶⁷ *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (clarified by *Monasky*, 140 S. Ct. 719).

⁶⁸ Compare this to *Toren v. Toren*, 26 F. Supp. 2d 240 (D. Mass. 1998), where a father with limited access rights filed a 1980 Convention petition when the mother filed a request to alter those visitation rights in Massachusetts, *rev'd on other grounds*, *Toren v. Toren*, 191 F.3d 23, 25, 1999 U.S. App. LEXIS 21877, *1.

a prompt return to the status quo, waiting seems to have a counter effect on the child now acclimating to the new environment, and may give way to more of an argument that the United States has become the child's habitual residence under the new *Monasky* standard.

With the lack of clarity and a seeming circuit split with the First Circuit, this issue may soon reach the U.S. Supreme Court.⁶⁹

8. Undertakings

Any practitioner who has litigated a 1980 Convention case is familiar with the issue of undertakings – things that a judge can ask the LBP to undertake either before or after the child's return to ensure it is safe and smooth. Undertakings routinely include a LBP providing financial support to the TP, agreeing to dismiss or drop an existing criminal charge or court case, or agreeing to certain behavioral modifications to ensure a calm re-entry to the habitual residence, pending any custody litigation. The concern, however, has always been that undertakings may or may not be enforceable in the other country after the child is returned, rendering them worthless. The U.S. Department of State, in its 2012 Country Profile to the HCCH says that a U.S. “court has wide latitude in ordering provisions for the safe return of the child. As such, either party may ask the court for undertakings to facilitate the child's safe return, and the court will decide accordingly.”⁷⁰ The issue is not as simple as stated, however. While the United States may have means of recognizing and enforcing foreign court orders under the Uniform Custody Jurisdiction and Enforcement Act, foreign countries do not necessarily have the same streamlined processes, described further below.

This issue came to the forefront in a recent Second Circuit case, *Saada v. Golan*,⁷¹ where a mother who refused to return to Italy with the parties' minor child after visiting New York for a family wedding, argued a grave risk to returning the child due to the violent nature of the parents' relationship. The trial court

⁶⁹ *Toren v. Toren*, 26 F. Supp. 2d 240 (D. Mass. 1998) *rev'd on other grounds*, *Toren v. Toren*, 191 F.3d 23, 25, 1999 U.S. App. LEXIS 21877, *1.

⁷⁰ HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, COUNTRY REPORT OF THE UNITED STATES OF AMERICA 37 (Nov. 2012).

⁷¹ 930 F.3d 533 (2d Cir. 2019).

found that there was a grave risk to returning the child, but that it could be ameliorated with certain undertakings, which included among others, that the father give the mother \$30,000 before the child was returned to Italy to provide for housing, financial support, and legal fees, that the father stay away from the mother after their return, and that the child only visit with the father with the mother's consent. In exercising its discretion, the district court acknowledged that it must take account of any ameliorative measures that can reduce whatever risk might otherwise be associated with a child's repatriation. These measures, or undertakings, might need to occur in the country of habitual residence. This requires an exercise of comity by the foreign court to enforce those measures or undertakings.⁷²

On appeal, the Second Circuit expressed concern that once a child is returned to his or her habitual residence, the U.S. court would lack jurisdiction to redress a parent's non-compliance with the "carefully crafted conditions" of the child's return.⁷³ The court concluded that when determining a repatriation of the child to his or her habitual residence would expose the child to a grave risk, "unenforceable undertakings are generally disfavored, particularly where there is reason to question whether the petitioning parent will comply with the undertakings and there are no other sufficient guarantees of performance."⁷⁴ Any undertaking that cannot be exercised until the child is returned to the habitual residence is necessarily unenforceable. A court should always look for alternative and enforceable measures to allow the child to return.

This issue will become increasingly prominent in court decisions under Article 13(b), particularly where the Guide to Good Practice on that exception references the need for courts to examine protective measures to ensure a prompt and safe return of a child.⁷⁵ The treaty itself has the ultimate goal of restoring the

⁷² See Guide to Good Practice on Article 13(b), *supra* note 37, at 11, Glossary, where the definition of Undertaking says, "An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned."

⁷³ *Id.*

⁷⁴ *Saadal*, 930 F.3d at 542.

⁷⁵ Protective measures can include both voluntary undertakings and certain existing measures in the habitual residence, such as housing assistance, fi-

status quo, and, in doing so, looks to courts to fashion orders that accomplish that goal, despite there being concerns in the habitual residence. This Second Circuit opinion will no doubt illuminate the concern about voluntary undertakings and cause other judges to reconsider the measures put in place that would otherwise allow that judge to return a child to her habitual residence. It remains unseen as to whether this opinion will cause courts to return fewer children to their habitual residence or create a more urgent need for the United States to ratify the 1996 Convention, as explained below.⁷⁶

9. Abstention

One final issue that has been appearing more routinely in 1980 Convention litigation in the United States is the issue of abstention. ICARA, the U.S. implementing legislation for the 1980 Convention, allows the petitioner to choose his or her venue – state or federal court in the location where the child now sits post-abduction.⁷⁷ There are a variety of reasons why a parent may choose one court over another, but, when the COVID-19 pandemic struck the United States in 2020, it appeared that U.S. federal courts were better equipped to hear cases on an expedited basis, or even remotely, than were U.S. state family courts. It is not uncommon that, when a child is abducted, one or both parents file cases in their respective family courts – the LBP filing in the country of habitual residence, seeking to establish custody on both an expedited/emergency basis and permanently and the TP filing in the country where they now sit with the child. Article 16 of the 1980 Convention specifically states, “[a]fter receiving notice of a wrongful removal or retention of a child . . ., the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention.”⁷⁸ This Article typically causes the family court

nancial assistances, domestic violence shelters and support, etc. *See* Guide to Good Practice on Article 13(b), *supra* note 37, at ¶¶ 43-47.

⁷⁶ *Id.* at ¶ 48.

⁷⁷ 22 U.S.C.S. § 9003(b).

⁷⁸ 1980 Convention, *supra* note 3, at art. 16.

where the child is now sitting to stay any custody proceeding to allow any Hague petition to proceed first.

With many LBPs filing their 1980 Convention petitions in U.S. federal court, and many TPs filing requests for civil protection orders and/or custody orders in U.S. state family courts, there is a question as to what should happen with the simultaneous litigation. Typically, Article 16 would require the state court proceeding in the country where the child sits to pause and allow the federal court to resolve the 1980 Convention petition, but in some more recent cases, federal courts have been looking more closely at whether to abstain from proceeding, in deference to the state court cases. Abstention is traditionally very rarely used and “is permissible only in a few “carefully defined” situations with set requirements.”⁷⁹ The essence of abstention is to prevent a federal court from intervening in pending state litigation where the petitioner can have adequate opportunity to raise his or her federal claims in the state proceedings. Its aim is to avoid duplicative litigation where there is already a vehicle to address the claim.

Therefore, when two parents were litigating in a San Diego, California family court, and the family court judge raised the 1980 Convention issue, and the LBP acquiesced to the judge scheduling a hearing to resolve the 1980 Convention issue, the LBP’s subsequent 1980 Convention petition in federal court was dismissed, using the abstention doctrine.⁸⁰ But, when two parents were litigating in an Illinois family court, after the mother requested a civil protection order and divorce, and the parents filed pleadings that mirrored some of the arguments they may have made in a 1980 Convention case, the federal court also abstained from proceeding with the LBP’s subsequently filed 1980 Convention petition.⁸¹ In neither of these two 2020 cases did the LBP file a 1980 Convention return petition in the state court proceedings, and instead chose to file in federal court. In the San Diego case, the court, *sua sponte*, raised the Hague Convention issue and scheduled an evidentiary hearing to resolve that issue, and

⁷⁹ *United States v. Morros*, 268 F.3d 695, 703 (9th Cir. 2001).

⁸⁰ *Barron v. Kendall*, No. 20-CV-00648-AJB-KSC, 2020 WL 2521915 (S.D. Cal. May 18, 2020).

⁸¹ *Cordoba v. Mullins*, No. 1:2020cv02721, 2020 WL 3429771 (N.D. Ill. 2020).

the LBP *acquiesced to that happening*. In the Illinois case, both parents filed pleadings that included arguments that may otherwise be argued in a 1980 Convention case, but there was no 1980 Convention case pending in the state court.

These two recent cases are not the first-time abstention was raised in a 1980 Convention case. The Ninth Circuit addressed this issue years ago in *Holder v. Holder*,⁸² where the LBP father, believing he could not pursue a custody order in Germany, where he was stationed with the Air Force, filed a custody petition in the California state family courts where the TP mother now sat with the child. Subsequently, he filed a return petition under the 1980 Convention in the federal courts. The federal trial judge's decision to stay the federal proceeding because of the state proceeding was overturned. The Ninth Circuit was not bothered by the fact that the LBP initiated the state custody suit and the federal 1980 Convention case saying, "he may pursue his remedies under *both* the Convention and state law."⁸³

In essence, a custody suit is not a 1980 Convention suit, and while there may be some similarities in the analysis of "home state" under the UCCJEA and "habitual residence" under the new *Monasky* standard, it is clear from the language of the treaty itself that a 1980 Convention case cannot resolve custody. Even if the LBP raised similar issues in a custody case that was concurrently filed with the 1980 Convention return petition, the legal analysis would not be the same, with custody cases resolving matters based on a minor child's "best interests." The treaty itself cannot resolve what is "best" for a child, nor does it confer jurisdiction to resolve that child's custody – it merely returns matters to the status quo, making the assumption that the status quo (the child sitting where they were physically sitting prior to the abduction) is what is best for the child until the parents can further resolve the issues of custody in the appropriate venue. Even with a LBP using a family court to request a child be returned or a foreign custody order enforced using the UCCJEA (see below), the 1980 Convention is still an alternative or additional remedy available to that parent which can be brought at the same time. It is the LBP's choice of venue under ICARA as to where he or

⁸² 305 F.3d 854 (9th Cir. 2002).

⁸³ *Id.* at 865.

she will file the petition, which can be based on numerous factors, such as expediency, judicial knowledge, or availability of technology to facilitate remote participation in proceedings.

This issue of abstention is no doubt going to become more prominent as more parents race to family courts in both jurisdictions to try to resolve matters, and as more practitioners become savvy to the streamlined enforcement mechanisms available under the UCCJEA.

III. A Current Alternative Path – the UCCJEA

Clearly, 1980 Convention litigation is becoming more complicated, expensive, and time-consuming as more parents and lawyers are aware of the treaty, and U.S. courts grapple with addressing issues that were not contemplated by the treaty when it was drafted in the late 1970's. But there is an alternative which is far more familiar to family law practitioners. The current version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was concluded by the Uniform Law Commission in 1997. It has since replaced its predecessor act, the Uniform Child Custody Jurisdiction Act, in all but one state (Massachusetts).⁸⁴ One of the primary reasons for the revision of this uniform jurisdictional act was to provide more consistency in the enforcement of custody and visitation orders state-to-state,⁸⁵ including through streamlined registration procedures, expedited enforcement provisions, and limited reasons to reject enforcement of an order.⁸⁶ Most importantly, for this discussion, it applies to international cases.

⁸⁴ UNIF. L. COMM'N, UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d> (last visited Aug. 16, 2020).

⁸⁵ UNIF. L. COMM'N, UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, PREFATORY NOTE (1997), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1f38ad4a-09fc-a400-1737-f9ec51ebf85b&forceDialog=0>. (last visited Feb. 6, 2020) [hereinafter UCCJEA 1997].

⁸⁶ *Id.*

A. UCCJEA's Application to Foreign Jurisdictions

Section 105 of the UCCJEA expressly mandates a court in the United States to treat a foreign country as if it were a sister-state, and to recognize and enforce a foreign custody order if it were made “under factual circumstances in substantial conformity⁸⁷ with the jurisdictional standards of” the UCCJEA.⁸⁸ The only exception would be if “the child custody law of” the “foreign country violates fundamental principles of human rights.”⁸⁹ As discussed above, that is a high hurdle to jump.⁹⁰

B. Registration of Foreign Custody Orders

The UCCJEA provides for a streamlined and relatively straight-forward registration process. A person seeking to register a foreign custody order in a U.S. state need only send a letter to a court in the state where he or she seeks its registration, along with two copies of the foreign custody order (with one being a certified or apostille version)⁹¹ and a verification that the order has not been modified, along with names and addresses for the person registering the order and individuals with rights under the terms of the order.⁹² The court, where the paperwork is filed, then sends notice to the persons named in the registration request alerting those persons that if they intend to contest the registration of the custody order, they must do so within twenty days after being served with the notice by requesting a hearing.⁹³ At the hearing, the custody order will be registered (in other words, it will be confirmed and no one may further contest the determinations of any of the matters under the order), unless the person who contests its registration establishes one of a few very narrow arguments.⁹⁴ The only arguments available to contest its

⁸⁷ *Id.* at § 105(b).

⁸⁸ *Id.* at § 105(a)-(b).

⁸⁹ *Id.* at § 105(c).

⁹⁰ The Court addressed the human rights issue in *Toland v. Futagi*, but found that it was not implicated because the child was in the guardianship of the maternal grandmother in Japan, and the guardianship order did not sever the father's custodial rights, which he could have sought to enforce in an action in Japan. *Toland v. Futagi*, 40 A.3d 1051 (Md. 2012).

⁹¹ UCCJEA 1997, *supra* note 85, at § 305(a).

⁹² *Id.*

⁹³ *Id.* at § 305(b)-(c).

⁹⁴ *Id.* at § 305(d).

registration are: (1) the court that issued the order did not have jurisdiction in substantial conformity with the jurisdictional principles in the UCCJEA; (2) the custody order was vacated, stayed, or modified by a court having authority to do so; or (3) there was no due process (notice and an opportunity to be heard) in the custody proceedings that resulted in the order. It really is this simple.

C. Recognition and Enforcement of Foreign Custody Orders

Once registered, the UCCJEA mandates the recognition and enforcement of foreign custody orders if: the other country exercised its jurisdiction in substantial conformity with the principles in the UCCJEA and the custody order has not been modified.⁹⁵ In the case of foreign courts, the section 105 exception applies. In other words, if the child custody laws of the foreign country violate fundamental principles of human rights, the U.S. court need not recognize and enforce that foreign court's order. This streamlined enforcement mechanism bypasses many of the questions raised above with the 1980 Convention.

1. Expedited enforcement

Enforcement can be quick using the UCCJEA. The 1980 Convention, however, despite aspiring to return a child within six weeks of initiating the case, is traditionally not as quick. In 2015, the average number of days to resolution (among all countries) was 163 days, with some resolutions taking as long as two or more years.⁹⁶ The UCCJEA section 210 gives a U.S. court authority to order a party to appear before the court, either with or without the child, which can aid in the immediate enforcement of a custody order.⁹⁷ Section 308 of the UCCJEA provides for a process that enforces the foreign custody order on an expedited basis.⁹⁸ The respondent would be obligated to appear in person, with the child if required by the court. The hearing is mandated to be held "on the next judicial day after service" of the show cause order, "unless that date is impossible."⁹⁹ The judge may

⁹⁵ UCCJEA 1997, *supra* note 85, at § 305(a).

⁹⁶ LOWE & STEPHENS, *supra* note 8.

⁹⁷ UCCJEA 1997, *supra* note 85, at § 210(a).

⁹⁸ *Id.* at § 308(a).

⁹⁹ *Id.* at § 308(c).

order the petitioner to take immediate physical custody of the minor child, unless the respondent successfully argues certain basic exceptions, such as the issuing court lacked jurisdiction in substantial conformity with the UCCJEA, the order to be enforced has been vacated, stayed or modified, or, there was no due process.¹⁰⁰ The court may also issue a warrant to take immediate physical custody of the child if the child may suffer “serious physical harm” or be removed from the state.¹⁰¹ The one potential obstacle, as you can see, is that the UCCJEA requires a foreign custody order. If no order exists, you will need to employ foreign counsel immediately. This differs from the 1980 Convention, which permits an LBP to initiate a return case so long as that parent has “rights of custody,” which can be obtained numerous ways, including parenting agreements, custody orders, and by operation of law.¹⁰²

2. *Interplay with temporary emergency custody jurisdiction*

The UCCJEA has a provision for temporary emergency jurisdiction in cases where a child is present in a U.S. state and there is an emergency. Emergency is defined as the child having “been abandoned” or the child, his or her sibling or parent, “is subjected to or threatened with mistreatment or abuse.”¹⁰³ This temporary jurisdiction can be invoked despite the state not having authority to decide custody of the child by issuing an initial custody order or modifying an existing order. The expectation is that this temporary order serves as a stopgap measure to allow the parents to avail themselves of the proper jurisdiction to resolve custody in a more complete manner, and the temporary order will remain in place until that proper jurisdiction takes those steps. The UCCJEA’s drafters made clear, in their comments, that temporary emergency jurisdiction is intended only for extraordinary circumstances.¹⁰⁴

There are provisions for the court vested with temporary emergency jurisdiction to communicate with the court that is ex-

¹⁰⁰ *Id.* at § 310(a).

¹⁰¹ *Id.* at § 311(b).

¹⁰² Remember that a parent’s rights of custody are determined by the law in the child’s habitual residence.

¹⁰³ UCCJEA 1997, *supra* note 85, at § 204(a).

¹⁰⁴ *Id.* at § 204 cmt.

exercising jurisdiction in substantial conformity with the jurisdictional principles in the UCCJEA. This presents certain challenges in the international context, where some foreign courts are precluded, or outright prohibited, from having direct judicial communication with a foreign judge.¹⁰⁵ It also creates some questions, such as what happens with a temporary order during a proceeding to determine whether to recognize a foreign custody order. Will the temporary order remain in place until that foreign order is recognized (or not)? If the proceeding is not scheduled promptly, can the temporary order be modified?

3. *Human rights exception*

The human rights exception delineated in section 105(c) of the UCCJEA should be narrowly construed. It is not a license to pass judgment on the social and cultural norms of another country. The concept is found in the 1980 Convention as an exception to returning a child to that child's habitual residence, as noted above. The drafters' comments to section 105 of the UCCJEA clarify that when a U.S. court is examining this provision, it should focus on the child custody law of the foreign country and "not on other aspects of the legal system." The drafters further stated that this exception "is invoked only in the most egregious cases."¹⁰⁶ Practitioners have attempted to invoke the human rights exception in UCCJEA cases, with varying degrees of success, typically arguing that the foreign court did not apply a "best interest" analysis in its decision. While some judges appear open to this argument, it often involves experts on the foreign country's laws and application, which is where many practitioners drop the ball, failing to consult with foreign counsel promptly and have foreign counsel testify as to the law, its application, and ultimate determination when presenting their case.¹⁰⁷

¹⁰⁵ See *In re C.M.*, No. B287846, 2018 WL 6716559 (Cal. Ct. App. Dec. 21, 2018) (unpublished opinion).

¹⁰⁶ UCCJEA 1997, *supra* note 85, at § 105 cmt.

¹⁰⁷ See *People in Interest of AB-A*, 451 P.3d 1278 (Colo. App. 2019); *Qaisi v. Alaeddin*, 580 S.W.3d 891 (Ky. Ct. App. 2019), where, arguably, the results might have been different if counsel had supported their arguments with evidence of foreign law.

4. *Due process*

For due process reasons, a U.S. court is not required to enforce a custody order made in any other jurisdiction, foreign countries included, if that court issued its order “without notice or an opportunity to be heard.”¹⁰⁸ That required process starts with proper service of process of the proceedings, which, in the international context, may require looking at another “Hague Convention,” the Hague Service Convention.¹⁰⁹ Service may not be quick. It may be inefficient. But it is an integral part of ensuring the enforceability of an order. This provision of the UCCJEA also implicates numerous situations where parents may run to their foreign court after their child is abducted and obtain an emergency temporary *ex parte* order. The UCCJEA’s enforceability provisions do not allow for the easy registration and enforcement of that *ex parte* order. The order may be recognized, as a matter of comity, or may be used as a springboard to a temporary emergency order in the U.S. court until the respondent can be served and have the opportunity to present his or her case.

D. *Foreign Country Recognition of U.S. Custody Order and the Issue of Exclusive, Continuing Jurisdiction*

Pursuant to section 202 of the UCCJEA, the court that issued its custody order consistent with the jurisdictional principles in the UCCJEA has the exclusive and continuing authority to modify that custody order until everyone has left the jurisdiction or the issuing court determines that the family members no longer have a significant connection to the state and substantial evidence is no longer available in the state in regards to the child.¹¹⁰ This concept is not common in foreign countries, where child custody jurisdiction often follows the child to his or her new residence, even if one of the parents remains in the jurisdiction where the initial custody order was issued.¹¹¹ Because this concept is not accepted in many foreign countries, it could lead to

¹⁰⁸ UCCJEA 1997, *supra* note 85, at § 205(b).

¹⁰⁹ See Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>.

¹¹⁰ UCCJEA 1997, *supra* note 85, at § 202.

¹¹¹ See generally *Brussels II bis*.

simultaneous custody cases, with each court issuing a dramatically different custody order. Despite a U.S. judge's obligation to initiate communication with the foreign judge in the instance of a simultaneous proceeding, it may again, be difficult or prohibited, particularly in countries with a civil code. The Hague Conference on Private International Law helped organize a network of judges that could be of guidance in initiating this direct judicial communication. A judge (not lawyer) who wishes to initiate direct communication with a foreign judge should seek guidance from the U.S. Department of State by sending an e-mail to judge-network@state.gov. Of course, there is no guarantee that the communication will occur. In some instances, U.S. judges, when receiving no response from their foreign counterpart, assumed the foreign jurisdiction was declining jurisdiction.¹¹² This is a faulty assumption, and lawyers should always attempt to put forth evidence of foreign law that demonstrates why the judge may be having difficulty obtaining a response, and what jurisdictional principles are adhered to in the foreign country.

IV. The Promise of the Hague Child Protection Convention

In 2013, the Uniform Law Commission amended the UCCJEA because of the United States' signing of the 1996 Convention.¹¹³ In other words, the United States is looking towards becoming a treaty party to yet another "Hague Convention." It will be implemented primarily through the UCCJEA. More easily stated, family lawyers will be able to refer to the UCCJEA, which will hopefully make the treaty more accessible. Because it is implemented through the UCCJEA, once ratified, there will be a new part of the uniform act that will be the go-to for any case between treaty partner countries. Therefore, despite having a familiar uniform act, family lawyers will need to begin familiar-

¹¹² *In re C.M.*, 2018 WL 6716559.

¹¹³ UNIF. LAW COMM'N, CHILD CUSTODY, JURISDICTION, AND ENFORCEMENT ACT 2013 AMENDMENTS (2013), <https://www.uniformlaws.org/committees/community-home?CommunityKey=9a8f1eb5-79ce-4fa1-b3be-45d5170a5351> [hereinafter UCCJEA 2013].

izing themselves with how to determine when the United States is a treaty partner with a foreign country.¹¹⁴

A. Provisions of the 1996 Convention

The 1996 Convention is, for lack of better terminology, a UCCJEA for international cases. This is a somewhat imprecise description because the earlier UCCJEA already treats foreign custody orders as if they were orders of a sister-state, with limited exception. The real essence of the 1996 Convention, and one of the primary reasons why it is so valuable to the United States, is that it will help ensure U.S. custody orders are enforceable overseas more consistently. The 1996 Convention does a bit more than this overly simplistic readout. It determines which country has authority to issue a custody order (called a “measure of protection” in the 1996 Convention), determines the law to be applied, and provides for the recognition and enforcement of these custody orders between contracting partners.¹¹⁵ It will be a hugely practical law that tries to further remove the glamour of forum-shopping and provides some consistency between countries. It also, as stated above, can fill some gaps between the 1980 Convention and existing domestic law.

B. The Current Status of This Treaty in the United States?

The United States took the first step towards making the 1996 Convention the law in the United States by signing the treaty on October 22, 2010.¹¹⁶ After the United States signed the treaty, the Uniform Law Commission (ULC) re-convened its drafting committee for the UCCJEA, and decided how to update

¹¹⁴ This is not as easy as it may sound. There are complex rules as to when the United States is a treaty partner with another country, and it also varies by treaty as to how and when this happens. Do not assume that because the United States has ratified a treaty that it is automatically a partner with every other country that is a treaty party. Also, do not assume that if the United States is a member of an organization that drafts the treaties that it is a treaty party to that specific treaty. *See* Matter of Marriage of Long & Borrello, 421 P.3d 989 (Wash. Ct. App. 2018).

¹¹⁵ 1996 Convention, *supra* note 1, art. 1. The 1996 Convention is more expansive than the UCCJEA and applies to other types of actions, such as actions related to a child’s property.

¹¹⁶ 1996 Convention Status Table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> (last visited Feb. 18, 2020).

that law to incorporate the 1996 Convention. The UCCJEA was ultimately updated to include one new Article that addresses proceedings under the 1996 Convention. This updated version of the uniform act was approved by the ULC during its annual meeting in Boston, Massachusetts in July 2013.¹¹⁷ This is where the U.S. process has stalled. The next steps would include the drafting of federal legislation to implement this treaty, and then seeking the advice and consent of the U.S. Senate. Given the change in administrations in 2017, and a U.S. Presidential election in 2020, it is unclear when this particular treaty will take the next step towards becoming law. Undoubtedly, even if the federal government took its next steps, additional planning must be done. The U.S. government would need to designate a Central Authority to operate under this treaty. Every U.S. state legislature would need to adopt the updated version of the UCCJEA. If the U.S. government pushes forward with the ratification process, it is far from reaching its conclusion.

C. How Would This Treaty Be Implemented in the United States?

For any custody case where the United States and another country would have a treaty partnership under the 1996 Convention, the court would need to look to the newest article of the UCCJEA (2013) to determine jurisdiction, choice of law, and whether to recognize and enforce an existing custody order. The primary jurisdictional basis under the 1996 Convention is the child's "habitual residence," which is the terminology that has given U.S. courts so much trouble under the 1980 Convention for years. This term of art is not unlike a child's home state but offers less precision. The new UCCJEA (2013) will require a court to consider all "relevant" factors in determining a child's "habitual residence" and lists six factors that the court *may* consider as part of that determination, including the child's home state, ties to a country, age and maturity, duration of the child's stay in the country, circumstances under which the child is in the country, and the parents' intent for that stay in the country.¹¹⁸ The term "habitual residence," despite being used in numerous Hague

¹¹⁷ UCCJEA 2013, *supra* note 114.

¹¹⁸ *Id.* at § 410.

Conventions, does not need to take the same definition for the 1996 Convention as it does for the other Hague Conventions, and it is left to the countries to determine the best definition. It remains to be seen whether U.S. courts would apply the *Monasky* totality-of-the-circumstances test when determining a child's habitual residence under the 1996 Convention, and how that will interplay with the text of the UCCJEA (2013).

The UCCJEA (2013) provides certain specific circumstances under which a court can exercise its jurisdiction to issue or modify a custody order. The key means is if the state has jurisdiction under the usual UCCJEA principles (home state, and if no home state, then substantial connections) and the United States is the child's habitual residence.¹¹⁹ The UCCJEA (2013) also provides for jurisdiction if the court cannot determine the child's habitual residence, if the child is a refugee, internationally displaced, or if the country that would otherwise have jurisdiction asks the court to assume jurisdiction. The UCCJEA (2013) includes a new article, section 413,¹²⁰ that mirrors the language of the 1980 Convention to prevent a transfer of jurisdiction following a child's wrongful removal or retention.

In addition to provisions on how to address simultaneous proceedings with a treaty partner, assuming temporary jurisdiction, and resolving certain conflict of laws, the most important part of the UCCJEA (2013) will be section 423. In section 423,¹²¹ the UCCJEA (2013) incorporates the 1996 Convention's recognition and enforcement provisions. Much like the current version of the UCCJEA, the UCCJEA (2013) mandates the recognition and enforcement of a measure of protection from a treaty partner if: the other country issued its order in substantial conformity with the UCCJEA and the order is not modified. Different from the existing UCCJEA, this Article includes several exceptions for when a U.S. court *may* decline to recognize a custody order issued by a treaty partner. These exceptions include: (1) the country that issued the order was not the child's habitual residence, (2) the respondent had no opportunity to be heard before issuing the order (except in emergency situations), (3) the order is inconsistent with a later order issued by an appro-

¹¹⁹ *Id.* at § 411(a).

¹²⁰ *Id.* at § 413.

¹²¹ *Id.* at § 423.

priate jurisdiction, (4) the order is manifestly incompatible with the state's public policy, (5) the country that issued the custody order did not provide the child the opportunity to be heard, violating fundamental principles of procedure of this U.S. state, and (6) certain situations related to a child's placement in foster care. Arguably, the fifth exception is the wildcard exception that may play more of a role in a U.S. custody order's recognition overseas under the treaty than a foreign custody order's recognition in our states.¹²²

D. The Benefits of Using the UCCJEA (2013) in an International Child Abduction Case?

Despite section 423's exceptions for recognition and enforcement, there are fewer ways to argue against returning a child under the terms in a clear and enforceable custody order than under the 1980 Convention. Most notably, there is no grave risk of harm exception to returning a child, which, statistically speaking, is the most argued 1980 Convention exception.¹²³ Hopefully, although it remains an unknown to date, it will be faster and easier to enforce a foreign custody order in an expedited proceeding, than to schedule a 1980 Convention trial, with discovery, witnesses, and appeals.

V. Conclusion

There is a changing landscape when it comes to litigating an international child abduction case in the United States. Professor Robert Spector has long professed that using the UCCJEA is a better mechanism for securing the return of an abducted child than the 1980 Convention, when the UCCJEA is available.¹²⁴ The 1980 Convention remains a viable and useful tool in securing

¹²² With the United States as the only country not having ratified the UN Convention on the Rights of the Child, and foreign jurisdictions routinely incorporating the child's voice into every proceeding, there are some concerns that if a U.S. court fails to include the child's voice in a custody proceeding where the resulting custody order must be recognized overseas, the foreign country may avail itself of this exception under the 1996 Convention, and refuse to recognize that U.S. custody order.

¹²³ LOWE & STEPHENS, *supra* note 8.

¹²⁴ Spector, *supra* note 4. Professor Spector is the drafter of the UCCJEA and participated in the negotiation of the 1996 Convention.

a child's return, but there are some unexpected turns that have emerged over the years, shunning the original view that child abductions were going to be a situation of non-custodial fathers ferreting away their children overseas. In a world that gets smaller by the day, it is becoming ever more important for family lawyers to understand the changing climate and the various tools moving forward to provide some consistency and security for children.