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Access Rights: A Necessary Corollary to Custody Rights under the Hague Convention on the Civil Aspects of International Child Abduction

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Abstract

This Note argues that the aspect of the Hague Abduction Convention addressing access rights is ineffective because it has forced some courts to misconstrue provisions of the Hague Abduction Convention in order to carry out the Convention's intent. This Note further argues that the burden of establishing the absence of a wrongful removal or retention should fall upon the parent who has removed the child. This Note also argues that the Hague Conference should amend the Convention to order a court to enforce previously ordered access rights in the child's new habitual residence. Part I provides an historical background on the problem of international child abduction. Part I also discusses the international response to the growing problem of children taken abroad. Part II illustrates the issues concerning access rights from the perspective of the drafters of the Hague Abduction Convention, and discusses case law dealing with access rights under the Hague Abduction Convention. Part III proposes a solution for the Hague Abduction Convention to place the burden of proving the propriety of the removal or retention of a child on the moving parent. Part III further proposes an amendment that would direct courts to recognize and enforce as far as possible the access rights of non-custodial parents. This Note concludes that without clearer and more equitable direction, courts may never respect the original custodial arrangement established to benefit the child.

ACCESS RIGHTS: A NECESSARY COROLLARY TO
CUSTODY RIGHTS UNDER THE HAGUE CONVENTION
ON THE CIVIL ASPECTS OF INTERNATIONAL
CHILD ABDUCTION

*Priscilla Steward**

INTRODUCTION

A sudden separation of a child from her parents can create devastating short and long term effects for the child.¹ The fear and pain of the left-behind parent may also be severe as the parent searches for and fights for the return of the child.² Frequently, a parent will abduct a child to gain exclusive possession and control of the child.³ A parent may further escalate difficulties for the child and for the non-custodial parent by removing the child to another nation.⁴ Without international devices in

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1. See Elisa Perez-Vera, *Explanatory Report*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 426, 428 (1982) [hereinafter PEREZ-VERA REPORT] (stating that one problem is that children are taken from their families and social environments where their lives have developed). The PEREZ-VERA REPORT is the official legislative history of the Hague Convention of the Civil Aspects of International Child Abduction. *Id.* at 427.

2. See GEOFFREY L. GREIF & REBECCA HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 183-87 (1993) (describing father's sense of loss after losing his fight to find his daughter after four years of searching and also discussing mother's frustrated attempt to gain custody of her child because of cultural biases favoring fathers). Obstacles that parents face in recovering children taken abroad may include language barriers, distance barriers, difficulties in getting information, a different legal system, and resistance from local authorities. *Id.* at 195.

3. See REMARKS OF ADAIR DYER TO BE OFFERED AT THE BRIEFING ON THE HAGUE INTERNATIONAL CHILD ABDUCTION CONVENTION AND THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (P.L. 100-300), Washington, D.C., Jan. 6-7, 1989 (visited Mar. 4, 1997) <[http://www.hiltonhouse.com/File.htm/REM\[JAN89.AD\]](http://www.hiltonhouse.com/File.htm/REM[JAN89.AD]>)>, I.C.2. [hereinafter DYER REMARKS] (stating that "the abrupt removal of a child abroad by the custodial parent or at a time when both parents were exercising joint custody, might be stimulated in part by desire to cut off all access to the child on the part of the parent left behind."). Adair Dyer was the first American appointed to the Permanent Bureau of the Hague Conference on Private International Law, and was assigned the task of preparing all necessary research for the Hague Convention on the Civil Aspects of International Child Abduction. *Id.* at I.B.

4. See PEREZ-VERA REPORT, *supra* note 1, at 428-29, 432 (discussing problem of up-

place to aid victimized parents and children, abducted⁵ children never see their parents again.⁶

As part of an international response to the growing number of children illegally taken abroad, the Hague Conference on Private International Law⁷ at its Fourteenth Session enacted the Hague Convention on the Civil Aspects of International Child Abduction⁸ ("Hague Abduction Convention" or "Convention").⁹ One purpose of the Convention is to secure the immediate return of children wrongfully removed or wrongfully retained in a different nation.¹⁰ Another purpose of the Convention is to se-

rooting children from family environment and discussing how abducting parent attempts to ensure custody by choosing more favorable forum State to decide custody issues); Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing the Doors to the Parent Abductor*, 2 TRANSNAT'L L. 589, 591 (1989) (discussing emotional, cultural, and legal problems parents experience when child is taken out of country); see also GREIF & HEGAR, *supra* note 2, at 186-87 (discussing disadvantages of left-behind parents who attempt to recover their children from another country); Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM.L.Q. 99, 100 (1980) (discussing how child abductions have become worldwide problem prompting multinational response).

5. See A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 545 (1981) (stating that expression "wrongful removal or retention of a child" is technically accurate concept in defining abduction); see also PEREZ-VERA REPORT, *supra* note 1, at 442 (defining wrongful retention to apply to "those cases where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying.").

6. See Lawrence H. Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV. 285, 290 (1985-86) (stating that "[w]ithout effective international mechanisms, deprived parents are left powerless and desperate, frequently driven to expensive and clumsy attempts at self-help.").

7. See Bodenheimer, *supra* note 4, at 99 n.1. (stating that "[t]he Hague Conference is an international organization of member governments whose Permanent Bureau is located at the Hague, Netherlands."). The sole mission of the Hague Conference on Private International Law ("the Conference") is to unify the rules of private international law by enacting multilateral treaties. DYER REMARKS, *supra* note 3, at I.B. The Conference presently has 29 members. Bodenheimer, *supra* note 4, at 99 n.1. The Permanent Bureau, which is the Conference's permanent secretariat, is responsible for establishing treaties. DYER REMARKS, *supra* note 3, at I.B.

8. The Hague Convention on the Civil Aspects in International Child Abduction, *opened for signature* Oct. 25, 1980, S. TREATY DOC. NO. 11, 99th Cong., 1st Sess., *reprinted in* 19 I.L.M. 1501 (1980) [hereinafter Hague Abduction Convention or Convention].

9. See PEREZ-VERA REPORT, *supra* note 1, at 426 (stating that on October 24, 1980, Hague Conference unanimously enacted Hague Abduction Convention).

10. See Hague Abduction Convention, *supra* note 8, art. 1(a), at 1501 (stating that one of objects of Hague Abduction Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State.").

cure the effective exercise of access rights¹¹ granted to the non-custodial parent.¹² The Hague Abduction Convention has been quite successful in returning children taken from their custodial parents.¹³ Under the Convention, when parents show that their children have been removed or retained in a another country in breach of their custody rights, a court applying the Hague Abduction Convention must order the immediate return of the children to their place of habitual residence.¹⁴

The Hague Abduction Convention does not, however, effectively reunite children with parents who previously enjoyed access rights because under the Hague Abduction Convention, only a removal of a child in breach of custody rights is an abduction.¹⁵ Parents have custody when they are responsible for the care of their children and have the right to determine where the children live.¹⁶ By contrast, parents with access rights may take their children for a limited period of time to a place other than

11. See REMARKS BY ADAIR DYER ON ACCESS (VISITATION) FOR THE NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION (Sept 30, 1993), 1 [hereinafter ACCESS SYMPOSIUM] (explaining that access and visitation are terms which can be used interchangeably). Adair Dyer notes, however, that a right of access is much broader than a right of visitation. *Id.* Rights of access may encompass the right to open communication with the child by means of letters, facsimile, telephone, and physical visitation. *Id.* The drafters of the Convention deliberately chose to use the term access to encompass these rights. *Id.*

12. See Hague Abduction Convention, *supra* note 8, art. 1(b), at 1501 (stating that one of objectives of Hague Abduction Convention is "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.").

13. See GREIF & HEGAR, *supra* note 2, at 194-95 (attributing success of Convention to high number of countries ratifying it).

14. See Hague Abduction Convention, *supra* note 8, art. 12, at 1502 (mandating immediate return of abducted children); see also PEREZ-VERA REPORT, *supra* note 1, at 441 (stating that Conference deliberately declined to define most terms in Hague Abduction Convention). Habitual residence, though not defined in the Hague Abduction Convention, is a factual inquiry focusing on the place that is the center of the child's day-to-day life. BRIAN L. WEBB AND DIANA S. FRIEDMAN, HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION 9-10 (1993); see also *Friedrich v. Friedrich*, 983 F.2d 1396, 1401-02 (6th Cir. 1993) (requiring change in geography and passage of time to alter child's habitual residence).

15. See Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW AND CONTEMP. PROBS. 209, 218 (1994) (demonstrating significant difference between custody rights and access rights).

16. See Hague Abduction Convention, *supra* note 8, art. 5(a), at 1501 (stating that "[r]ights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.").

their children's habitual residence.¹⁷ The removal of a child to another country which ends contact between the child and the non-custodial parent is not an abduction under the Convention.¹⁸ Although studies have shown that leaving the country and prohibiting contact between a parent and child has the same deleterious effect on the child regardless of which parent has the custody right,¹⁹ a court does not have to return a child to his or her original environment unless the removal breaches a right of custody.²⁰ Access rights, although beneficial to the child, do not receive protection equal to that afforded custody rights under the Convention.²¹

Legal commentators have noted that the Hague Abduction Convention does not adequately address issues concerning the access rights of non-custodial parents.²² Although the Conven-

17. See *id.* art. 5(b), at 1501 (stating that “[r]ights of access shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”); see also PEREZ-VERA REPORT, *supra* note 1, at 452 (discussing additional ways of exercising access rights). Access rights include access across national borders. *Id.*

18. See PEREZ-VERA REPORT, *supra* note 1, at 444-45 (stating that majority of drafters were unwilling to place breach of access rights in same category as breach of custody rights and thus unwilling to make breach of access rights wrongful); Silberman, *supra* note 15, at 218, 247-48 (stating that parents with custody rights may take their children to another country without risking return order under Hague Abduction Convention).

19. See Adair Dyer, *The Hague Convention on the Civil Aspects of International Child Abduction—towards global cooperation. Its successes and failures*, 1 INT’L. J. OF CHILDREN’S RTS. 273, 282 (1993) (stating that breach of access rights is functionally equivalent to breach of custody rights because in each case child is denied meaningful relationship with parent). When a child is taken from his family and social environment, “the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem.” PEREZ-VERA REPORT, *supra* note 1, at 428-29.

20. See PEREZ-VERA REPORT, *supra* note 1, at 444 (stating duty to return arises only where court finds removal or retention of child wrongful under Hague Abduction Convention); ACCESS SYMPOSIUM, *supra* note 11, at 2 (stating that wrongful removal or retention of child refers only to breach of custody rights); Silberman, *supra* note 15, at 247-48 (stating that breach of access rights does not trigger return of child).

21. See PEREZ-VERA REPORT, *supra* note 1, at 432 (noting that drafters were unwilling to view both sets of rights equally). Moreover, scholars have noted that the Convention has been ineffective in facilitating parental access to the child in his or her new environment. *Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Jan. 18-21, 1993, reprinted in 33 I.L.M. 225, 244 [hereinafter *Second Special Commission*]. Legal experts from forty-four countries as well two intergovernmental organizations (“IGO’s”) and four international non-governmental organizations (“INGO’s”) were represented at this meeting of the Second Special Commission. *Id.* at 227.

22. See Nigel Lowe, *Problems Relating to Access Disputes Under the Hague Convention on*

tion provides a separate article that deals with rights of access under Article 21,²³ scholars and courts criticize the Convention because it fails to give direction to judicial authorities regarding their jurisdiction and their ability to provide ways to secure and facilitate the exercise of access rights.²⁴

This Note argues that the aspect of the Hague Abduction Convention addressing access rights is ineffective because it has forced some courts to misconstrue provisions of the Hague Abduction Convention in order to carry out the Convention's intent. This Note further argues that the burden of establishing the absence of a wrongful removal or retention should fall upon the parent who has removed the child. This Note also argues that the Hague Conference should amend the Convention to order a court to enforce previously ordered access rights in the child's new habitual residence. Part I provides an historical background on the problem of international child abduction. Part I also discusses the international response to the growing problem of children taken abroad. Part II illustrates the issues concerning access rights from the perspective of the drafters of the Hague Abduction Convention, and discusses case law deal-

International Child Abduction, 8 INT'L J. OF LAW AND THE FAM. 374, 375, 381 (discussing dissatisfaction among experts at Second Special Commission regarding lack of protection for access rights).

23. Hague Abduction Convention, *supra* note 8, art. 21, at 1503. The Hague Abduction Convention states that

[a]n application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracted States in the same way as an application for the return of a child.

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

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

24. *Id.*

Second Special Commission, *supra* note 21, at 244 (stating that "whilst Article 21 recognizes rights of access, it has no firm legal provisions to enforce such rights."); ACCESS SYMPOSIUM, *supra* note 11, at 4 (recognizing weakness in Article 21 of Hague Abduction Convention). "The Convention gives no examples of how Central Authorities are to organize this co-operation so as to secure the 'innocent' exercise of access rights . . ." PEREZ-VERA REPORT, *supra* note 1, at 466.

ing with access rights under the Hague Abduction Convention. Part III proposes a solution for the Hague Abduction Convention to place the burden of proving the propriety of the removal or retention of a child on the moving parent. Part III further proposes an amendment that would direct courts to recognize and enforce as far as possible the access rights of non-custodial parents. This Note concludes that without clearer and more equitable direction, courts may never respect the original custodial arrangement established to benefit the child.

I. INTERNATIONAL CHILD ABDUCTION: NATURE AND GOVERNING LAWS

Social and technological changes over the last three decades have greatly affected the nature²⁵ of international child abduction.²⁶ The number of reported cases of international child abduction has increased significantly since the late 1970s.²⁷ Such increases in international child abduction have prompted responses from the international community including the Council of Europe²⁸ and the Hague Conference of Private Inter-

25. See PEREZ-VERA REPORT, *supra* note 1, at 442. The Perez-Vera Report states that the international nature of the Convention arises out of a factual situation, that is to say the dispersal of members of a family among different countries. A situation which was purely internal to start with can . . . come within the scope of the Convention, for example, one of the members of the family going abroad with the child, or through a desire to exercise access rights in a country other than that in which the person who claims those rights lives.

Id.

26. See REPORT ON INTERNATIONAL CHILD ABDUCTION BY ONE PARENT ("LEGAL KIDNAPPING") prepared by M. Adair Dyer, Preliminary Document No. 1 of August 1978, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEEN SESSION, CHILD ABDUCTION 12, 18 [hereinafter "Dyer, LEGAL KIDNAPPING REPORT"] (noting improvements in international transportation designed to facilitate international movement also facilitates international child abduction and that greater number of international marriages coupled with increasing acceptance of divorce has produced more divorces on international level); see also GREIF & HEGAR, *supra* note 2, at 187-92 (noting increase numbers of international marriages which are at greater risk of resulting in international child abductions).

27. See Stotter, *supra* note 6, at 289-90 (reporting increasing rates of child abduction on international level).

28. Statute of the Council of Europe, signed at London on 5 May 1949, art. 1(a)(b), 87 U.N.T.S. 103, 105-06. The purpose of the Council of Europe is to "(a) achieve a greater unity between its Members . . . (b) through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms." *Id.* The two major institutions of the Council of Europe are the Committee of Ministers

national Law to remedy and to prevent such abductions.²⁹

A. *Nature of International Child Abduction*

Since the 1970s, the magnitude and frequency of international child abduction has dramatically increased.³⁰ Overall, parents have brought approximately 10,000 cases of international child abduction to the U.S. Department of State's Office of Children's Issues³¹ between the late 1970s and mid-1990s.³² International child abduction, likewise, has been a growing problem for nations around the world as a result of various social and technological developments.³³ While the desire of one parent to hurt

and the Parliamentary Assembly. CLIVE ARCHER, *ORGANIZING EUROPE* 60 (2d ed. 1994). The Committee of Ministers is the executive organ of the Council of Europe. *Id.* Each member state of the Council of Europe has one representative and one vote on the Committee. *Id.* Articles 15 and 16 of the Council of Europe permit the Committee of Ministers to conclude conventions or agreements to further the aim of the Council of Europe. Statute of the Council of Europe, arts. 15-16, 87 U.N.T.S. at 110.

29. See Dyer, *LEGAL KIDNAPPING REPORT*, *supra* note 26, at 15 (stating that many countries in the Council of Europe "have expressly encouraged work in this field by the Hague Conference because of the worldwide scope of the problem, since abductions by air on an intercontinental basis are becoming more frequent."). In addition to the Council of Europe and the Hague Conference on Private International Law, the Organization of American States adopted the Inter-American Convention on the International Return of Children to address the problem of international child abduction. Inter-American Convention on the International Return of Children, done at Montevideo, Jan. 15, 1989, 29 I.L.M. 66.

30. See GREIF & HEGAR, *supra* note 2, at 179-80 (reporting that one study shows that over twenty percent of child abductions cross international borders while another investigation reveals that forty percent of abductions are international). United States citizens reported eighty-five cases of abduction between 1973 and 1977. Stotter, *supra* note 6, at 289-90. Between 1981 and 1985, 1516 cases were reported. *Id.* at 289-90.

31. See Bureau of Consular Affairs, U.S. Dep't of State, Pub. No. 10405, *International Parental Child Abduction* (1996). The U.S. Department of State's Office of Children's Issues is a government body designed to assist victims of international parental child abduction. *Id.*

32. See *id.* These actions are commenced in hopes of returning children removed or retained from the United States. *Id.*

33. See Stotter, *supra* note 6, at 289, tbl. n.13 (providing table depicting general increase of reported international child abduction in Africa, Inter-America, East Asia, Europe, Canada, and Middle East); see also Russell Jenkins, *Britain Pleads for Abducted Children*, *TIMES NEWSPAPERS LIMITED*, Sept. 18, 1996 (stating that approximately 1000 children were abducted from Great Britain each year according to National Council for Abducted Children). As of 1991, over 700 active cases of child abduction existed worldwide. U.S. DEPT. OF STATE, *Child Custody Unit Helps Parents Keep Track*, (Jan. 21, 1991). In the United States, cases of international child abduction are closed after two years unless a parent or relative maintain regular contact with the authorities. NEIL C. LIVINGSTONE, *RESCUE MY CHILD* 97 (1992).

the other fuel many child abductions,³⁴ experts agree that the child is the main victim of an abduction.³⁵ Without legal remedies in place to aid the children and left-behind parents, many families have been left without recourse in effecting the return of their abducted children.³⁶

1. Why Child Abduction is on the Rise

The increase in international child abduction is due to many social, cultural, and technological changes.³⁷ International transportation and communications have become faster and more efficient,³⁸ thus facilitating border crossing.³⁹ As a consequence of such advances, immigration has increased.⁴⁰ Simultaneously, more people, including children, have dual passports, thus, facilitating international travel.⁴¹

34. See Rania Nanos, *The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOKLYN J. INT'L L., 437, 438 (stating that parents may use children as pawns in bitter custody battles).

35. See *International Parental Child Abduction Act of 1989: Hearing on H.R. 3759 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 111 (1990) (attachment 1 to letter from Thomas E. Harries, Ph.D., dated Sept. 26, 1990) (stating that "[a]n increasing number of scholars in the field of human behavior have identified that no child victim of a parental kidnapping escapes from severe and prolonged, if not permanent, psychic damage as the result of being taken from the other parent.") (emphasis omitted).

36. See Lord Hailsham of St. Marylebone, *PARL. DEB., H.L.* (5th ser.) 1248-49 (1985) (stating that without international remedy to child abductions, abducting parents may obtain different custody order in new country to where child was abducted).

37. See GREIF & HEGAR, *supra* note 2, at 187-92 (noting higher rates of immigration and easier international travel has led to increased cross-cultural marriages which have highest risk of international abduction). "The causes of the problem are, first, greater mobility between countries arising from cheaper and speedier communications and relaxation of travel restrictions, and secondly, the tendency in all western countries towards easier separation and divorce and the loosening of family ties." R.L. Jones, *Council of Europe Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children*, 30 INT'L & COMP. L.Q. 467, 472 (1981); see also Peggy D. Dallmann, *The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by U.S. Courts*, 5 IND. INT'L & COMP. L. REV. 171, 178 (noting that increased immigration and facilitation of international travel has aided increase of abduction).

38. See Dyer, *LEGAL KIDNAPPING REPORT*, *supra* note 26, at 18 (stating that "an abductor can put thousands of miles of distance between the child and the parent left behind in only a few hours.").

39. See *id.* at 18-19 (noting increased freedom to cross borders); SANDRA DAVIS ET AL., *INTERNATIONAL CHILD ABDUCTION*, Foreword (1993) (stating that border crossing has become increasingly easier).

40. See GREIF & HEGAR, *supra* note 2, at 191 (noting higher rates of immigration).

41. See Stotter, *supra* note 6, at 292 (discussing increased ease and efficiency in

Social acceptance of international marriages has led to an increase in the number of such marriages.⁴² Cultural differences between couples, however, may lead to poor communication and misunderstanding.⁴³ Often differences may be attributed to conflicting expectations in parenting or marital roles.⁴⁴ Finally, the increase in divorce has fueled the escalation of child abduction.⁴⁵

2. Why Children are Abducted

Often child abduction is attendant with a heated custody dispute following divorce proceedings that result in feelings of rage, fear, and jealousy thereby motivating the abductor to take the child.⁴⁶ Sometimes a parent will abduct a child to maintain a relationship with the other parent through conflict.⁴⁷ Other times, the children are used as pawns to hurt the other parent.⁴⁸ A parent may abduct the child, additionally, to ensure custody.⁴⁹ A parent, for instance, might abduct a child before a court can finalize an order of custody⁵⁰ in order to gain leverage by using a

international travel); *see also* DAVIS, *supra* note 39, Forward (stating that border control has relaxed and some children with dual nationalities have two passports).

42. *See* GREIF & HEGAR, *supra* note 2, at 187-88 (noting growing number of international marriages and stating that international marriages have higher risk of international abduction).

43. *See id.* at 188-89 (discussing case where ethnically intermarried couple experienced difficulties decided in which religion to raise their daughter).

44. *See id.* at 189. (illustrating one study in which family noted that husband's thwarted expectation that his wife would assume position of strength in family while still remaining beautiful and feminine led to his violent behavior and their eventual divorce). Seeing one's child brought up in a different cultural tradition may intensify the pain of losing the child in the breakup of the relationship. *Id.* at 192.

45. *See id.* at 9 (discussing steady increase in divorce since 1950s); Stotter, *supra* note 6, at 292 (noting "general trend toward more liberal granting and recognition of divorces" has led to increase in abductions).

46. *See* DYER REMARKS, *supra* note 3, at I.C.2. (discussing mixture of emotions that abductors may feel including love, hate, fear, jealousy, and deprivation).

47. *See id.* (stating that "[s]ometimes even, the abduction was intended to pull back together a broken or deteriorating family.").

48. *See* LIVINGSTONE, *supra* note 33, at 95-96 (stating that children wrongfully taken abroad are pawns in custody disputes); Rivers, *supra* note 4, at 591 (stating that children may become pawns in battle between parents).

49. *See* PEREZ-VERA REPORT, *supra* note 1, at 429 (noting that "[t]he person who removes the child . . . hopes to obtain a right of custody from the authorities of the country to which the child has been taken."); LIVINGSTONE, *supra* note 33, at 96 (discussing how abductors have good chance to gain custody in their home state).

50. *See* DYER REMARKS, *supra* note 3, at I.C.2. (noting that "[p]erhaps 50% of the

new location as a forum for deciding custody issues.⁵¹

Child abduction, in addition, is often tied to visitation rights.⁵² A non-custodial parent, for example, might exercise visitation rights by taking the child out of the country with the permission of the custodial parent but, subsequently, refuse to return the child at the end of the visitation period.⁵³ Even a late return may trigger fear in the custodial parent a sense of mistrust that the child will not be returned at all.⁵⁴ In such a case, the custodial parent may try to frustrate the visitation rights of the non-custodial parent by keeping the child away from that parent.⁵⁵ An increased restriction on visitation rights, however, may increase the desire of the non-custodial parent to abduct the child to ensure a meaningful relationship with the child.⁵⁶

A change in the circumstances of a parent may lead to the decision to take a child abroad.⁵⁷ A parent, for example, may relocate for employment purposes or to marry an individual in another country.⁵⁸ Although the parent may not have a malicious motive, taking the child abroad may frustrate the lawful access rights of the non-custodial parent.⁵⁹

cases occur when there is no custody order, either temporary or permanent, outstanding.”).

51. See PEREZ-VERA REPORT, *supra* note 1, at 429 (stating that “the abductor will hold the advantage since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims.”).

52. See DYER REMARKS, *supra* note 3, at I.C.2. (discussing that parents fear abduction of child during visitation, thus, restrict visitation on part of non-custodial parent).

53. See Bodenheimer, *supra* note 4, at 100 (discussing how some parents abuse visitation rights). “Many cases of international parental child abduction are actually cases in which the child traveled to another country with the approval of both parents but was later prevented from returning.” Bureau of Consular Affairs, *supra* note 31.

54. See DYER REMARKS, *supra* note 3, at I.C.2 (stating visitation may be attended with fear that visiting parent will retain child abroad).

55. See *id.* (discussing how custodial parents can frustrate visitation rights of non-custodial parent by refusing to allow visiting parent access to child). Frustration of visitation rights can also be accomplished by the custodial parent moving abroad with the child. *Id.*

56. See *id.* (stating that “a cut off or severe restriction of access to a child stimulated emotions of frustration, deprivation and pride leading to an abduction which in turn cut off access by the custodial parent.”).

57. See *Viragh v. Foldes*, 415 Mass. 96, 612 N.E.2d 241, 244 (1993) (noting that custodial parent remarried man with dual citizenship in United States and Hungary).

58. See *id.* at 245 (noting that custodial parent moved because her new husband had job opportunity in United States).

59. See *id.* (discussing that father brought suit under Article 21 of Hague Abduc-

Some parents take their children abroad to protect them from perceived threats by the other parent.⁶⁰ The parent, frequently, fearing for the child's safety believes that the only option available is running with the child.⁶¹ When a parent, for example, believes that he or she will lose custody to a physically or sexually abusive parent, the parent, in fear for the child's safety, may take the child as far away as possible from the perceived dangerous parent.⁶²

3. The Effect of Abduction on the Child

Studies show that children are adversely affected by an abduction.⁶³ Removing a child from the parent responsible for raising the child brings instability and uncertainty to the child's life.⁶⁴ International abduction forces children to live in new environments and in cultures to which they must become accustomed.⁶⁵ Because of the psychological harm attendant with

tion Convention to enforce his access rights after mother left country with their children).

60. See GREIF & HEGAR, *supra* note 2, at 93-97 (discussing circumstances in which parent may take child to escape domestic violence situation).

61. See *id.* at 94 (noting that parents who feel that legal and social service systems are ineffective may abduct as last resort).

62. See *id.* at 94-95 (discussing safe-houses and "the underground" as a refuge for victims and children of domestic abuse).

63. See PEREZ-VERA REPORT, *supra* note 1, at 432 (discussing the negative effects of abduction on the child). Children returned from an abduction have experienced some of the following symptoms:

[E]xcessive fearfulness; . . . fear of going outside the house; being despondent, lonely and mistrustful of other people and therefore not being able to get close to them and alleviating the loneliness; anger at either or both the parents; a sense of helplessness since they are unable to control what happens to them in their environment; night terrors and nightmares . . . Children may cease growing emotionally as well as academically . . . There may be an inability to trust adults, and . . . disruption in identity formation. A child whose life is unstable and unpredictable cannot develop a stable and integrated personality structure.

64. Dorothy S. Huntington, *Parental Kidnapping: A New Form of Child Abuse*. (visited Mar. 18, 1997) <http://www.hiltonhouse.com/articles/Child_abuse_huntington.txt>. See Dyer, LEGAL KIDNAPPING REPORT, *supra* note 26, at 21 (stating that "the child is the true victim of 'childnapping' because the child suffers the sudden break in stability and the loss of contact with the parent responsible for rearing the child."). The child's sense of loss of community brought on by the abduction can leave the child in a state of depression. Huntington, *supra* note 63.

65. See PEREZ-VERA REPORT, *supra* note 1, at 432 (stating that relocated children must adjust to living with relatives with whom they are not well acquainted and must learn language and cultural conditions of their new environment).

child abduction, some experts consider abduction a form of child abuse.⁶⁶

When a family's breakdown leads to visitation and custodial interference by the parents, the children are commonly taught to hate the other parent.⁶⁷ The abducting parent frequently speaks negatively about the other parent.⁶⁸ Due to such negative reinforcement, children may suffer great psychological problems and behavioral maladjustments including resentment of both parents.⁶⁹

4. Lack of Legal Recourse for the Left-Behind Parent

International child abductions frequently place left-behind parents in frustrating positions.⁷⁰ Sometimes parents do not know where the abductors took their children.⁷¹ Even when non-abducting parents know where to find their children, many encounter serious financial difficulty in recovering their chil-

66. See *International Parental Child Abduction Act of 1989: Hearing on H.R. 3759 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 111 (1990) (attachment 1 to letter from Thomas E. Harries, Ph.D., dated Sept. 26, 1990) (criticizing parents who abduct their children); Huntington, *supra* note 64.

67. See Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIM. L. 271, 272 (1994) (noting that such behavior is called the Parental Alienation Syndrome).

68. See STANLEY S. CLAWAR & BRYNNE V. RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN* 15-36 (1991) (discussing psychological manipulation of child by parent using techniques which include body language, denial of other parent, forcing child to choose sides, and telling the child that other parent does not love or want child).

69. See *id.* at 129 (discussing psychological problems associated with Parental Alienation Syndrome). Disorders include:

anger, loss or lack of impulse control in conduct . . . , loss of self-confidence and self-esteem, clinginess and separation anxiety, development of fears and phobias . . . , depression and suicidal ideation, sleep disorders, eating disorders, academic problems or radical improvement in academics, withdrawal from one or both parents, confusion . . . , bed-wetting, daydreaming, drug abuse and other self-destructive behaviors, peer group problems . . . , obsessive-compulsive behavior, motor tension . . . , anxiety, psychosomatic disorders, repetition of 'scripts' . . . learned from the programmer . . . , damaged sexual identity, desire to live with neither parent, rescuer role or parentification, excessive guilt, [and a] retreat into fantasy.

70. *Id.* See Bodenheimer, *supra* note 4, at 110 (stating that parents are at loss about how to find their children when they are taken out of country).

71. See *id.* at 111 (stating that parents and their attorneys run into difficulties when whereabouts of abductor is unknown). Frequently, family and friends of the abductor will help to hide the child. GREIF & HEGAR, *supra* note 2, at 186.

dren.⁷² Often, after the dissolution of a marriage, abductors may take their children to the abductors' home country where the abductors are familiar with the culture and have family and legal assistance.⁷³ A parent seeking a child's return often faces language barriers in attempting to communicate with the authorities of the other nation.⁷⁴ Courts, moreover, tend to favor their own nationals in custody disputes.⁷⁵ Mothers, for example, frequently face difficulties when the father abducts the child to a Middle East nation where the culture favors fathers over mothers in the rearing of children.⁷⁶

Before any laws were in place to deal with international child abductions, parents had little recourse in getting back their children.⁷⁷ When a child is abducted to another country, frequently, the abducting parent will attempt to secure a favorable custody order regarding the child.⁷⁸ Thus, there may be two conflicting custody orders in two different countries per-

72. See Bodenheimer, *supra* note 4, at 111 (noting that parents face enormous cost of travel, detective services, and attorney and court fees).

73. See GREIF & HEGAR, *supra* note 2, at 181-83 (noting that "[a]bductors born abroad fled to their country of origin in almost three-quarters of the cases in which they crossed international borders.").

74. See Rivers, *supra* note 4, at 591 (noting difficulties faced by left-behind parents including language barriers, cost for legal representation, and different legal systems); see also Stotter, *supra* note 6, at 290 (noting that parents also face bureaucratic red tape, corruption, and lack of interest when they seek their children in other countries).

75. See GREIF & HEGAR, *supra* note 2, at 186 (discussing biases favoring nationals); LIVINGSTONE, *supra* note 33, at 96 (discussing how courts tend to favor their own citizens even against citizen of friendly nation).

76. See LIVINGSTONE, *supra* note 33, at 96, 98 (describing difficulties mothers had attempting to take custody of their children in male-dominated societies of Middle Eastern nations).

Abduction to some Middle Eastern countries has been especially difficult for those attempting recovery When an abducting father of Middle Eastern origin returns home, an American wife who pursues him there in an attempt to gain custody encounters a system that may not help her because of legal and cultural assumptions that fathers make the major decisions affecting their children.

77. GREIF & HEGAR, *supra* note 2, at 186-87. See Stotter, *supra* note 6, at 288-90 (noting that without agreements or mechanisms between nations honoring custody and visitation arrangements, courts are not bound to respect custody decrees issued in other countries). Courts in many countries will not enforce the existing custody order without first hearing the case on the merits. *Id.* at 288. Moreover, no international obligations required a nation to order the return of a child taken from another country. *Id.* at 288-90.

78. See PEREZ-VERA REPORT, *supra* note 1, at 429 (discussing how abducting parents attempt to legalize the situation they have created by trying to get custody in the new location); LIVINGSTONE, *supra* note 33, at 96 (stating that in cases where child is ab-

taining to the same child.⁷⁹ Some parents, consequently, resort to desperate self-help measures, including re-abducting the child.⁸⁰

B. *Addressing International Child Abduction Under the European Convention*

In 1972, at the Seventh Conference of the Council of Europe (the "Council"), the Council considered ways to strengthen cooperation among nations concerning the guardianship and custody of children.⁸¹ In 1973, the Council met to propose a resolution to the problem of international child abduction.⁸² Initial drafts of the proposed convention addressed the recognition and enforcement of custody orders from courts in different countries.⁸³ Concerned that the drafts did not adequately deal with cases of child abduction, Swiss Delegate Mr. W. Baechler, suggested a formal draft of the Convention, which dealt more with the return of abducted children.⁸⁴ In May, 1980, at Luxembourg, the Council of Europe opened for signature the European Child Custody Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children ("European Child Custody Convention").⁸⁵ Reflecting aspects of the Swiss plan, some of the goals of the European Child Custody Convention are to ensure

ducted from United States, "[a]lmost without exception, a foreign court rules in favor of their own citizen's case, even if the country is a friend of the United States.")

79. See Hailsham, *supra* note 36, at 1248 (noting that "[c]ourts in different countries can make divergent custody orders in respect of the same child.")

80. See Stotter, *supra* note 6, at 288-90 (stating that feelings of frustration and powerlessness may lead to attempts at re-abduction of child); see also, Bureau of Consular Affairs, *supra* note 31, at 5-6, 15-16 (admonishing parents not to take any illegal measures to return children). The State will not assist in any such unlawful acts. *Id.*

81. See Stotter, *supra* note 6, at 303 (stating that European Committee of Experts at Conference agreed that existing international conventions and declarations did not deter increase in child abduction).

82. See *id.* (discussing process of Council of Europe in creating convention to deal with child abduction); see also Anton, *supra* note 5, at 539 (discussing changes in solutions to remedy problem of child abductions).

83. DYER REMARKS, *supra* note 3, at I.C.3.

84. Anton, *supra* note 5, at 539; DYER REMARKS, *supra* note 3, at I.C.3.; Stotter, *supra* note 6, at 303.

85. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20, 1980, 19 I.L.M. 273 [hereinafter European Child Custody Convention].

that custody decisions are uniformly recognized and enforced,⁸⁶ to protect rights of access,⁸⁷ and to secure the immediate return of children wrongfully removed or retained abroad.⁸⁸

In its attempt to balance the interests between custody rights and access rights,⁸⁹ the Council provided that courts should enforce access rights in the same manner as other custody related issues.⁹⁰ The Council, however, recognized that strict enforcement of access orders from abroad may be impracticable because of changes in the location of the children.⁹¹ The Council, therefore, provided that the court of the child's new location may adjust the access order taking into account new conditions.⁹²

C. *Hague Convention on the Civil Aspects of International Child Abduction*

In an attempt to address and to remedy the increase in international child abductions, the Hague Conference on Private International Law enacted the Hague Convention on the Civil Aspects of International Child Abduction.⁹³ Provisions of the

86. *See id.* at pmb. (stating that "making . . . arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children.").

87. *See id.* art. 11(2) (stating that "the competent authority of the State addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter.").

88. *See id.* pmb. (stating its desire to make "suitable provision to enable the custody of children which has been arbitrarily interrupted to be restored.").

89. *See id.* (stating that "the right of access of parents is a normal corollary to the right of children.").

90. *See id.* art. 11(1) (stating that "[d]ecisions on rights of access and provisions of decisions relating to custody which deal with the right of access shall be recognized and enforced subject to the same conditions as other decisions relating to custody.").

91. *See id.* art. 11(2) (permitting court to revise original access order which would take into consideration new situations of parties involved).

92. *Id.*

The wording of Article 11(2) represents the outcome of extensive discussion in the Committee of Experts. It reflects the difficulty frequently encountered in practice in establishing how access is to be given when the parents fail to agree on times and places. The court or other competent authority in the State where the child is living will ordinarily be in the best position to decide such details in default of agreement, since it will have better facilities than the court in the State of origin to make the necessary enquiries and a greater knowledge of local circumstances (such as, for example, when local school holidays begin and end).

Jones, *supra* note 37, at 472.

93. *See* Hague Abduction Convention, *supra* note 8, pmb., at 1501 (stating that

Hague Abduction Convention are executed through the designated Central Authority⁹⁴ of each Contracting State.⁹⁵ The Convention mandates the return of children illegally removed or retained from their custodial parents.⁹⁶ The Convention further provides that each Central Authority must facilitate the effective exercise of access rights.⁹⁷

1. The Hague Conference on Private International Law

In January 1976, at the Thirteenth Plenary Session of the Hague Conference on Private International Law (the "Conference"), Canada suggested that the Hague Conference address the illegal removal of children abroad.⁹⁸ By October 1976, the Conference had decided that the topic would be on its future agenda and appointed a special commission to discuss the operation of the Hague Abduction Convention.⁹⁹ On October 24, 1980, the Fourteenth Plenary Session of the Conference adopted by unanimous vote the Convention on the Civil Aspects of International Child Abduction.¹⁰⁰ The Hague Abduction Convention attempts to safeguard the interests of children by protecting them from the harmful effects of abduction and by maintaining their familial stability.¹⁰¹ Toward those ends the Convention's

best interests of children may be protected by protecting children from harmful effects of abduction).

94. See DYER REMARKS, *supra* note 3, at I.C.2. (stating that Central Authority is administrative body in Contracting State which is communicative center for applications under Hague Abduction Convention).

95. See *id.* art. 6, at 1501 (providing for creation of Central Authority in each Contracting State for purpose of carrying out objectives of Convention).

96. See *id.* art. 12, at 1502 (directing judicial authority to return illegally removed or retained children); *but see id.* arts. 4, 13, and 20, at 1501, 1502-03 (providing exceptions to returning children).

97. See *id.* arts. 7(f) and 21 (directing Central Authority to facilitate and protect access rights as much as possible).

98. See DYER REMARKS, *supra* note 3, at I.C.1. (illustrating importance for international response to child abduction).

99. See *id.* at I.B. (stating that Adair Dyer was first American appointed to Permanent Bureau and was assigned task of preparing all necessary research for Hague Abduction Convention).

100. See PEREZ-VERA REPORT, *supra* note 1, at 426 (stating that States present to adopt Convention included Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela, and Yugoslavia). On October 25, 1980, the delegates signed the Final Act of the Fourteenth Session containing the text of the Convention. *Id.*

101. See Hague Abduction Convention, *supra* note 8, pmb., at 1501 (stating that

first objective is to quickly return a child wrongfully removed or retained from his or her place of habitual residence.¹⁰² The second objective of the Hague Abduction Convention is to secure the protection of custody and access rights.¹⁰³

Under the Hague Abduction Convention, the removal or retention of a child is wrongful where it is in breach of the custody rights attributed to a person, institution, or other body.¹⁰⁴ The removal or retention must violate such custody rights under the laws of the state of the child's habitual residence immediately before the removal or retention.¹⁰⁵ Custody rights may arise by operation of law,¹⁰⁶ by judicial or administrative authority,¹⁰⁷ or by agreement having legal effect under the law of that state.¹⁰⁸ Such rights must have been actually exercised, or would

"the interests of children are of paramount importance in matters relating to their custody," and concluded Convention to "protect children internationally from the harmful effects of their wrongful removal or retention.").

102. *See id.* art. 1(a) (stating that one object of Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State.").

103. *See id.* art. 1(b) (stating that one object of Convention is "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.").

104. *See id.* art. 3(a), at 1501.

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

Id.

105. *See id.* art. 4, at 1501 (stating that "[t]he Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.").

106. *See* Silberman, *supra* note 15, at 223 (explaining that in many countries, married couple maintains joint custody of child born to them until court otherwise provides).

107. *See* PEREZ-VERA REPORT, *supra* note 1, at 451 (explaining that this would include order from court or body empowered to issue orders relating to custody and care of child).

108. *See* Hague Abduction Convention, *supra* note 8, art. 3, at 1501 (providing that "rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."). It is not necessary for the parent to show that a custody order was actually rendered. P.M. NORTH AND J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 731 (11th ed. 1987).

Reference to violation of a custody order obviously was not sufficient to cover the problem. In fact, limiting the Convention to cases where there was a custody order outstanding might only have led parents to act even more precipitantly in carrying their children abroad in order to avoid the effects of the Convention. Thus, a case of joint custody by operation of law at the place

have been exercised but for the wrongful removal or retention.¹⁰⁹ Under the Hague Abduction Convention, one alleging that a child has been wrongfully removed or retained has the burden to prove the elements of a wrongful removal or retention.¹¹⁰

2. Pursuing A Claim Under the Hague Abduction Convention: The Role of the Central Authority

Under Article 6 of the Hague Abduction Convention, each Contracting State must designate a Central Authority to execute the duties imposed under the Convention.¹¹¹ Central Authorities must cooperate with each other to secure the prompt return of the children and to carry out the other objectives of the Convention.¹¹² Central Authorities have the duty to initiate and facilitate the institution of judicial or administrative proceedings with a view toward carrying out the objectives of the Convention.¹¹³ One claiming that a child has been wrongfully removed

where the family is living is covered by the Convention when one parent runs abroad with a child or children.

DYER REMARKS, *supra* note 3, at I.C.2.

109. See Hague Abduction Convention, *supra* note 8, art. 3(b), at 1501 (stating that removal or retention of child is wrongful where "at the time of removal or retention those [custody] rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.").

110. See GERMANY: CONSTITUTIONAL COURT DECISION IN CASE CONCERNING THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, INCLUDING MEMORANDUM PREPARED BY THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW FOR SUBMISSION TO THE CONSTITUTIONAL COURT, 35 I.L.M. 529, 548 (1996) [hereinafter GERMAN CONSTITUTIONAL COURT] ("The person seeking return of the child has the burden to show all the elements of a wrongful removal or retention as set out in Articles 3 and 5 of the Convention . . ."); Interview with Judge Paul McRandall, Northern Ireland Family Court Judge, in New York, New York (Oct. 8, 1997).

111. See Hague Abduction Convention, *supra* note 8, art. 6, at 1501 (mandating that "[a] Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.").

112. See *id.* art. 7, at 1502 (stating in relevant part "Central Authorities shall cooperate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.").

113. See *id.* art. 7(f), at 1502. Central Authorities must

either directly or through any intermediary, . . . take all appropriate measures to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access.

or retained may apply to either the Central Authority of the child's habitual residence, or to the Central Authority of any Contracting State for assistance in securing the return of the child.¹¹⁴

3. Judicial Proceedings to Return the Child

The Hague Abduction Convention sets forth provisions for the mandatory return of abducted children.¹¹⁵ A child wrongfully removed or retained must be immediately returned if proceedings have been brought within one year of the date of the child's removal or retention.¹¹⁶ If the aggrieved parent has not brought proceedings within one year of the removal or retention, the court must order the child's return unless it is established that the child is settled in his or her new environment.¹¹⁷

Id.; see also art. 21, at 1503 (stating that Central Authorities "may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.").

114. See *id.* art. 8, at 1502.

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

Id.; see also *id.* art. 10, at 1502 (providing that "Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."). Applications to organize or secure access rights may be presented to the Central Authorities in the same way as an application for the return of the child. *Id.* art. 21, at 1503.

115. See Hague Abduction Convention, *supra* note 8, art. 12, at 1502 (directing judicial authority to return abducted children). "Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return." PEREZ-VERA REPORT, *supra* note 1, at 458.

116. See Hague Abduction Convention, *supra* note 8, art. 12, at 1502.

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

Id.

117. *Id.*

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year [from the date of the wrongful removal or retention], shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Id.

If the child is settled,¹¹⁸ an order to return the child is within the discretion of the judicial authority.¹¹⁹ If the judicial authority issues an order concerning custody or access rights, it may direct the person who prevented the exercise of such rights to return the child and to pay necessary expenses incurred on behalf of the applicant.¹²⁰

The Hague Abduction Convention provides five limits or exceptions to the mandatory return of a wrongfully removed or retained child.¹²¹ The Convention ceases to apply upon the child's sixteenth birthday.¹²² Children found by the court to be of sufficient age and maturity to decide their residence may object to returning to their home country.¹²³ The court may refuse the child's return if it finds that such a return would create a grave risk of harm to the child.¹²⁴ A court may refuse to return a

118. See PEREZ-VERA REPORT, *supra* note 1, at 458-59 (explaining that definition of "settled" under Convention is determined on case by case analysis). In considering whether the child is "settled" in his or her environment, the court may consider the length of time and the level of the child's adjustment in the environment. *Id.* at 459.

119. See Silberman, *supra* note 15, at 213 (demonstrating power of judicial authority to return or retain child).

120. Hague Abduction Convention, *supra* note 8, art. 26, at 1503-04.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Id.

121. See PEREZ-VERA REPORT, *supra* note 1, at 432 (illustrating purpose of exceptions).

Once the applicant's burden of proof has been met, the person opposing return has the burden of establishing one of the affirmative defenses set out in Article 13(1)(a) and (b), which would authorize the court to refuse return The second paragraph of Article 13 [which deals with the age and maturity of the child in question] and Article 20 do not assign the burden of proof to a party to the lawsuit but rather leave it to the court or to the moving party to produce the relevant facts.

GERMAN CONSTITUTIONAL COURT, *supra* note 110, 35 I.L.M. at 548.

122. See Hague Abduction Convention, *supra* note 8, art. 4, at 1501 (providing that "[t]he Convention shall cease to apply when the child attains the age of 16 years.").

123. See *id.* art. 13(a), at 1502 (providing that "[t]he judicial or administrative authority may . . . refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.").

124. See *id.* art. 13(b), at 1502 (stating that judicial or administrative authority of requested state is not bound to order child's return if opposing party demonstrates that

child if it finds that the person, institution, or other body caring for the child was not actually exercising custody, or has consented to or subsequently acquiesced to the child's removal or retention.¹²⁵ The judicial authority may refuse the return of the child if doing so would be against the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.¹²⁶

The Hague Abduction Convention, thus far, has been successful in returning wrongfully abducted children to their habitual residence.¹²⁷ The Hague Abduction Convention has been instrumental to parents seeking their children abducted abroad by providing a government resource empowered to act on their behalf.¹²⁸ The Hague Abduction Convention owes its success to the growing number of participating countries to the Convention.¹²⁹ The Hague Abduction Convention continues to

"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.").

125. *Id.* art. 13(a), at 1502.

The judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention.

Id.

126. *See id.*, art. 20, at 1503 (providing that "[t]he return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."). "[E]ven when defenses have been established, the court has discretion whether or not to order return." Silberman, *supra* note 15, at 213 n.20.

127. *See* GREIF & HEGAR, *supra* note 2, at 194-95 (stating that eighty-four percent of abductions to Canada, United Kingdom, and Australia after enactment of Hague Abduction Convention resulted in return of wrongfully removed children). In comparison, the return rate of international child abductions to non-Hague Abduction Convention countries was forty-three percent. *Id.*

128. *See* Hague Abduction Convention, *supra* note 8, art. 6, at 1501 (mandating that each Contracting State appoint Central Authority which must cooperate and maintain communications with Contracting State to which child has been removed or retained).

129. *See Contracting States to the Convention* (visited Mar. 4, 1997) <http://www.hiltonhouse.com/articles/Contracting_states.txt>. As of February 21, 1997, Argentina, Australia, Austria, Bahamas, Belize, Bosnia and Herzegovina, Burkina Faso, Canada, Chile, Colombia, Croatia, Cyprus, Denmark, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Former Yugoslav Republic of Macedonia, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, Spain, St. Kitts and Nevis, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, the

strengthen as more nations ratify and enforce it.¹³⁰

4. Access Rights Under The Hague Abduction Convention

The Hague Abduction Convention is premised on the notion that children should maintain meaningful relationships with their parents.¹³¹ While protecting the rights of custodial parents, the Hague Abduction Convention also attempts to protect and facilitate the access rights of non-custodial parents.¹³² While the Convention recognizes rights of access in Article 21, however, it has no provisions that enforce such rights.¹³³

a. Need for Access Rights

One of the main purposes of the Hague Abduction Convention is to ensure that parents and children maintain meaningful relationships.¹³⁴ When the drafters of the Convention first considered the issue of access rights, their concern was to give children family relationships that were as complete as possible.¹³⁵ Research indicates that a breach of access rights through removal is just as damaging to children as is the breach of custody rights through removal.¹³⁶ Some authorities, however, believe that it is in the best interest of the child to sever ties with one of

United States of America, Venezuela, and Zimbabwe are parties to the Hague Abduction Convention. *Id.*

130. See GREIF & HEGAR, *supra* note 2, at 195 (stating that more State membership provides greater chance child may be returned).

131. See PEREZ-VERA REPORT, *supra* note 1, at 429-30 (stating that framers of Convention wished to facilitate contact between children and their parents).

132. See Hague Abduction Convention, *supra* note 8, arts. 7(f) and 21, at 1502, 1503 (providing that Central Authority should remove barriers to effective exercise of access rights).

133. See *Second Special Commission*, *supra* note 21, at 244 (criticizing Convention for its failure to impose duties on judicial authorities to facilitate access rights of non-custodial parents).

134. See PEREZ-VERA REPORT, *supra* note 1, at 429-30 (explaining that drafters of Convention wanted to ensure contact between parents and children).

135. See *id.* at 432 (explaining that according to drafters, comprehensive family relationship is conducive to development of stable personality); see also The United Nations Convention on the Rights of the Child, art. 10, U.N. Doc. A/44/736, *reprinted in* 28 I.L.M. 1448, 1461 (1989) (providing that "[a] child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents.").

136. See PEREZ-VERA REPORT, *supra* note 1, at 428-29 (stating that depriving child of family environment is equally detrimental regardless of type of legal title parent possesses); Dyer, *supra* note 19, at 282 (stating that in both situations child is denied meaningful relationship with one of their parents).

the parents when both parents are separated either factually or legally because of possible animosity the parents have against each other.¹³⁷ The Hague Abduction Convention, nevertheless, adheres to the notion that access rights and custody rights should work together.¹³⁸ The Convention demonstrates that authorities should recognize access as a valid interest in custody.¹³⁹

b. Drafters' Attempt to Secure Access Rights

The Hague Abduction Convention attempts to protect and facilitate the access rights of non-custodial parents in Articles 7 and 21.¹⁴⁰ The Convention delegates to the Central Authorities of Contracting States the responsibility of supporting and facilitating the effective exercise of access rights.¹⁴¹ There is, however, no provision in the Hague Abduction Convention mandating the return of a child for the exercise of access rights.¹⁴² Such a duty is not triggered where the removal merely frustrates the

137. See PEREZ-VERA REPORT, *supra* note 1, at 432 (stating that Hague Conference generally disagreed with this school of thought, but agreed that separation from one parent may be appropriate in some situations).

138. See *id.* (stating that “[a]ccess rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child.”); see also DYER REMARKS, *supra* note 3, at I.C.4. (reporting that drafters considered visitation “necessary corollary” of custody rights).

139. See Dyer, *supra* note 19, at 287 (stating that “it is still broadly recognized that, if international access can be arranged with satisfactory precautions against wrongful retention of the children in question, this may contribute to preventing abductions of children by eliminating the frustration which the absence of satisfactory access may create.”).

140. See Hague Abduction Convention, *supra* note 8, arts. 7(f) and 21, at 1502, 1503 (providing that application to secure rights of access may be presented to Central Authority in same manner as application to order return of child).

141. See *id.* arts. 7(f) and 21, at 1502, 1503 (outlining role of Central Authority in aiding non-custodial parents protect access rights).

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

Id. art. 21, at 1503. Specifically, the Convention permits Central Authorities to initiate and facilitate judicial proceedings with a view towards organizing or securing rights of access. *Id.* arts. 7(f) and 21, at 1502, 1503.

142. See PEREZ-VERA REPORT, *supra* note 1, at 444 (explaining that it is unlikely that child will return for visitation); Silberman, *supra* note 15, at 247-48 (explaining that duty to return child arises only when child is wrongfully removed or wrongfully retained within meaning of Article 3); see also, ACCESS SYMPOSIUM, *supra* note 11, at 2 (comparing Articles 3 and 12 with Article 21 of Hague Abduction Convention).

legitimate rights of access of the non-custodial parent.¹⁴³

c. Weaknesses

Although Article 21 recognizes rights of access, the Convention has no provisions that enforces such rights.¹⁴⁴ Experts say that one of the Convention's biggest failures is its ineffectiveness at securing rights of access.¹⁴⁵ Some experts say that Central Authorities may not act unless there is a legal requirement that they do so.¹⁴⁶

The drafters of the Convention carefully considered the best way to fairly secure the access rights of non-custodial parents.¹⁴⁷ The Canadian delegation, during negotiations, first sug-

143. See PEREZ-VERA REPORT, *supra* note 1, at 444-45.

Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent. *Id.*; see also ACCESS SYMPOSIUM, *supra* note 11, at 2 (discussing rejection by drafters of Convention to treat breach of access equally with breach of custody).

The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible.

Anton, *supra* note 5, at 554-55.

144. See *Second Special Commission*, *supra* note 21, at 244 (criticizing Convention for not imposing obligations on judicial authorities); see also PEREZ-VERA REPORT, *supra* note 1, at 430, 465-66 (acknowledging weakness in Convention).

145. See Dyer, *supra* note 19, at 282, 286-87 (noting that Hague Abduction Convention provisions on access are relatively weak). Article 21 is "undoubtedly incomplete." PEREZ-VERA REPORT, *supra* note 1, at 430. See also Lowe, *supra* note 22, at 375, 381 (1994) (noting apparent disapproval expressed by legal experts at Second Special Commission on the operation of Convention because of lack of provisions to ensure exercise of access rights).

146. See Lowe, *supra* note 22, at 382-83 (suggesting that Convention should have obligated Central Authorities to assist in instituting access proceedings). Experts were also concerned that without legal mandates, judges may be unwilling to give sufficient weight to access rights. *Second Special Commission*, *supra* note 21, at 244. Others scholars, however, contend that Central Authorities could effectuate access provisions by providing administrative assistance that would bring the case before a tribunal thereby placing the final decision on access rights in a court's discretion. *Id.*

147. See PEREZ-VERA REPORT, *supra* note 1, at 465 (noting that although Hague Abduction Convention does not regulate access rights in exhaustive manner, it does attempt to secure co-operation between Central Authorities to protect access rights). Article 21 "shows that the Convention tends to view the rights of access as corollary to rights of custody; in this way it permits harmonization of the rights of the parents." *Hague Conference on Private International Law: Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil*

gested that a breach of rights of access should be given the same protection as a breach of custody rights.¹⁴⁸ Although the drafters acknowledged that a breach of access rights caused by the removal of a child by the custodial parents caused problems, the drafters were reluctant to afford the same protection as for a wrongful removal or retention of a child.¹⁴⁹ The drafters were concerned that giving both sets of rights equal protection would eventually lead courts to look at both parents as if they had equivalent rights.¹⁵⁰ The drafters further believed that strict rules in the field of access rights would be too impractical to draft.¹⁵¹

From its inception, Article 21 of the Hague Abduction Convention has been characterized as soft law.¹⁵² The leniency of Article 21 was a setoff against the rigorous provisions concerning the return of abducted children.¹⁵³ In negotiating the Convention, the ability to effectively secure access rights had to yield to the drafters' need for strict provisions to return abducted chil-

Aspects of International Child Abduction, 29 I.L.M. 219, 231 (1990) [hereinafter *First Special Commission*]. Thirty-three countries were represented at the First Special Commission as well as two IGO's and seven INGO's were represented by observers. *Second Special Commission*, *supra* note 21, at 227.

148. See ACCESS SYMPOSIUM, *supra* note 11, at 2 (noting that drafters subsequently rejected proposal after some discussion).

149. See PEREZ-VERA REPORT, *supra* note 1, at 445.

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem however defied all efforts of the Hague Conference to co-ordinate views thereon.

Id.

150. See PEREZ-VERA REPORT, *supra* note 1, at 445 (explaining that "[a] questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.").

151. See Anton, *supra* note 5, at 14 (stating that drafters also believed that goodwill between parents was more conducive to effective exercise of access rights rather than use of formal rules). "If separating parents were able to effect a smooth transition to a mutually satisfactory single-parent arrangement that included resolution of key emotional, custodial, and financial issues, there would be no abduction." GREIF & HEGAR, *supra* note 2, at 9.

152. See Dyer, *supra* note 19, at 287 (referring to weak nature of legal provisions governing access rights).

153. See *id.* (noting that those States that attempted to include more policy exceptions for return of abducted children and resisted rigorous provisions on return of children were largely same States which opposed strict rules on enforcement of access rights).

dren.¹⁵⁴ The Second Special Commission reviewing the operation of the Hague Abduction Convention dismissed a suggestion by some countries to add a Protocol to the Hague Abduction Convention that would more effectively secure access rights.¹⁵⁵

Because a removal or retention of a child is wrongful only when it is a breach of custody rights, it is imperative to distinguish between rights of custody and rights of access.¹⁵⁶ Under the Hague Abduction Convention, custody rights include the right to care for the child as well as the right to determine the child's place of habitual residence.¹⁵⁷ Rights of access include the right to take the child for a limited period of time to a place other than the child's state of habitual residence.¹⁵⁸ Rights of custody is an independent concept under the Hague Abduction Convention and is not necessarily the equivalent of what any particular country may refer to as custody rights.¹⁵⁹ Custody as defined by the Convention is the definition that judicial authorities deciding issues under the Convention will use in determining whether a parent possesses rights of custody.¹⁶⁰ Courts deciding cases under the Hague Abduction Convention must analyze the arrangement of the care of the child set forth by the laws of the

154. See *id.* (explaining "mushiness" of Article 21).

155. See *id.* at 287 (stating that Central Authorities are encouraged to constructively utilize its powers granted under Article 21).

156. See Silberman, *supra* note 15, at 218 (explaining that mandate to return arises only upon wrongful removal or retention).

157. See Hague Abduction Convention, *supra* note 8, art. 5(a), at 1501 (providing that "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.>").

158. See *id.*, art. 5(b), at 1501 (providing that "'[r]ights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.>").; see also PEREZ-VERA REPORT, *supra* note 1, at 452 (stating that access rights defined in Article 5(b) are not exhaustive).

159. See *First Special Commission*, *supra* note 147, at 222 (stating that custody rights "are not necessarily coterminous with rights referred to as 'custody rights' created by the law of any particular country or jurisdiction thereof."). "'Rights of custody' . . . does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure, and purposes of the Convention." *Second Special Commission*, *supra* note 21, at 229.

160. See Silberman, *supra* note 15, at 224 (noting that parent may have limited rights under law of State but still sufficient to invoke custody rights under Convention). Australia, for example, customarily will grant custody to one parent but will grant guardianship to both parents. *First Special Commission*, *supra* note 147, at 222. The parent without custody maintains the right to consent or refuse consent to the removal of the child from the country. *Id.* Under the Australian system, co-guardians maintain rights of custody within the meaning of the Hague Abduction Convention in that both parents have the right to determine the child's place of habitual residence. *Id.*

child's habitual residence to determine the nature of the rights that parents have under the Convention.¹⁶¹

D. *The Hague Child Protection Convention*

In October 1996, the 18th Session of the Hague Conference on Private International Law concluded the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference ("Hague Child Protection Convention").¹⁶² The objectives of the Hague Child Protection Convention are to resolve conflicts of jurisdiction, applicable law, and recognition and enforcement of proceedings for matters relating to the care and protection of children, including parental responsibility.¹⁶³ Article 5 of the Hague Child Protection Convention states that the country of the child's habitual residence has the jurisdiction to decide issues pertaining to the child's interests.¹⁶⁴ If the child's habitual residence changes, the first country is divested of jurisdiction and jurisdiction is conferred upon the new country.¹⁶⁵ The Hague Child Protection Convention provides that the State having jurisdiction over the child

161. See *First Special Commission*, *supra* note 147, at 222 (illustrating that "what is called 'custody' to only one parent under domestic law, does not necessarily mean that all 'rights of custody' within the intent of the Hague Convention have been granted to that parent.").

Since each domestic legal system has its own terminology for referring to rights which touch upon the care and control of children, and even some English-language systems do not employ the term 'custody', it is necessary to look to the content of the rights and not merely to their name.

Id.

162. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, done at the Hague, October 19, 1996, reproduced in 35 I.L.M. 1391 [hereinafter *Hague Child Protection Convention*].

163. See *id.* pmb., at 1396 (stating further that interest of child is primary consideration); see also *id.* art. 1 (outlining objects of Hague Child Protection Convention). Under the Hague Child Protection Convention, "the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child." *Id.*

164. See *id.* art. 5, at 1397 ("The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.").

165. See *id.* ("Subject to Article 7, in case of a change of the child's habitual resi-

may request that another State assume jurisdiction if such a transfer would be in the child's best interests.¹⁶⁶ A wrongful removal or retention can not alter a child's habitual residence or confer jurisdiction on the new country except in limited circumstances.¹⁶⁷ Article 15 of the Hague Child Protection Convention provides that the law of the child's habitual residence applies in matters pertaining to the care of the person and the property of the child.¹⁶⁸ A State exercising jurisdiction may consider the law of another State where the situation has a substantial tie.¹⁶⁹ If the child's habitual residence changes, the law of the State of the new habitual residence will apply to the child.¹⁷⁰ Any parental responsibility that existed under the laws of the original country will continue in the new country.¹⁷¹ The provisions of the

dence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.”).

166. *See id.* art. 8, at 1397.

By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

Id.

167. *See id.* art. 7, at 1397.

In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or (b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

Id.

168. *See id.* art 15(1), at 1399 (“In exercising their jurisdiction under the provision of Chapter II, the authorities of the Contracting States shall apply their own law. . . .”)

169. *See id.* art 15 (2), at 1399 (referring to State exercising jurisdiction, “in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.”).

170. *See id.* art. 15(3), at 1399 (“If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.”).

171. *See id.* art 16(3), at 1399 (“Parental responsibility which exists under the law

Hague Child Protection Convention concerning the applicable laws and the State exercising jurisdiction apply to any country which may be designated by the provisions.¹⁷²

The procedures for securing access rights are set forth in Article 35 of the Hague Child Protection Convention, which encourages authorities of one State to co-operate with authorities of other States in securing access rights.¹⁷³ One attempting to secure access rights in another country may submit evidence and information to the authorities in his own State.¹⁷⁴ That State will make findings and a decision as to whether that parent should have access to the child habitually resident elsewhere and will decide under what conditions such access should take place.¹⁷⁵ The parent seeking access may then present that decision in the State of the child's habitual residence which must use the other court's findings as evidence in making its decision as to whether access would be granted and, if so, under what conditions.¹⁷⁶ The Hague Child Protection Convention does not preclude a parent from bringing an action for the return of the child or the protection of access rights under the Hague Abduction Conven-

of the State of the child's habitual residence subsists after a change of that habitual residence to another State."); *see id.* art. 17, at 1399 ("The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.").

172. *See id.* art 20, at 1399 ("The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.").

173. *Id.* art 35(1), at 1401.

The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.

Id.

174. *Id.* art 35(2), at 1401.

The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised.

Id.

175. *Id.*

176. *See id.* ("An authority exercising jurisdiction . . . to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.").

tion.¹⁷⁷

II. CASE LAW INTERPRETING ACCESS RIGHTS UNDER THE HAGUE ABDUCTION CONVENTION

In order to facilitate the effective exercise of access rights by the non-custodial parent, some courts may place movement restrictions on the rights granted to the custodial parent.¹⁷⁸ However, where no such restrictions are in place, courts have had to decide issues under the Hague Abduction Convention pertaining to access rights.¹⁷⁹ In deciding such cases some courts have denied relief to non-custodial parents and their children while others have attempted to accommodate them.¹⁸⁰

A. Restricting the Rights of Custodial Parents

In order to facilitate the effective exercise of access rights by the non-custodial parent, a state's laws or a court may place limitations on the rights of the custodial parent.¹⁸¹ A court, for example, may order the custodial parent to remain in the state,

177. *See id.* art. 50, at 1402.

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

Id.

178. *See* Silberman, *supra* note 15, at 218 (noting that some courts maintain relationship between children and parents by prohibiting custodial parent from leaving immediate area or country). The laws of a country may also prohibit a custodial parent from leaving the country with the child without permission from the court or the other parent. *First Special Commission, supra* note 147, at 222.

179. *See* ACCESS SYMPOSIUM, *supra* note 11, at 2 (stating that such cases are few because most Hague Abduction Convention cases involve illegal removal or retention).

180. *Compare Re G (A minor) (Enforcement of Access Abroad)*, [1993] 3 All ER 657 (deciding that Article 21 was too vague to create any rights under which non-custodial parent may enforce original access order) with *Viragh v. Foldes*, 612 N.E.2d 241 (ordering custodial parent to pay travel expenses of non-custodial parent in order to facilitate visitation).

181. *See* Silberman, *supra* note 15, at 218 (noting how some courts encourage relationship between children and both parents); *Canada: Supreme Court Decision in Thompson v. Thompson (Hague Convention on the Civil Aspects of International Child Abduction)*, 34 I.L.M. 1159 (1995) [hereinafter *Thompson v. Thompson*]. In *Thompson*, a court granted the mother of a boy custody on the condition that she not leave jurisdiction without permission from the court. *Id.* After violating the condition the court ordered the return of the child. *Id.*

area, or country of the non-custodial parent.¹⁸² Removing the child to another location in violation of such an order is a wrongful removal within the meaning of Article 3 of the Hague Abduction Convention.¹⁸³

A custodial agreement or decree preventing a parent from leaving the country with the child is sufficient to invoke the Convention.¹⁸⁴ In *the Matter of David S. v. Zamira S.*,¹⁸⁵ as part of a separation agreement, both parents decided that the wife would have custody of the couple's only son while the father would have regular visitation.¹⁸⁶ When the father brought suit for the return of the children following the wife's removal of the children to New York,¹⁸⁷ the New York family court decided that the mother's conduct was contemptuous and subsequently granted custody of the children to the father.¹⁸⁸

The decision in *David S.* has been criticized by one scholar because the court considered the custody order granted after the child moved to New York.¹⁸⁹ The Hague Abduction Convention specifies that a removal is wrongful if it violates rights of custody existing at the time of the removal.¹⁹⁰ While the scholar

182. See *Second Special Commission*, *supra* note 21, at 233-34 (stating that placing limitations on custodial parent's right to move is practice in some countries).

183. See Silberman, *supra* note 15, at 218 (stating that some courts do not agree on who actually possesses custody rights granted under such provisions); *Thompson v. Thompson*, 34 I.L.M. at 1172-76 (discussing various approaches to dealing with this type of wrongful removal).

184. See Silberman, *supra* note 15, at 218 (discussing wrongful removal in breach of custody rights held jointly).

185. *In Re David S. v. Zamira S.*, 574 N.Y.S.2d 429, 151 Misc. 2d 630 (Fam. Ct. Kings County 1991). Both parents were Canadian nationals. *Id.* at 430.

186. See *id.* at 430 (stating that couple agreed that wife would keep child in Metropolitan Toronto, Canada area and that child would be available to father). After the mother gave birth to the couple's daughter, the court granted the father a temporary order preventing the mother from removing the children from Ontario and from getting passports for the children. *Id.* at 431.

187. See *id.* (stating that after children were removed from Ontario to New York, the Supreme Court of Ontario declared that father was entitled to custody and access of children).

188. See *id.* at 432 (deciding further that because daughter was not included in separation agreement and laws of Ontario would grant father joint custody of daughter unless otherwise provided, removal of daughter was wrongful in any event).

189. See Silberman, *supra* note 15, at 219 (stating that custody order granting custody to father after child is removed should not be overriding factor of court in determining if removal of children from Ontario was wrongful).

190. See Hague Abduction Convention, *supra* note 8, art. 3, at 1501 (defining wrongful removal and wrongful retention). "[T]he spirit of the Convention . . . is designed to preserve the parenting arrangements in place prior to the disruption and

criticizes the reasoning of the court in *David S.*, she nevertheless agrees with the court's final decision because the mother's inability to change her residence in fact provided the father with rights of custody.¹⁹¹

The *David S.* case is comparable to *C. v. C.*¹⁹² In 1985, the marriage broke down and the Australian court ordered the wife to take custody of the child under the condition that neither parent was to remove the child from Australia without the consent of the other.¹⁹³ In 1988, the mother went to England with the child without the father's consent.¹⁹⁴ The court found that the removal of the child was wrongful under Article 3 of the Hague Abduction Convention.¹⁹⁵

Courts, like persons, may also enjoy custody rights.¹⁹⁶ Courts have found that a limitation on travel vests custody in a judicial authority.¹⁹⁷ In *B v. B*,¹⁹⁸ the Canadian father and English mother of a six year old boy, upon divorcing, petitioned the court to make custodial arrangements for the child¹⁹⁹ whereby the judge ordered that the wife be granted interim custody while

to have any modifications made in the state of habitual residence." Silberman, *supra* note 15, at 219. "[A] custody order issued by a court *after* the removal of a child should be relevant only to the extent it evidences what the existing rights were at the time of removal." *Id.*

191. See Silberman, *supra* note 15, at 219 (explaining that father's right to determine child's place of residence gave him more than simple visitation rights).

192. *C. v. C. (Minor: Abduction: Rights of Custody Abroad)*, 2 All ER 465, 1 WLR 654 (1989). The mother in *C. v. C.* was of English nationality and the father was Australian. *Id.* at 466. The couple lived in Sydney, Australia where they had one son. *Id.*

193. See *id.* at 467 (placing limitations of movement with child on both parents).

194. See *id.* at 466 (stating that father filed suit claiming wrongful removal under Hague Abduction Convention).

195. See *id.* at 468 (holding that because custody arrangement granted father right to determine child's place of residence, father had rights of custody as defined by Article 5 and mother breached his rights by removing the child).

196. See Hague Abduction Convention, *supra* note 8, art. 3, at 1501 (stating that custody rights may be attributed to institution or other body). "[L]egal persons can also, in terms of the Convention, hold rights of custody." PEREZ-VERA REPORT, *supra* note 1, at 451.

197. See *B v. B (Abduction: Custody Rights)* [1993] Fam. 32 (C.A.) (enforcing condition that custodial parent keep child within country).

198. *B v. B (Abduction: Custody Rights)* [1993] Fam. 32.

199. See *id.* at 35 (noting that both parents had initially applied to court for custody and access rights). On May 17, 1991, the mother sought to obtain court permission to remove the child to England. *Id.* The mother included an affidavit which stated in part, "I have no intention of leaving this jurisdiction without an appropriate order of this honourable court." *Id.*

the father be granted interim access.²⁰⁰ The mother removed the child to England the day after the judge rendered the orders.²⁰¹ The court decided that because the order was temporary, it reserved in itself the right to determine the child's place of residence until the court issued a final decree.²⁰² The court determined that it had custody rights and that the mother breached those rights.²⁰³

One court has held that parents may not breach their own custody rights.²⁰⁴ In *Re H* a Scottish mother and an Irish father of and infant daughter separated and the Supreme Court of Ontario granted interim custody to the mother on the condition that she remain in Ontario with the child.²⁰⁵ Despite the court's order prohibiting the mother from Ontario without the permission of the court, the mother moved with the child to England.²⁰⁶ The court determined that the removal of the child in the face of an order from the court not to remove the child without permission was a violation of the conditions placed on her

200. *See id.* (providing temporary custody agreement until court could make final decision). The judge set forth a defined visitation schedule for the father and children which included every other weekend from 10:00 a.m. to 5:00 p.m. on Saturday and from 12 noon to 4:00 p.m. on Sunday. *Id.* The order made no provision specifically prohibiting the mother from removing the child from the jurisdiction. *Id.*

201. *See id.* (stating that mother removed child despite her assertion that she would not remove child without order from court). The father filed for the return of the child invoking the Hague Abduction Convention.

202. *See id.* at 38.

It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence.

Id.

203. *See id.* (holding that mother wrongfully removed child and ordering child's return); *see also* Hague Abduction Convention, *supra* note 8, art 3, at 1501 (defining wrongful removal as breach of rights of custody belonging to institution or other body); *Id.* art. 5, at 1501 (defining custody rights as right to determine residence of child).

204. *See Re H (Minor: Abduction)* [1990] 2 FLR 439, [1990] FCR 990 (Eng. Fam. Jan. 16, 1990) (holding that violation of condition placed on one's own rights is breach).

205. *See id.* (illustrating court's intent to keep child within country to allow visitation by father).

206. *See id.* (stating that mother also did not notify father that she was moving). When the English court heard the case brought on the father's application for the child's return, the mother argued that the removal was not wrongful because she held rights of custody. *Id.* The court disagreed and held that Article 3 of the Convention did not specify whose custody rights must be breached for the removal of a child to be wrongful. *Id.*

own rights, thus, making the removal of the child wrongful under Article 3 of the Convention.²⁰⁷

Limitations on the right to leave a jurisdiction with a child, whether imposed by a court or by an enforceable agreement do permit non-custodial parents more options in procuring the return of their children from their new locations.²⁰⁸ A court is likely to consider the removal of a child in violation of an order not to remove the child wrongful.²⁰⁹ Whether the court looks at the breach as a violation of the right of the non-custodial parent, of the court, or of the custodial parent's own right, a court will almost certainly find an Article 3 violation and barring any exceptions, the court will order the return of the child.²¹⁰

B. *The Special Issue of Access Rights and Article 21*

Few courts have decided issues concerning rights of access since the enactment of the Hague Abduction Convention.²¹¹ Some case law, however, has demonstrated a developing problem with regard to the application of Article 21 of the Hague Abduction Convention and the proper role of the Central Authority.²¹² An English court in *In Re T* deciding the validity of an

207. *See id.* (stating that "[t]here is nothing, in my judgment, in Art. 3 which indicates, as the mother asserts, that the breach of the rights of custody has to be a breach of the rights belonging to some other person.").

The mother's conduct in removing the child from the Province of Ontario constituted a wrongful removal within the meaning of Art. 3 of the Convention in that it was a breach of the rights of custody attributed to her under the law of the Province by reason of a judicial decision.

Id.

208. *See Second Special Commission, supra* note 21, at 233-34 (noting that courts order return when custodial parent moves with child without permission); Silberman, *supra* note 15, at 218 (stating that some non-custodial parents have more protection of access rights); *Thompson*, 34 I.L.M. at 1172-76 (discussing various approaches courts have taken when movement restrictions are placed on custodial parents).

209. *See Silberman, supra* note 15, at 218 (noting that several courts held that "when a custodial agreement or decree prevents a parent from leaving the country with the child, such a restriction gives 'custody rights' to the resident parent sufficient to invoke the Convention.").

210. *See First Special Commission, supra* note 147, at 222-23 (stating that most legal experts agreed that court ordering return of child because of custodial parent's violation of court order complies with spirit of Convention).

211. *See ACCESS SYMPOSIUM, supra* note 11, at 2 (stating that there is only small amount of case law on access rights because most Hague Abduction Convention cases involve the breach of custody rights).

212. *See Hague Abduction Convention, supra* note 8, art. 21, at 1502 (providing section dealing with access rights). Article 21 states:

Article 21 application dismissed the application based on a lack of jurisdiction.²¹³ In *In Re T*, a father attempted to enforce in England his access rights granted by the Superior Court of California, but the court held that Article 21 of the Hague Abduction Convention does not give a judicial authority the jurisdiction to enforce access orders issued in another country.²¹⁴ The court found that the application should have been filed instead under the Custody and Children Act of 1989, which is the English implementing legislation of the Hague Abduction Convention.²¹⁵

In England, the Family Court decided *B v. B*, a case regarding court jurisdictional issues in securing access rights.²¹⁶ In September 1985, after receiving custody of the couple's three children,²¹⁷ the mother moved from Canada to the United Kingdom with the children.²¹⁸ The father obtained an order from the Supreme Court of Ontario permitting him to take possession

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

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

Id.; see also Lowe, *supra* note 22, at 374-85 (discussing uncertainty concerning obligations imposed on Central Authority and judicial authorities and dissatisfaction of experts at Second Special Commission because of weakness of Convention in protecting access rights).

213. See *In Re T (Minors) (International Child Abduction: Access)* (United Kingdom 1993) [1993] 1 W.L.R. 1461 (deciding that court decided that Central Authority should not have issued originating summons).

214. See *id.* (stating that role of Central Authority is limited to executive matters).

215. *Id.*

The duty of the Central Authority on receiving an application to make arrangements for organizing or securing the effective exercise of access rights under Article 21, is to make appropriate arrangements to provide English solicitors to act on behalf of the applicant for the purpose of instituting an application under section 8 of the Children Act 1989.

Id.

216. See *B v. B (Minors: Enforcement of Access Abroad)* [1988] 1 All ER at 652, 655 (holding that wrongful removal need not be proved for court to hear case).

217. See *id.* at 653-54 (stating that Supreme Court of Ontario granted father reasonable access to his children).

218. See *id.* at 654 (stating that upon moving to United Kingdom, mother made children wards of court).

of the children in order to exercise his access rights and he tried to enforce the order in the United Kingdom.²¹⁹ The mother argued that because she had the right of custody over the children, the father's application should be dismissed because there was no wrongful removal or retention.²²⁰ The court refused the mother's argument because such a reading of the Convention would undermine the provisions of the Convention designed to secure access rights.²²¹

The *B v. B* court, however, dismissed the application to secure the father's access rights because the access order was made in Canada, and by the time the breach of the father's rights of access accrued, the child's habitual residence changed to the United Kingdom.²²² Interpreting Article 4 of the Hague Abduction Convention,²²³ the *B v. B* court concluded that in order for his rights to be enforced, those rights must arise in the Contracting State in which the child was habitually resident before any breach occurred.²²⁴

Finally, the *B v. B* court criticized Articles 7 and 21 for their inability to provide adequate remedies to secure access rights for non-custodial parents.²²⁵ The court specifically criticized the

219. *See id.* (noting that mother's removal of children out of country frustrated his access rights).

220. *See id.* at 655 (stating that court has no duty to return child for exercise of access rights); *see also* PEREZ-VERA REPORT, *supra* note 1, at 444 (mandating court to return child only after wrongful removal or retention); Anton, *supra* note 5, at 554-55 (stating that removal of child from non-custodial parent is not wrongful).

221. *See B v. B* (Minors: Enforcement of Access Abroad), 1 All ER at 656 (stating that "[The Convention] would be of no assistance and it is difficult to envisage any circumstances in which a mere breach of rights of access on the removal of a child abroad by a custodial parent could be remedied or dealt with under the Convention.").

222. *See id.* at 657-58 (declining to enforce Canadian order because it had no force in United Kingdom).

223. *See* Hague Abduction Convention, *supra* note 8, art. 4, at 1501 (stating that removal or retention must violate custody rights existing under laws of State of child's habitual residence immediately before removal or retention).

224. *See B v. B* (Minors: Enforcement of Access Abroad), 1 All E.R. at 657 (reasoning that rights conferred by court of child's habitual residence are those upon which application is based and habitual residence in Contracting State in which rights existed is sufficient for that State's jurisdiction).

225. *See id.* at 658 (stating that "[i]n the absence of any express reference to the judicial discretion in cases in which there has been a breach of access rights only, I am not persuaded that . . . the convention was intended to secure the enforcement of rights of access in the same way as rights of custody."); *see also* Hague Abduction Convention, *supra* note 8, art. 7, at 1502 (stating that Central Authorities must work together to facilitate and organize effective exercise of access rights); *Id.* art. 21, at 1503

provisions because they do not impose any specific duties upon a judicial authority to take any steps to secure the access rights of non-custodial parents.²²⁶ Neither Article 7 nor Article 21 provides any direction or limitation upon which a court can exercise its discretion in facilitating access rights.²²⁷

The English court's decision in *Re G* overruled the decision in *B v. B*.²²⁸ In *Re G*, the Canadian family court granted custody of a divorced couple's child to the mother and permitted the mother to live in either Canada or England while granting access rights to the father.²²⁹ The mother subsequently settled in England and the father had not seen the child since shortly after the move.²³⁰ The father brought proceedings under the Hague Abduction Convention to enforce the access rights granted him by the Canadian court.²³¹ The English court again considered whether Article 4 of the Convention requires that an access order arise under the Contracting State of the child's habitual residence in order to be enforced.²³² The *Re G* court held that the decision in *B v. B* was too narrow a reading of Article 4.²³³ The court noted instead that Article 4 does not specify under which State the right of access must arise.²³⁴

(stating that Central Authorities must assist in institution of proceedings with view of protecting access rights).

226. *See B v. B (Minors: Enforcement of Access Abroad)*, 1 All ER at 658 (finding lack of guidance to enforce Article 21).

227. *See id.* (criticizing that "[t]he obligations imposed by arts 7 and 21, however, are imposed on the central authority exclusively and even the provisions of art 7(f) contain the limiting words 'in a proper case'.")

228. *Re G (A minor) (Enforcement of Access Abroad)* [1993] 3 All ER 657.

229. *See id.* at 659 (providing father right of access in England).

230. *See id.* at 660 (noting that father maintained weekly telephone contact to child and sent her cards and presents). The mother informed the father that she would not permit him access to the child. *Id.*

231. *See id.* at 660 (stating that Central Authority of England and Wales assisted father in making application to protect his access rights).

232. *See id.* at 661 (noting that when mother moved child to England, child's habitual residence was changed from Canada, where original custody and access order was made, to England).

233. *See id.* at 666 (explaining that "[i]f Article 21 did not apply to the enforcement of a foreign access right in the country of the child's habitual residence, it would seldom achieve [its goals].").

234. *See id.* (explaining that court's interpretation of Contracting State in Article 4 was incorrect because it involved reading words into Convention so that Contracting State was State where right of access existed). The court further explained that access usually must be enforced in the country where the child resides. *Id.* "It is unusual for a breach of access rights to occur when the child is away from home." *Id.*

The *Re G* court explained the purpose of Article 21 and the role of the Central Authority in securing the rights of access for applicants.²³⁵ The court decided that because the Central Authority of England and Wales assisted the father in applying for the enforcement of his access rights, it fully performed its obligations under Article 21.²³⁶ The *Re G* court stated that the Central Authorities have no mandatory duties with regard to promoting the exercise of access rights except to promote cooperation between the parties and communication between Contracting States.²³⁷

The *Re G* court dismissed the father's application for the enforcement of his access rights because the court decided that the father should not have sought an order to enforce compliance with the Convention.²³⁸ The court stated that the provision of Article 21 imposed no duties upon judicial authorities to take affirmative acts to secure the non-custodial parent's access rights.²³⁹ The court held that the provision is too vague to create any rights at all for the non-custodial parent.²⁴⁰

The court further stated that an application for the procurement of access rights should not be brought under Article 21, but should be brought instead, as an independent request upon the court of the child's habitual residence.²⁴¹ Because Article 21

235. *See id.* at 667 (stating that duties of Central Authority are executive and not judicial in nature which include duty to assist or initiate proceedings to protect access rights).

236. *See id.* at 668 (stating that once Central Authority made it possible for applicant to appear in English court, it had done all that is required under Hague Abduction Convention to help applicant secure his rights of access).

237. *See id.* (stating that Article 21 ensures that application is brought to attention of Central Authority of Contracting State). The Central Authority may comply with the obligations of Article 21 by providing legal aid and appointing lawyers to act on behalf of the applicant who may negotiate an agreement between the parties or pursue litigation. *Id.* at 663-64.

238. *See id.* at 668 (stating that applicability of Article 21 was exhausted once Central Authority brought application to court).

239. *See id.* at 664 (criticizing that "[t]here are no teeth to be found in [A]rticle 21 and its provisions play no part in the decision to be made by the judge.>").

240. *See id.* (suggested that Article 21 should direct courts to enforce access orders in the way provided by Article 11(2) of the European Child Custody Convention). According to the court, Article 21 provides no rights in private law which a parent can enforce regarding access rights. *Id.*

241. *See id.* at 664, 668 (determining that father should have brought case under Section 8 of the Children Act of 1989 which provides for the effective exercise of access rights); *see also* Children Act, 1989, ch. 41 § 8 (Eng.) (providing authority for court to issue "an order requiring the person with whom a child lives, or is to live, to allow the

provided no guidance to the judicial authority in securing the access rights of non-custodial parents the access order issued in Canada could not be enforced.²⁴² Instead, the court found that in cases regarding access rights, courts should exercise their discretion and consider the best interests of the child while regarding the existing access order as persuasive guidance in their decisions.²⁴³

The greatest hurdle that non-custodial parents face is that under the Hague Abduction Convention, the removal of a child by the custodial parent is not wrongful.²⁴⁴ The Hague Abduction Convention provides little remedy even if such removal was made to deliberately frustrate their ability to effectively exercise their rights of access.²⁴⁵ The Superior Court of California, for example, refused to order the return of a child removed from Israel by the custodial mother when such removal interfered with the father's access rights.²⁴⁶ The California Superior court found that the removal of the child to the U.S. was not wrongful under the laws of Israel because the mother had custody rights

child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.”).

242. See *Re G (A minor) (Enforcement of Access Abroad)* [1993] 3 All ER 657 (declining to help father maintain contact with his child); but see ACCESS SYMPOSIUM, *supra* note 11, at 5 (criticizing English Court's decision in *Re G*). “The English Courts have gone too far in suggesting that the application based on breach of access rights arising under a Foreign Court Order somehow is not a Convention proceeding.” *Id.*

243. See *id.* (quoting *Re C (A Minor)* (unreported), 8 September 1992).

In considering whether or not it is in the best interest of the child for the order to be implemented, the court must pay regard to the decision of the foreign court. It must pay regard to how recently the court has seen fit to make the order, and it must bear in mind that, having regard to the doctrine of comity of nations, unless it is clear that the enforcement of the order is contrary to the welfare of the child, which is the paramount consideration, that the court should respect the order of the court in the requesting jurisdiction.

Id.

244. See *B v. B (Minors: Enforcement of Access Abroad)* 1 All ER at 656 (stating that Hague Abduction Convention offers little assistance despite non-custodial parent's expectation that Hague Abduction Convention would help reestablish contact between parent and child).

245. See *Anton*, *supra* note 5, at 554-55 (stating that removal of child by custodial parent is not wrongful).

246. See *District Attorney v. Officer, Superior Court, County of Santa Barbara* No. 215833 (Dec. 17, 1996) (unpublished opinion) (noting that Israeli court, upon separation of parties, granted sole custody to mother while giving visitation rights to father).

while the father had nothing more than access rights.²⁴⁷

Some courts, however, have interpreted the Hague Abduction Convention in order to comply with its goals.²⁴⁸ In *Gross v. Boda*, after the dissolution of their marriage the mother had sole custody of the parties' child while the father had visitation rights under the laws of Arizona.²⁴⁹ According to the Court of Appeals in Wellington, New Zealand, visitation rights give a parent possession and a right care for the child for an indefinite period.²⁵⁰ The court's definition of visitation rights overlaps with the definition of rights of custody.²⁵¹ The court, therefore, construed a right of visitation as a type of custody right and concluded the removal of a child in breach of visitation rights is wrongful.²⁵²

C. *Bearing the Increased Cost of Access Rights*

Some courts have attempted to accommodate a non-custodial parent where removal by the custodial parent frustrated the custody arrangements made by a court which assumed that the child would remain within the jurisdiction.²⁵³ In *Costa v. Costa*, a couple divorced in May 1989 and the New York State Supreme Court granted custody of the couple's child to the mother and granted access to the father.²⁵⁴ When the mother took the children out of the country to live in England, the father applied to

247. See *id.* (stating that laws of Israel and United States authorized mother's removal of child).

248. See *Gross v. Boda*, [1995] 1 N.Z.L.R. 569 (December 2, 1994) (ensuring father's ability to maintain contact with his child).

249. See *id.* at 570 (stating that father's visitation rights included contact with his child every other weekend and alternating holidays and summer vacation).

250. See *id.* at 573 (finding that custodial parent's right to determine child's residence is subject to the existing visitation order of non-custodial parent). Moving out of the State would affect the existing rights of the non-custodial parent. *Id.*

251. See *id.* (stating that "[i]t follows in my view that under the Court order, and jointly with the mother, the father had the right to possession and care for the child for the purposes of [the definition of custody rights under New Zealand's legislation implementing the Hague Abduction Convention]."); see also Hague Abduction Convention, *supra* note 8, art. 5(a), at 1501 (stating that custody rights "include rights relating to the care of the person of the child.").

252. See *Gross*, 1 N.Z.L.R. at 572 (ordering return of child); but see S v. H (*Abduction: Access Rights*) [1997] 1 FLR 971 (Eng. Fam. Div.) (stating that Convention deliberately drew distinction between custody rights and access rights).

253. See *Costa v. Costa* (Aug. 21, 1991) (visited Mar. 4, 1997) <<http://www.hiltonhouse.com/File.htm/Costa.UK>> (implying, however, that court did not specifically order custodial parent to remain in country).

254. See *id.* (setting forth nature of relationship between children and parents).

the English court for an access order under the Child Abduction and Custody Act of 1985.²⁵⁵ The court decided that Article 7(f) of the Hague Abduction Convention permitted the judicial authority to make arrangements for the exercise of the applicant's access rights.²⁵⁶ In ordering access, the court ordered the mother to bear some of the cost of the father's travel expenses.²⁵⁷

Similarly, the Supreme Court of Minnesota in *Viragh v. Foldes*²⁵⁸ remanded the case to consider the mother's financial ability to pay the father's expenses for international travel to visit his children.²⁵⁹ In *Viragh*, the Hungarian Guardianship Authority ordered custody to the mother and defined visitation to the father.²⁶⁰ Without notifying the father,²⁶¹ the mother moved to the United States with the children.²⁶² The court found that the mother did not violate the father's access rights because she did not deny him the right to visit with the children in the United States.²⁶³ The court, however, found that the children's pres-

255. *See id.* (analyzing New York State law and finding that mother had no right to remove children from jurisdiction). The court declared the removal wrongful but did not order the return of the children because the father sought only the enforcement of his access rights. *Id.*

256. *See id.* at 15 (stating that "I find that the scope of the Convention does not limit the territorial jurisdiction of this court to make appropriate arrangements for access."). The court ordered access by the father in England explaining that because the children were traumatized by their parent's tensions, it would be inappropriate for the children to leave England for the purposes of access with their father. *Id.*

257. *See id.* (deciding that it would be fair for mother to pay part of cost because she was responsible for children being taken from father).

258. *Viragh v. Foldes*, 415 Mass. 96, 612 N.E.2d 241 (1993).

259. *See Viragh*, 612 N.E.2d at 250 (alleviating additional expense on father of maintaining visitation).

260. *See id.* at 243 (explaining that order consisted of father visiting with his children on alternating weekends, two weeks in July and August, and three days during winter and spring holidays).

261. *See id.* (noting that under Hungarian law, custodial parent must receive permission from either non-custodial parent or from court before removing child abroad for period longer than one year otherwise retention of child abroad is wrongful). At the time of the initial hearing, however, the children were in the United States for only eight months. *Id.* at 248. Thus, the issue focused on the father's access rights both in the lower court and on appeal. *Id.*

262. *See id.* at 244 (explaining that mother met and subsequently married citizen of both United States and Hungary). She moved to the United States to be with him. *Id.*

263. *See id.* at 247 (indicating that mother was willing to negotiate schedule for visitation with father). The mother stated that she offered to send the children to Hungary once a year at her husband's expense if the father would post a bond to assure that

ence in the United States rendered the father's ability to visit with them impracticable.²⁶⁴

The *Viragh* court noted that the Hague Abduction Convention does not mandate any remedy for a non-custodial parent seeking access rights.²⁶⁵ The lower court found that the children should not be order to return to Hungary for visitation.²⁶⁶ The court, however, used its interpretation of Article 26²⁶⁷ to order the moving custodial parent to pay the necessary travel expenses of the non-custodial parent in the exercise of his access rights.²⁶⁸

Other courts in the United States, although not deciding under the Hague Abduction Convention, have similarly ordered a custodial parent to pay a portion of the travel expenses of either the non-custodial parent or of the child visiting the non-custodial parent.²⁶⁹ In *Willey v. Willey*, the Florida Appellate Court reversed and remanded a case where the lower court ordered that the father pay all travel expenses in exercising his

the children would be returned. *Id.* at 244. The father refused to agree to those terms. *Id.*

264. *See id.* at 247 (stating that father had neither sufficient money to afford ticket to England nor ability to borrow money); *Second Special Commission, supra* note 21, at 244. "One expert explained that, in many cases, the problem was financial rather than legal." *Id.*

265. *See Viragh*, 612 N.E.2d. at 246 (stating, however, that court had discretion to order return of children to effectuate visitation under Article 18 of the Convention). "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Abduction Convention, *supra* note 8, art. 18, at 1503. The appellate court ultimately affirmed the lower court decision to permit visitation in the United States at the mother's financial expense and remanded the case to determine an appropriate visitation schedule which takes into account the financial situations of the parties. *Viragh*, 612 N.E.2d, at 249.

266. *See id.* (noting risk that children would be wrongfully retained).

267. Hague Abduction Convention, *supra* note 8, art. 26, at 1504. Article 26, in pertinent part, reads as follows:

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Id.

268. *See Viragh*, 612 N.E.2d at 249 (noting that court ordered suspension of father's child support obligation to defray visitation expenses while children resided in United States).

269. *See Willey v. Willey*, 683 So. 2d 647 (Fla. 4th DCA 1996) (noting strong public policy favoring shared parental responsibility).

visitation rights where the mother moved from Florida to Illinois.²⁷⁰ The court reasoned that the order unfairly placed an enormous economic burden on the father, thus, effectively defeating his visitation rights.²⁷¹

Similarly, an Appellate Court in Nebraska affirmed a lower court order that the mother bear one half of the cost of travel expenses for the father to maintain visitation with his children.²⁷² The lower court granted the mother permission to move, with the children, from Nebraska to Washington.²⁷³ Because the move would burden the visitation rights of the father by forcing him or the children to travel a significant distance to maintain contact, the court ordered her to share in the travel cost.²⁷⁴

III. *THE HAGUE ABDUCTION CONVENTION SHOULD BE MODIFIED TO ADEQUATELY ADDRESS THE ISSUE OF ACCESS RIGHTS*

The Hague Abduction Convention should adequately protect rights of access without forcing courts to consult the implementing legislation in their respective States.²⁷⁵ Without uniform rights throughout the Contracting States, parents will be faced with differing custody judgments depending on the State to where the child has been removed. It seems erroneous that Article 21 does nothing more than order Central Authorities to get aggrieved parents to the courtroom and then leaves non-cus-

270. *See id.* at 651 (finding that lower court abused its discretion by ordering father to shoulder complete financial burden of visiting his child after mother moved with child out of state).

271. *See id.* at 651 (stating that placing significant economic burden on father could defeat his visitation rights).

272. *See Harvey v. Harvey*, No. A-94-1251, 1995 WL 676406 (Neb. App. Nov. 14, 1995) (supporting father's access rights).

273. *See id.* at *2 (declining to significantly impede on mother's ability to travel).

274. *See id.* at *6 (declining to force father to shoulder entire burden of contacting children when mother chooses to move with children); *see also Seymour v. Seymour*, 1987 WL 17721 (Tenn.App. Oct. 1, 1987). In *Seymour*, the custodial mother moved with the marital children from Tennessee to Maryland placing a strain on the father's visitation schedule with the children. *Id.* at *3. The Tennessee Court of Appeals revised the initial visitation schedule and ordered the mother to pay part of the expenses for the children to visit with their father. *Id.*

275. *See supra* notes 213-15, 235-43 and accompanying text (declining to enforce non-custodial parents' access rights because they did not apply under England's implementing legislation).

nodial parents without further remedy once they get to court.²⁷⁶ A careful reading of the Hague Abduction Convention, however, gives no further instructions for securing the access rights of non-custodial parents. Article 21 gives no direction to the judicial authority on how a court should proceed after a case is brought before it.²⁷⁷ In order for a judicial authority to carry out the spirit of the Convention, it must add its own interpretation to the word of the treaty without any substance to support its decision. With regard to access rights, the Hague Abduction Convention at best grants the judicial authority so much discretion that it can either do something to help non-custodial parents enforce their access rights or it can do nothing at all.

A. Prior Cases Demonstrate the Need for the Revision of Article 21 of the Hague Abduction Convention

Such court decisions as *Gross*,²⁷⁸ *Costa*,²⁷⁹ and *Viragh*²⁸⁰ demonstrate that courts stretch the letter of the Hague Abduction Convention in order to comply with its spirit. The court in *Gross* employed a very broad definition of visitation rights in order to preserve the rights of the father and to respect the original custody order.²⁸¹ Without determining that visitation rights granted in Indiana had any special characteristics, the court in *Gross* decided that visitation rights were, *per se*, a type of custody right under the Hague Abduction Convention.²⁸² The Convention clearly treats visitation rights and custody rights separately,²⁸³ although the *Gross* court attempted to mesh the two rights into one.²⁸⁴

The court in *Costa* interpreted Article 7(f) of the Hague Ab-

276. See *supra* note 242 and accompanying text (criticizing English courts for holding that Article 21 application is not Convention proceeding).

277. See *supra* notes 144-55, 235-40 and accompanying text (discussing criticisms of Article 21 because it imposes no obligations on judicial authorities).

278. See *supra* notes 248-52 and accompanying text (discussing *Gross* case).

279. See *supra* notes 253-57 and accompanying text (discussing *Costa* case).

280. See *supra* notes 258-68 and accompanying text (discussing *Viragh* case).

281. See *supra* notes 250-52 and accompanying text (discussing *Gross* court's decision to order return of child because of breach of access rights).

282. See *supra* note 252 (discussing English court finding that access rights and custody rights are different).

283. See *supra* note 147-51 and accompanying text (explaining that drafters deliberately rejected suggestion to give equal protection of access rights and custody rights).

284. See *supra* notes 250-52 and accompanying text (discussing *Gross* court finding that father had custody based on his right of visitation).

duction Convention liberally in order to give it authority to act with regard to access rights. The court interpreted Article 7(f) as the vehicle granting it the jurisdiction to arrange for the visitation rights of the non-custodial parent.²⁸⁵ The language of Article 7(f), however, is quite similar to that of Article 21 of the Hague Abduction Convention.²⁸⁶ Article 7(f) describes the power of the Central Authority. Like Article 21, nothing in Article 7 makes any mention of the powers or of the jurisdiction of judicial authorities.²⁸⁷

The court in *Viragh* generously read Article 26 of the Convention to order a mother to pay expenses for a father to continue visitation with his children.²⁸⁸ While Article 26 does permit a court to order the person who removed the child to pay the expenses on behalf of the applicant, such expenses normally would go toward legal costs and the costs of locating the child.²⁸⁹ Article 26 further provides that the abductor may be directed to pay the expenses of returning the child.²⁹⁰ The drafters of the Hague Abduction Convention, however, envisioned an order for return only in the event of an abduction.²⁹¹ According to the Convention, no abduction exists where the removal or retention of a child is in breach of mere access rights.²⁹² Thus, it is unlikely that the drafters envisioned Article 26 as a remedy to a breach of access rights by ordering the custodial parent to pay

285. See *supra* notes 256-57 and accompanying text (discussing *Costa* court's use of Article 7(f) to order visitation rights for non-custodial parent).

286. Compare Hague Abduction Convention, *supra* note 8, art. 7(f), at 1502 (stating that Central Authorities must "initiate or facilitate the institution of judicial or administrative proceedings with a view . . . , in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access.") with *id.* art. 21, at 1503 (stating that "Central Authorities, . . . may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.").

287. See *id.* art. 21, at 1503 (discussing only obligations of Central Authorities).

288. See *supra* notes 258-68 and accompanying text (discussing court's decision to remand case that lower court may evaluate mother's ability to pay expenses for children to visit their father).

289. See PEREZ-VERA REPORT, *supra* note 1, at 468 (discussing the discretionary option of courts to require 'abductor' or person preventing access rights to pay expenses incurred by applicant in bringing suit).

290. See *supra* note 267 and accompanying text (quoting Article 26 of Hague Abduction Convention).

291. See *supra* notes 142-43 and accompanying text (stating that duty to return is not triggered unless there is wrongful removal or retention).

292. See *supra* notes 156 and accompanying text (discussing that wrongful removal or retention involves breach of custody rights only).

for returning the child for visitation. The reluctance of the drafters to provide ready solutions to the problem of access rights, moreover, shows that it is unlikely that they intended to make a provision requiring such payment.²⁹³

B. The Hague Child Protection Convention Gives Greater Guidance to Judicial Authorities on Securing Access Rights

The Hague Child Protection Convention provides substantial improvement on the gaps left by the Hague Abduction Convention. Where the Hague Abduction Convention left judicial authorities deciding that they were without jurisdiction to decide issues concerning access,²⁹⁴ the Hague Child Protection Convention specifically provides that courts in the child's habitual residence maintain jurisdiction and apply their own laws concerning the care of the person of the child including matters relating to access rights.²⁹⁵ The Hague Child Protection Convention, additionally, directs authorities of the Contracting States to co-operate with each other in the securing of access rights.²⁹⁶ Such a mandate was missing in the Hague Abduction Convention. These provisions in the Hague Child Protection Convention give greater protection than does the Hague Abduction Convention to parents seeking to exercise access rights to their children while giving children a greater opportunity to maintain more complete relationship with both parents.

C. The Hague Child Protection Convention Does Not Adequately Secure Access Rights

The Hague Child Protection Convention, however, leaves serious problems that may continue to frustrate non-custodial parents originally granted access rights to their children. The Hague Child Protection Convention is unfair to non-custodial

293. *See supra* notes 149-51 and accompanying text (discussing drafters unwillingness to provide strict provisions to protect access rights).

294. *See supra* notes 144-46 and accompanying text (discussing criticisms that Article 21 of Hague Abduction Convention addressed only Central Authorities and provided no direction for judicial authorities to deal with access rights).

295. *See supra* notes 164-72 and accompanying text (discussing provisions of Child Protection Convention providing for jurisdiction and applicable law to be applied in State of child's habitual residence).

296. *See supra* notes 173-77 and accompanying text (discussing Article 35 of Child Protection Convention which deals with process of securing and exercising access rights).

parents who have access rights in their country before the custodial parent moves to another country. The Hague Child Protection Convention permits custodial parents to frustrate the non-custodial parents' ability to maintain contact with their children. If the custodial parent is unsatisfied because the other parent has access, moving will frustrate the rights granted to the non-custodial parent.

The cost of re-litigating to secure access in another nation, additionally, may prove to be enormously prohibitive to non-custodial parents.²⁹⁷ Under Article 35 of the Hague Child Protection Convention, an access order granted in the country of the non-custodial parent is not enough to ensure access in the new country.²⁹⁸ The access order is used only as evidence that the new country must use when considering whether access will continue in the new country.²⁹⁹ The non-custodial parent, thus, must still convince the court in the new country that he or she should get access to the child. This process may be so complex and expensive that it may extinguish the access rights of non-custodial parents who have already received access rights under the original custody order.

The State that made the original custodial and access order when the child was a habitual resident should be in no worse a position than the new State to decide that access is appropriate. The original custodial order and the laws governing such decisions presumably take the child's best interests into account. That order should be modified only to take into account the distance factor, not to re-decide the merits of whether the non-custodial parent should get access at all. The State of the child's new habitual residence should enforce the original access order to the extent it is practical under the new circumstances.

The drafters of the Hague Abduction Convention believed that the best interests of children are served when the child has the opportunity to know and to have the benefit of both par-

297. See *supra* note 72 and accompanying text (discussing problem of costly litigation when parents must fight in courts of other countries in order to maintain rights provided in their own country).

298. See *supra* notes 173-77 and accompanying text (discussing process by which non-custodial parent must receive access rights in child's new country under Hague Child Protection Convention).

299. See *supra* notes 174-76 and accompanying text (stating that State of child's new habitual residence must consider order from other State in making its final decision concerning access rights).

ents.³⁰⁰ The initial custody order by the court of the child's habitual residence reflects what is supposed to be in the child's best interests.³⁰¹ Where a court restricts the custodial parent from leaving the State without the permission of the other parent or from the court, it does so on the underlying assumption that it is best for the child to have the benefit of a meaningful relationship with both parents. When a court grants one parent custody rights while granting the other access rights, it does so because it is best for the child to have the influence of both parents.³⁰² Neither parent should be excused from respecting the child's benefit by taking the child to another country thereby frustrating access.

D. *The Moving Parent Should Bear the Burden of Proving that the Removal or Retention of the Child is Proper*

The Hague Abduction Convention requires that the parent requesting the return of a child prove all elements of a wrongful removal or retention.³⁰³ Such a requirement can prolong the process of securing the return of the child as the left-behind parent gathers evidence to demonstrate that the other parent had no right to remove or retain the child. Courts should consider any removal of a child from his or her habitual residence as wrongful unless it was supported by a court order and the laws of the state of the child's habitual residence, or by consent or acquiescence of one responsible for the care of the child.³⁰⁴ Once an application is made for the return of a child, courts should place the burden on the moving parent to prove that the removal or retention was not wrongful. The parent should then justify removing a child in the face of an order which was made under the assumption that the child would remain in the country so as to facilitate the exercise of parental responsibility by both parents. If the moving parent can demonstrate that under

300. See *supra* notes 134-39 and accompanying text (discussing drafter's desire to provide children with complete family relationships).

301. See *supra* note 243 and accompanying text (stating that court's primary consideration in matters of custody is best interests of child).

302. See *supra* notes 134-39 and accompanying text (stressing importance that children maintain contact with both parents).

303. See *supra* note 110 and accompanying text (discussing that burden of proof is on parent making application to prove that child was wrongfully removed or retained).

304. See *supra* note 110 (discussing current burden of proof for parent seeking return of child).

the laws of the original State, or under the court order, or by consent of the other parent, the removal was proper, the removal or retention would not be wrongful. Should the moving parent, however, fail to meet his or her burden, the child should be returned to the original country immediately.

If the court should find the removal or retention not wrongful, then the court should enforce any access order provided in the original country. Additionally, the Hague Conference should give judicial authorities the option to order the moving parent to absorb the travel expenses for periodically reuniting their children with their non-custodial parents.³⁰⁵ When the custodial parent moves out of the jurisdiction and frustrates the access rights of the other parent, the custodial parent frustrates the right of the child to continual contact with the non-custodial parent. Courts should have the discretion to order the custodial parent to restore that benefit to the child.³⁰⁶

E. The European Child Custody Convention Provides a Plausible Solution that Would Protect Access Rights

One of the factors that distinguish the Hague Abduction Convention from the European Child Custody Convention is that the latter provides that rights of access be enforced in the same manner as rights of custody.³⁰⁷ Under the European Child Custody Convention, however, the ultimate arrangements that a court may make with regard to access may not be the same as the original order.³⁰⁸ Drafters of the European Child Custody Convention noted a difficulty in establishing the manner in which access rights were to be exercised when parents could not agree.³⁰⁹ Article 11 of the European Child Custody Convention nonetheless provides a more workable solution than the Hague

305. *See supra* notes 257, 268-74 and accompanying text (stating that non-custodial parent should not be forced to shoulder entire economic burden of visiting child when custodial parent removed child from non-custodial parent).

306. *See supra* note 269 and accompanying text (noting policy of shared parental responsibility).

307. *See supra* note 90 and accompanying text (quoting Article 11(1) of European Child Custody Convention which provides for enforcement of access rights).

308. *See supra* notes 91-92 and accompanying text (discussing that European Child Custody Convention permits court to adjust access order to account for new situation of parties).

309. *See supra* note 92 and accompanying text (discussing European Child Custody Convention provision on protecting access rights).

Abduction Convention by providing that a court respect a non-custodial parent's access rights. The Hague Abduction Convention should likewise protect non-custodial parents by preventing the custodial parent from denying access to the child after relocation. For the Hague Abduction Convention to adopt a remedy similar to that found in the European Child Custody Convention would mean that it would enforce orders instead of rights which is contrary to the original intent of the Convention. The Convention, however, may serve its objective of securing access rights by enforcing access orders. Rights of access differ from rights of custody in that custody rights may arise with or without a court order³¹⁰ while a parent's rights are usually demoted from custodial to access rights upon an enforceable order or agreement.

Although the Hague Abduction Convention does not mandate the enforcement of access orders, one of the purposes of the Convention is to ensure that the rights recognized in the State of the child's habitual residence are respected abroad.³¹¹ The custody and access order originally made in such a State presumably took into account what arrangements were in the child's best interests. Since the child's best interests are the overriding concern of the Convention, it should take steps to preserve the spirit of the original order. The Convention should, thus, direct courts to take notice of the access order previously granted. While it may not be practical for the subsequent judicial authority to strictly enforce an access order in the State where the child now resides,³¹² the court should make some genuine provisions for the effective exercise of access rights.³¹³

CONCLUSION

The Hague Abduction Convention has been successful in securing the return of children abducted abroad. That success has been in large part the result of the growing number of coop-

310. *See supra* notes 106-08, and accompanying text (discussing methods of attaining custody rights).

311. *See supra* notes 101-03 and accompanying text (quoting objectives of Hague Abduction Convention).

312. *See supra* notes 91-92 (noting change in child's new local environment may justify adjustment in visitation schedule).

313. *See supra* note 243 and accompanying text (stating that unless doing so would be detrimental to child, courts should attempt to respect existing orders regarding child custody).

erating States in securing the return of abducted children. The weakness in organizing, securing, and facilitating access rights, however, is the Convention's biggest failure. Because the provisions concerning access rights are so vague, they do not protect access rights and are, therefore, ineffective. While States have agreed to cooperate with each other, they are left with no direction on how to fulfill the Convention's purpose of securing the effective exercise of access rights. An amendment to the Hague Abduction Convention that would give judicial authorities the discretion to make moving custodial parents more responsible for continued access between children and non-custodial parents would be a positive step in giving children complete familial relationships. Directing courts to take notice of the original parenting arrangement may further enable non-custodial parents to have a meaningful relationship with their children. Unless the Hague Abduction Convention is modified to effectively facilitate access rights, custodial arrangements established for the benefit of children may not be respected and children may permanently lose contact with their parents.