Rights of Custody: State Law or Hague Law?

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A unique feature of the Hague Abduction Convention is that the courts of the States-parties are called upon to interpret each other's internal laws. This task is particularly difficult as there is often little or no case law in the requesting State to assist the courts of the requested State. This leads to inconsistencies in the determination of cases with similar fact patterns. It also produces results which are often inconsistent with the Hague Abduction Convention objectives.

Article 3 of the Hague Abduction Convention states that a removal or retention of a child is considered wrongful where "a) it is in breach of rights of custody attributed to a person …, under the law of the State in which the child was habitually resident immediately before the removal or retention". The court of the requested State is thus required to ascertain the petitioner's rights of custody as they are defined in the requested State.

The nature and extent of custody rights as defined by Article 3 is among the most problematic issues concerning the interpretation of the laws of co-signatory States. The right of custody, as opposed to the more limited right of visitation, is a prerequisite to initiate a procedure for return under the Hague Abduction Convention. Although each State-party has its own definition of custody rights, the Hague Abduction Convention attempts to create an autonomous definition of such rights. Article 3 specifically defines custody rights as including the "right to determine the child's place of residence". Given the international nature of the Hague Abduction Convention, the fact patterns intrinsic to a return petition are rarely present in ordinary intra-State custody cases. The question of whether a parent has the right to determine the residence of a child is an issue to be determined during the course of a custody case, and not a pre-requisite to filing a custody petition. Thus, Hague Abduction Convention petitions often require the court in the requested State to interpret the law of the requesting State in a more extensive manner than has previously been done by the courts of the requesting State.

To illustrate: if a father files a custody petition in England, the court would not need to make a preliminary determination as to whether he has rights of custody before proceeding with the case. On the contrary, it may well be that the petitioner lacks any legal custody rights and petitions the court to establish those rights. Were that same father

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to file a petition in France for return of his abducted child under the Hague Abduction Convention, he would first have to prove to the French court that he possessed a right of custody law under English law at the time of the alleged unlawful removal. This would require the French court to interpret the custody rights of the father according to English law in order to consider his petition.

The Hague Abduction Convention provides what appears on the surface to be a narrow, State-based approach to determining the question. Article 3a provides that the rights of custody are those attributed to a person under the laws of the State of habitual residence of the child immediately prior to the child's removal. It would therefore appear that the French court in this instance would need to receive a legal opinion as to English law in order to determine whether the father meets this initial prerequisite of a return application. The early phases of Hague Abduction Convention case law did engage in precisely such an inquiry.

One leading case which undertook such an inquiry was the English case of *Costa v. Costa*.[1] This case involved a New York couple whose two sons were born and raised there. The parties had an acrimonious divorce, which resulted in the mother receiving custody and the father obtaining defined access. Two years subsequent to the divorce, the mother removed the children from the jurisdiction and brought them to England without the father's consent or court permission. The issue raised was whether the father's access as defined by the divorce agreement constituted custody rights under New York law. The English court held that the relevant law in determining if the removal was wrongful is the law of the State of New York, the children's state of habitual residence.

No fewer than three expert opinions were submitted to the English court regarding New York law. All drew the same principal conclusion. The access rights of the father under New York law forbade the custodial mother from frustrating those rights by moving to a distant location. Without court permission to do so, the removal is wrongful. The New York case law cited in the opinions were all relocation cases rather than abduction cases because, as noted above, New York courts would not usually be called upon to rule on the legality, *ex post facto*, of a removal from its jurisdiction.

CUSTODY RIGHTS: DEFINED BY THE STATE, CONSTRUED UNDER HAGUE ABDUCTION CONVENTION

"An international convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all Contracting States".[2] The principle of uniformity in applying the Hague Abduction Convention is an accepted one. Courts that have addressed the issue all confirmed the importance of uniform definitions in order to avoid both uncertainty and asymmetry in applying the Convention.

The Supreme Court of Israel, in addressing the defense of a child's objections to return, observed that "In order to fulfill the purpose of the Convention, which is based on mutuality of the Signatory States, there is a salient tendency to remain true to a definition

[1] *Costa vs. Costa* (U.K. 1991) High Court of Justice, Family Division, CA 518/91.
[2] Lord Browne-Wilkinson, Re H (Abduction: Acquiescence) [1998] AC 72.

of the exceptions that is uniform and coordinated between the narrow construction of the exceptions to the Convention regarding the obligation to return an abducted child".[3]

The United States legislation implementing the Hague Abduction Convention, the International Child Abduction Remedies Act (ICARA), directs that "uniform international interpretation" of the Convention is part of its framework.[4]

The Guide to Good Practice, compiled by delegates to the Special Commissions of the Hague Conference convened every four years and updated from time to time, emphasizes an autonomous definition of Hague Abduction Convention terms. Part III of the Guide, under Implementing Measures, observes that an international approach is necessary for consistent interpretation and application.

Case law and legal scholars have supported the approach taken by the Guide to Good Practice. Interpreting rights of custody solely according to State law cannot only lead to inconsistent interpretation, but create totally unacceptable outcomes which are contrary to the objectives of the Hague Abduction Convention. Linda Silberman, who has written extensively on the Hague Abduction Convention, has noted: "If Convention cases became subject to varying national approaches and perspectives, neither of the core objectives of the treaty would be attainable".[5]

Custody rights as defined by the various States-parties can vary significantly. Custody rights of fathers of children born out of wedlock (known as unmarried fathers, although they may in fact be married, just not to the mothers involved) are those most often subject to interpretation. Some jurisdictions, such as The Netherlands and Germany, require unmarried fathers to take specific legal action in order to have their custodial rights recognized. The action may be as simple as registering the partnership with the mother with the proper administrative body, as is done in The Netherlands. Failure to do so, however, leaves the father without custodial rights, even if *de facto* he is an active parenting partner, including providing financial support of the child. This can create a situation whereby two cases of abduction with identical fact patterns can result in contrary decisions, the outcome depending solely on the laws of the State of habitual residence.

A case tried in Israel, *K v. B*, is illustrative of the point. A Dutch couple conducted a relationship which resulted in the birth of two children. The parents never married, nor did they register as a couple in the Couples Registry, nor were the children registered in the Custody Registry. The father did not request that his parental rights be recognized by the courts. There was, however, court-ordered visitation which permitted him to spend time with the children on a regular basis. After learning of the possibility that the mother might move with the children to Israel, he instituted custody proceedings in The Netherlands. The court appointed the Dutch Bureau of Child Welfare to make a report on the family and custody recommendations. A preliminary hearing took place and the appointed social worker made appointments with both parents.

When the father learned that the mother was preparing to move to Israel before the court proceedings were completed, he filed for a *ne exeat* order. The mother's attorney was served with notice of the hearing, but the mother removed the children from the

[3] *Toufik Abu Arar vs. Paula Ragozu*, Family Appeal Request 672/06 October 15, 2006, Supreme Court of Israel.
[4] See 42 U.S.C. sec.11601(b)(3)(B).
[5] *Law and Contemporary Problems*, LVII: no.3 (Summer 1994), p.258.

jurisdiction before the hearing date. The *ne exeat* order was subsequently issued, but by that time the mother and children were already in Israel.

The father filed a petition for return under the Hague Abduction Convention in the Family Court of Israel. The issue of the father's custody rights under Dutch law was contested but no conclusive legal opinion was produced. The court resolved the issue by applying the Israeli legal presumption of similarity of laws when applying foreign law. As the relevant law in Israel, The Guardianship and Capacity Law, 1982-5722, recognizes the equal guardianship rights of both parents at birth, the court concluded that Dutch Law provides for the same paternal rights. The other defenses having been rejected, the court ordered the return of the children to The Netherlands.[6]

The mother appealed to the District Court. The appellate court was not satisfied with the legal presumption of similarity of laws and ordered an opinion under Article 15 of the Hague Abduction Convention from the authorities in The Netherlands. After submitting and then withdrawing its initial opinion, the Dutch Central Authority issued an opinion which was not entirely conclusive. It stated that unmarried fathers do not have custody rights without registering their parenthood, which the father in the matter at hand had failed to do. At the same time, the mother was required to make the children available for the court ordered visitation arrangements with the father and to meet with the professionals of the social services agencies. The appellate court, presented with the opportunity to interpret custody rights according to Hague Abduction Convention case law, struck a blow against uniformity, and chose the narrow interpretation as defined by Dutch law. The judgment was overturned and the children were permitted to remain in Israel.[7]

The father filed for leave to appeal to the Israel Supreme Court, which will grant leave only for cases involving significant issues which require clarification or where there is a judgment that diverts from the prevailing case law. Although the particular case raised both significant issues and ruled against an apparent treaty obligation to return abducted children, the Supreme Court declined to grant leave to appeal. The decision denying leave did not address the issue of the application of State law versus the application of Convention law.[8]

The case of *K v. B* demonstrates both the inconsistency and the incongruity of results when applying State law to define custody rights. Suppose that the requesting and requested States were reversed in *K v. B*, with the facts remaining the same. An Israeli mother removes her children to The Netherlands and the unmarried Israeli father has never taken any formal action to insure his parental rights in Israel. The father files an action in The Netherlands under the Hague Abduction Convention to return his children to Israel. As stated above, Israeli law extends equal parental rights to both parents, regardless of their marital status, at the birth of their child. No registration requirement exists. The Dutch court requests an Article 15 declaration from its Israeli counterpart. The Israeli court states that under Israeli law, the father had custody rights as defined by the Hague Abduction Convention. The Dutch court, with the same fact pattern, now is required to order the return of the children to Israel. This is clearly not the intent of the

[6] Family Docket 161-07-12, Tel Aviv Family Court, 3 August 2012.
[7] Family Appeal 1006/12, Tel Aviv District Court, 24 December 2012.
[8] Family Request to Appeal, 9442/12, Supreme Court of Israel, 17 February 2013.

Hague Abduction Convention drafters. It creates an element of arbitrariness in applying the Convention. Rather than furthering its purpose of preventing abductions, it might actually encourage them.

The Dutch definition of custody rights is not consistent with Hague Abduction Convention case law and is indeed contrary to the definition of custody rights in the majority of States-parties to the Hague Abduction Convention. Some jurisdictions have even adopted legislation that makes the removal of a child during the pendency of a custody proceeding a wrongful act, regardless of the petitioner's rights at the time of filing, and thus in violation of the Hague Abduction Convention. The Province of Quebec, for example, has such a provision in the enacting legislation which adopted the Hague Abduction Convention as law. The state of Nevada has a statute making it unlawful to remove a child during a custody proceeding regardless of the custody rights of the abducting parent. A warning to that effect is even included as an integral part of the summons issued with the initiating complaint in a custody proceeding.

How then, do we reconcile the State-based concept of custody rights with the need to apply the Hague Abduction Convention in a uniform and consistent manner? As a body of case law has developed in the various courts of the States-parties, the definition of custody rights has taken on a particular Hague Abduction Convention perspective, which attempts to synthesize the laws of the various states with the goals of the said Convention. Although most courts are inclined to simply apply the definition of custody rights as defined by the requesting States, there is a clear move towards applying a uniform Convention approach when examining the elements that constitute rights of custody.

CUSTODY RIGHTS AND *NE EXEAT* ORDERS

The significance of a *ne exeat* order has exemplified how courts of the States-parties have given different meanings to the same term as it pertains to the right of custody. In an attempt to clarify the definition of custody rights, the Hague Abduction Convention provides in Article 5a that the right of custody includes the right to determine the child's residence. That has not prevented extensive litigation in the contracting states as to whether the issuance of a *ne exeat* order alone, absent any other basis in law or by agreement, falls within that definition.

The Canadian Supreme Court considered this issue in the case of *Thomson v. Thomson*.[9] That case involved a mother who removed the parties' child from Scotland during the active litigation of a custody petition brought on by the father. Although the parents of the 8-month-old child had joint parental rights, the Scottish court had granted the mother temporary sole custody, with access rights to the father. The court also enjoined the removal of the child from Scotland by either party. The mother took the child to Canada contrary to the order of the Scottish court.

The Canadian Supreme Court upheld the decision of the Manitoba trial court and ordered the immediate return of the child. The Supreme Court held that the Scottish court had jurisdiction to determine the custody of the child and the issuance of the *ne exeat* order was an expression of that authority. The removal by the mother was therefore unlawful because it was contrary to the father's rights of custody granted by the Scottish

[9] [1994] 3 SCR 551.

court. However, the Canadian Supreme Court expressed its opinion that a temporary non-removal order made during the course of custody litigation is distinguishable from a permanent non-removal order made part of a final custody judgment. The court opined that such a permanent order would be too restrictive of the custody rights of the primary custodial parent and would have serious implications on the rights of mobility of that parent.

The judgment of the Canadian Supreme Court does not help clarify the issue of State law versus an autonomous Hague Abduction Convention law. It upheld the Article 5 definition of custody rights but its *obiter* makes it clear that in a case where a court in the requesting State has issued a permanent non-removal order that it had jurisdiction to make and said order complies with the Hague Abduction Convention definition of custody rights, Canadian courts will still not recognize that right as it clashes with the Canadian definition of custody. If that *obiter* becomes case law, it would seriously undermine the attempt to create a uniform Convention definition of custody rights. In fact, taken to its logical conclusion, it could have a far reaching negative impact on the uniform implementation of the Hague Abduction Convention. Except for Article 20, which permits a requested State to ignore the decision of the requesting State where a return order would constitute a violation of the fundamental rights of the requested States' constitution, there is no provision in the Hague Abduction Convention for ignoring or overruling the custody order of a signatory State. An Article 20 defense, requiring that the order of return not be issued if it would constitute "something which departs so markedly from the essential scheme and order envisioned by the constitution …," is rarely invoked and even more rarely upheld. [10]

Other States-parties have taken a mostly uniform approach to the interpretation of a *ne exeat* order as it relates to custody rights. The Constitutional Court of South Africa was requested to rule on the significance of a *ne exeat* order in the case of *Sonderup vs. Tondelli.*[11] The matter involved a 4-year-old child who had spent the majority of her life in Canada. Her divorced parents had agreed that the mother would have sole custody and the father access rights. The agreement further provided that the child could not be removed from the province without court order or consent by both parents, with the exception that either party was permitted to travel once a year outside the province for a period not to exceed 30 days. The father subsequently requested a *ne exeat* order. A consent order was made requiring an investigation of the issues of custody and access. In the interim, the mother was permitted to travel abroad for one month and made a monetary guarantee to insure her return on the designated date. The mother took the child to South Africa and did not return.

The mother's claim that the non-removal order did not constitute a right of custody was rejected by the South African court. It held that the weight of authority in Hague Abduction Convention cases held that a non-removal order did constitute custody rights under Article 5. The mother cited the prevailing United States case law at that time, which held that a *ne exeat* order did not constitute a right of custody, referring, amongst others, to the case of *Croll v. Croll.*[12] The South African Constitutional Court held that the prevailing

[10] *Nottinghamshire County Council v. K.B.* [2011] IESC 48, Supreme Court of Ireland.
[11] 2001 (1) SA 1171 (CC).
[12] 229 F.3d 133 (2d Cir. 2000).

view in the United States courts was contrary to the Convention's meaning, even citing the dissenting opinion in *Croll* of Judge (later Justice) Sonia Sotomayor.

The conflicting interpretations of the significance of a *ne exeat* right in the various United States federal courts eventually led to the United States Supreme Court grant of *certiorari* in the case of *Abbott vs. Abbott*.[13] Until then, the majority of United States federal circuits had adopted the restrictive interpretation as defined in *Croll*, which held that the issuance of a *ne exeat* order did not constitute a right of custody in favor of the requesting parent.[14] The exception was the Eleventh Circuit, which applied the interpretation accepted in the majority of Hague Abduction Convention jurisdictions.[15]

The majority opinion of the Supreme Court overturned the judgment of the Court of Appeals and held that the accepted interpretation of custody rights includes the right to prevent the removal of a child from the jurisdiction. Any other interpretation would render the Hague Abduction Convention meaningless. The Court stated that it was not relevant that traditional notions of custody referred to physical custody. The emphasis needs to be placed on the Convention understanding of the term. Doing so would promote international consistency and prevent arbitrary results. It is significant that Justice Scalia, not noted for an inclination to refer to international case law when making his decisions, joined the majority opinion. *Abbott* boldly stated that "The definition of 'rights of custody' is an issue of treaty interpretation and does not depend on the domestic law of the country of habitual residence".[16] That perhaps was the clearest declaration of a unique autonomous Hague Abduction Convention definition of custody rights to be applied by any court called upon to determine a petition for return in a Convention proceeding.

It is now accepted case law in the majority of jurisdictions that the definition of custody rights for purposes of implementing the Hague Abduction Convention includes the right to prevent the removal of the child from the jurisdiction of his or her habitual residence. This definition has also been accepted by the European Court of Human Rights, whose judgments bind the members of the Council of Europe. The case of *Neulinger & Shruk vs. Switzerland*,[17] which produced great controversy due to its troublesome interpretation of the Article 13b defense (discussed below), did make a positive contribution by affirming that a *ne exeat* order creates a right of custody. Had our Dutch father in *K vs. B* succeeded in obtaining the *ne exeat* order prior to the removal of his children from The Netherlands, he could have relied on the Hague Abduction Convention definition of custody rights to base his petition for return and obtained a return order. Even though Dutch law did not recognize his custodial rights, Hague Abduction Convention case law would have. Were the Israeli courts willing to apply Hague Abduction Convention law rather than State law, his children would have been returned to The Netherlands.

The synthesis between custody rights as defined by the State and the autonomous Hague Abduction Convention definition has been addressed in a number of cases. A two-step approach has been developed which takes into account the law of the State of

[13] 130 S Ct. 1983 (2010). The case involved a *ne exeat* right provided by Chilean law, rather than a specific court order.

[14] See *Gonzalez vs. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), *Fawcett vs. McRoberts*, 326 F.3d 491 (4th Cir. 2003) and *Abbott vs. Abbott*, 542 F.3d 1081, 542 F.3d 1081 (5th Cir. 2008).

[15] See *Furnes vs. Reeves*, 362 F.3d 702(11th Cir. 2004).

[16] 130 S. Ct. at 1991.

[17] Docket no. 41615/07, Grand Chamber, 6 July 2010.

habitual residence, as provided in Article 3, while applying a common Hague Abduction Convention definition of those rights.

Initially, the question of whether the petitioning parent had rights of custody related to the distinction between custody rights and rights of access as defined in Article 3. Some States applied a broad definition of rights of access, attaching to it the same significance as a right of custody. The critical differentiation related to the right of the primary custodial parent to relocate to another jurisdiction despite the weekly visitation rights of the "access" parent. Jurisdictions such as New York viewed the right of the non primary custodian to have regular contact with his or her children as an implicit limitation on the right of the primary custodial parent to relocate to a remote location. It was standard practice in custody agreements there to include a radius clause which prohibited the primary custodian from relocating with the children beyond a certain distance from their residence at the time of separation. Parents who unilaterally removed their children to a new location, which essentially rendered null the visitation agreement, often found that as a result of their actions, custody would be transferred to the left-behind parent. New York law was succinctly described as "you move, you lose".[18] This position was subsequently overturned by the New York Court of Appeals in *Tropea vs. Tropea*.[19]

Simultaneous developments have led to a blurring of the distinction between custody and access rights. On one hand, the traditional notion of custody rights has undergone a transformation. Courts rarely grant all the decision-making authority to one parent, which would be called sole legal custody, while leaving the other parent with no authority other than the right to see the children at designated times. The most common situation is that both parents possess equal legal custody rights, while one parent has primary physical custody. This is becoming passé as more jurisdictions adopt a presumption of joint physical custody.

AUTONOMOUS NATURE OF HAGUE ABDUCTION CONVENTION

Parallel to the change in the State courts definition of custody has been the development of an autonomous Hague Abduction Convention definition of custody rights which places the emphasis on the right to determine the child's place of residence. In the 2004 English case of *Re P* (Abduction Consent),[20] LJ Ward held that the Hague Abduction Convention requires the court to give the expression "rights of custody" an autonomous interpretation. He further stated that the task of the court is to establish the rights of the parents under the law of the State of habitual residence and then to consider whether those rights are rights of custody for Hague Abduction Convention purposes.

The case of *Re P* gave the courts the legal basis for developing a uniform definition of custody rights that would be conducive to Convention goals without the need to amend the Convention, a difficult and arduous task which has not happened since its adoption in 1980. It made it clear that the State definition of custody rights was not simply to be applied as is to a petition for return under the Hague Abduction Convention.

[18] See New York Court of Appeals decisions, *Weiss v. Weiss*, 52 N.Y.2d 170 (1981), *Priebe vs. Priebe*, 55N.Y.2d 997 (1981), *Daghir vs. Daghir*, 56 N.Y.2d 938 (1982).
[19] 87 N.Y.2d 727 (1996).
[20] [2004] EWCA Civ 971.

A year later, in another Court of Appeal of England case, LJ Thorpe expanded on *Re P* and took its development to the next level. Justice Thorpe recognized that the Hague Abduction Convention is a living instrument. He was also aware that revision of its text "is simply impracticable …". He cited the provisions of the 1969 Vienna Convention on the Law of Treaties, which also came into force in 1980, permitting a construction that reflects "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[21]. He held that social developments must be incorporated by evolutions in interpretation and construction in order for a treaty to remain relevant.[22]

In interpreting the meaning of an Article of the Convention, Justice Thorpe held that the answer is to be found in the international jurisprudence of the Contracting States. He went so far to say that it is not sufficient to argue the case law of the jurisdiction in which the case is litigated. He held that it is incumbent upon an attorney arguing a Hague Abduction Convention case to not only cite English case law but also to refer to the international jurisprudence of the Hague Abduction Convention as applied by the States-parties. The court even made reference to the case law data base of the Hague Conference, the INCADAT website, in order to encourage attorneys to refer to international case law.

Having established that there is an autonomous Hague Abduction Convention definition of custody rights, one is still faced with the question of which case law is controlling. Are the courts hearing a Hague Abduction Convention petition to review the international judgments and attempt to determine the controlling case law? Perhaps it is the Hague Abduction Convention case law of the jurisdiction in which the proceedings take place that should prevail. Justice Thorpe, relying on the case of *Re H (Abduction: Acquiescence*),[23] held that it is the English perception of the autonomous law of the Hague Abduction Convention which should be applied.

The *Hunter* case takes a significant step forward in recognizing the need for an autonomous definition of Hague Abduction Convention terms in general and custody rights in particular. However, it does not go far enough. It is understandable, from a practical perspective and as a matter of applying legal principles, that courts of a State-party would prefer to rely on the decisions of their own legal system when analyzing the issues of a case. It could be argued that to require courts to take into account the judgments of foreign jurisdictions would place too onerous a burden on judges, many of whom are overburdened, particularly when Hague Abduction Convention cases are meant to be determined in an expedited fashion.

The need for clarity and uniformity, however, outweighs whatever additional burden is imposed on the courts. The Hague Abduction Convention is essentially a treaty which determines jurisdiction. One of its primary purposes is to discourage forum shopping. If the Convention produces contradictory outcomes because of the application of conflicting definitions of its terms, then forum shopping will not be discouraged. On the contrary, it may encourage some parents to remove their children to a jurisdiction that has a more favorable legal interpretation. Another goal of the Hague Abduction Convention is to

[21] Article 31(3)(b).
[22] *Hunter vs. Murrow (Abduction: Rights of Custody*) [2005] EWCA Civ 976.
[23] [1997] 1 FLR 872.

discourage unlawful removals. The more clarity there is regarding what constitutes an unlawful removal, the better the chance of deterring a potential abduction.

The clearest expression of the synthesis of a State's definition of custody rights and a determination of whether those rights constitute a right of custody under the Hague Abduction Convention can be found in the judgment of the United States Court of Appeals for the Second Circuit in *Ozaltin vs. Ozaltin*.[24] The case involved a Turkish-American couple who had been living together in Turkey whose two daughters were taken by the mother from Turkey to the United States without the father's permission.

The father promptly filed an application for return with the Turkish Central Authority. The mother then obtained an *ex parte* order of protection in a Turkish Family Court. The mother subsequently filed for divorce in Turkey and was awarded temporary alimony payments so she could care for herself and the children.

This prompted the father to file in the Turkish Court for temporary custody, or in the alternative, an order requiring that the children be brought to Turkey and visitation rights be granted. The request for temporary custody was denied, but visitation in New York was granted, as well as the right to take the children for a visit to Turkey during the summer. The father failed to timely return the children to the United States after the summer visit, but was finally compelled to do so by the Turkish court. A second application by the father for temporary custody was rejected by the Turkish Family Court.

The father then filed his Hague Abduction Convention petition in the United States District Court for the Southern District of New York. The mother opposed the petition, claiming, among other arguments, that the father did not have custody rights under Turkish Law. The District Court heard opposing expert testimony from two witnesses regarding the nature of the father's custody rights under Turkish Law. The District Court found that the initial removal was in violation of the father's rights of custody and ordered the return of the two children.[25] The mother appealed, claiming that the removal was lawful under Turkish law. She cited in particular the order of the Turkish Court requiring the father to return the children's passports to her after the summer visit so that she could return to the United States. The Court of Appeal rejected her arguments. Citing the *Abbott* case, the court held that "the definition of 'rights of custody' under the Convention is an issue of treaty interpretation and does not depend on the domestic custody law of the country of habitual residence". The court went on to explain that it is domestic law that supplies the "substance of parental rights, but the relevant provisions of the Hague Convention determine whether those rights are considered 'rights of custody' under the Convention". The court gave a two-step formula for analyzing custody rights under the Hague Abduction Convention. The first step is to examine State law to ascertain the substance of the parental rights held by the petitioner. The second step is to determine whether those rights meet the definition of custody rights under the Hague Abduction Convention guidelines.

The expansion of the INCADAT data base, advanced internet legal search tools, and the resources available through the various Central Authorities operating in each State to implement the Convention make it relatively easy to access case law of the States-parties. The concern is that the attempt to develop an autonomous Hague Abduction Convention

[24] 708 F.2d 355 (2d Cir., 2013).
[25] *In re S.E.O.*, 873 F. Supp. 2d 536 (S.D.N.Y. 2012).

interpretation of custody rights will be limited to the courts of a certain category of States, namely the common law States. A perusal of the first 500 cases reported on the INCADAT website, representing almost one half of the listed cases, reveals that common law countries account for 402 of those reported cases. Of the remaining 98 cases, 48 are from German or French speaking jurisdictions. Italy and Israel, with 10 reported cases each, accounting for 40% of the remaining 50, while the Scandinavian States and The Netherlands account for another 40%. The final ten cases are evenly divided between European and non-European States.

Although the INCADAT database appears in English, French, and Spanish, it is clear that the overwhelming number of cases is from English-speaking jurisdictions. Besides the language issue, the very notion of court interpretation of a statute, whether it be an international treaty or a State law, is intrinsic to the role of the courts in common law jurisdictions, while not accepted in civil law countries. There is, therefore, a concern that the autonomous nature of the custody definition will be overwhelmingly shaped by English speaking common law jurisdictions.

To balance that out, it should be noted that the United States and the United Kingdom together accounted for approximately 25% of the incoming return petitions in 2008, according to the statistical analysis compiled by Nigel Lowe of Cardiff University, the last year for which The Hague Conference has available statistics.[26] In order for the Hague Abduction Convention to achieve both a truly autonomous status and uniformity of interpretation, the courts of both legal systems will have to take note and follow the case law of each other, integrating their decisions so as to form common definitions and methods of application.

EUROPEAN SUPRANATIONAL COURTS: FORCE FOR UNIFORMITY OR DISPARITY?

The 47 member-States of the Council of Europe are subject to the rulings of the European Court of Human Rights, which are binding on them. There is no challenge available on the State level to a decision of the European Court of Human Rights. Its case law binds the national courts of Council of Europe members. The European Court of Human Rights took a mostly non-interfering position vis-a-vis the Hague Abduction Convention from the time of its entry into force. Petitions filed in the Court in Hague Abduction Convention matters were almost entirely brought by left-behind parents who felt that national courts had improperly rejected their petition for return, thereby violating their rights to family life under Article 8 of the European Convention on Human Rights. Upon a finding of a violation, the European Court of Human Rights never would order the return of the child, but rather would fine the offending State-party for the failure to return, an entirely arbitrary and unspectacular amount, usually in the amount of 20,000. Euros, including legal expenses. Other than the satisfaction of their claim having been justified, the left-behind parent remained left behind.

The European Court of Human Rights occasionally issued judgments which affirmed the principles of the prevailing Hague Abduction Convention case law, thus conforming to the prevailing case law but having little impact in developing it. It should be pointed

[26] See www.hcch.net.

out that the European Court of Human Rights case law on child abduction concerns the application of the principles of the European Convention on Human Rights, and not the Hague Abduction Convention *per se*. However, its review of whether the Council of Europe members apply the terms of the Hague Abduction Convention so as to comply with the European Convention on Human Rights, necessarily affects how those States interpret the former.

In 2005 an abducting parent petitioned the Court, claiming that the order of a Turkish court to return her daughter to Israel was a violation of her Article 8 rights under the European Convention. This was the initial case in which the ECHR was called upon to rule that an order of return was made in violation of the European Convention. The Court found that the Turkish court acted properly and found the mother's application inadmissible (*Eskinazi and Chelouche vs. Turkey*).[27]

Another case in which the abducting parent petitioned the Court commenced an unfortunate journey toward undermining the viability of the Hague Abduction Convention in Europe. *Maumousseau and Washington v. France*[28] involved a French national who married a United States citizen. A daughter was born of their marriage. The mother had travelled with the daughter to France for an agreed visit, but refused to return to the United States at its conclusion. The father filed a petition for return in France. The mother based her opposition on the grave risk defense defined in Article 13b of the Hague Abduction Convention. The French court, after carrying out a detailed examination of the family situation and the child's best interest, ordered the return to the United States. The mother petitioned the European Court of Human Rights, claiming that the order of return violated her rights under Article 8 of the European Convention on Human Rights because the return was not in the child's best interest and would place her in an intolerable situation. The European Court of Human Rights held that the French court had not acted in violation of Article 8 of the European Convention, for it had conducted a full examination of the child's best interest and found that they were best served by returning her to the United States.

The importance of *Maumosusseau* is not in the outcome but rather in the analysis. The rejection of the mother's petition was not due to the fact that the best interests test should be conducted in the court of habitual residence. Rather the European Court of Human Rights held that the French court had properly conducted an examination of the child's best interest and thus the said European Court did not see any reason to intervene in the French court's conclusion that the return did in fact serve her best interests. The court did not hold that such an examination is mandatory, but neither did it state that such an examination is improper in a Hague Abduction Convention proceeding. One could infer from the decision that if it had not conducted such an examination, the French court would have acted in violation of Article 8. That is precisely what the European Court of Human Rights held three years later.

The circumstances of the case of *Neulinger and Shuruk vs. Switzerland*[29] as heard before the Swiss courts were not particularly exceptional. The couple met and married in Israel. The mother had previously emigrated there from Switzerland and the father was Israeli

[27] Case no. 14600/05, 6 December 2005.
[28] Application no. 39388/05, 15 November 2007.
[29] Application no. 41615/07, decided by the Grand Chamber on 6 July 2010.

born. They had a son born in Israel in 2003. The couple subsequently divorced, and the mother was granted primary physical custody. A *ne exeat* order was issued by the Israeli court prohibiting the removal of the child from the State. The mother filed a motion to rescind the *ne exeat* order, which was denied by the court in March 2005. Approximately three months later, despite the *ne exeat* order, the mother removed the child to Switzerland.

The father filed a petition for return under the Hague Abduction Convention in Switzerland approximately one year later. The trial court dismissed his petition, as did the Cantonal appellate court in May 2007. In August 2007 a Swiss Federal Court overturned the two previous judgments and ordered the child's return to Israel. The following month, the mother filed a petition with the European Court of Human Rights, claiming violations of her right to a fair trial, her right to religious freedom, and her right to a family life. The mother also requested a temporary injunction against the return order, which was granted by the European Court of Human Rights before the father had effected return of the child to Israel. This was the first instance of the European Court of Human Rights preventing the execution of a return order made by a State court under the Hague Abduction Convention. The father requested that the matter be heard by the Grand Chamber, which granted his request.

Not until three years later did the Grand Chamber hand down its judgment. The decision was supported by 16 of the 17 judges, with four concurring opinions and one dissent. All of the opinions found the removal to have been unlawful. However, regarding the grave risk defense, the court now held that the examination which had been undertaken in *Maumousseau* was not only obligatory, but expanded on its extent. The majority opinion stated that "… the court must ascertain whether the domestic courts conducted an in depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child …".[30] Totally ignoring some thirty years of Hague Abduction Convention case law, the European Court of Human Rights rearranged the Hague Abduction Convention and turned it into a custody procedure. The court subsequently reaffirmed its reasoning in the case of *Raban vs. Romania*,[31] handed down in October 2010.

The *Neulinger* decision caused enough consternation in the legal community that the then President of the Court, Judge Jean-Paul Costa, who had been part of the majority in *Neulinger*, subsequently tried to reassure those concerned by stating, in a speech delivered in Ireland, that *Neulinger* did not signal a change of direction by the European Court of Human Rights regarding the Hague Abduction Convention (speech given on 14 May 2011 at an Irish-British-French Symposium on Family Law in Dublin). He emphasized that the passage of so much time between the initial application to the European Court of Human Rights and its final decision (three years) was the critical factor in finding a violation of Article 8 of the European Convention on Human Rights. That explanation is troubling in and of itself, as apparently the court's own delays are grounds for denying a return. However, judging from subsequent cases, his assurances have had little or no impact on

[30] Para. 139 of the Opinion.
[31] Application no. 25437/08.

the Court, which continues to treat abduction cases as though they were custody disputes.[32] The position of the Court as it now stands is that an abducting parent may obtain an order preventing the return of the child to its State of habitual residence, while the paramount relief granted to a parent whose child has been abducted is a symbolic monetary award.

The impact of the European Court of Human Rights decisions in abduction cases heard in European national courts is not yet clear. The courts of the United Kingdom have gone to great lengths to hold that *Neulinger* and its progeny can be understood within the context of the European Convention on Human Rights, therefore not altering the case law of the member States regarding the Hague Abduction Convention. Justice Thorpe valiantly attempted to reconcile the European Court of Human Rights judgments with Hague Abduction Convention precedents in the case of *Eliassen and Baldock vs. Eliassen*.[33] He held that the *Neulinger* decision did not dictate a new approach to the Article 13b defense, an approach that would require an in depth examination of the child's circumstances in order to determine his/her best interests. The opinion found that "There is a fundamental implausibility in the notion that the ECHR would in one paragraph proclaim its ringing support for the aims and objectives of the Hague Convention and in the next require the full scale welfare investigation which would undermine those objectives."[34] Yet that is precisely what the ECHR did.

Justice Thorpe also tried to distinguish *Neulinger* by emphasizing that the grounds for accepting the petition had to do with the extraordinary length of time (3 years) between filing the petition with the European Court of Human Rights and the decision of the Grand Chamber. The passage of time in *Neulinger* rendered the return order inimical to the child's best interest. Justice Thorpe stated that although the gross delay was caused by the European Court of Human Rights, this could be avoided in the future by using the court's expedited procedure in Hague cases. Thus the Hague Convention could continue to co-exist with the European Court of Human Rights.

While the Supreme Court of the United Kingdom upheld the judgment in *Eliassen, (Re E (Children)*,[35] it too attempted to smooth over the glaring departure of the European Court of Human Rights from Hague Abduction Convention case law. The Supreme Court's judgment affirmed that no drastic change had been called for by the European Court of Human Rights in undertaking a swift determination of abduction proceedings and that the Hague Abduction Convention and the European Convention on Human Rights were not incompatible. Rather "… in virtually all cases, as the Strasbourg court has shown, they march hand in hand".[36]

Left unchallenged was the finding in *Neulinger* that the Swiss court had violated the rights of the mother by ordering her to return with the child to Israel in order to minimize the harm to the child upon her return. It is a well-established principle in Hague Abduction Convention case law that the abducting parent cannot create an Article 13b defense by claiming that separating the child from the abductor will create a grave risk, while at the same time refusing to return with the child.[37] *Neulinger* further opened the floodgates by

[32] See *X vs. Latvia*, Grand Chamber judgment of 26 November 2013, Application No. 27853/09.
[33] [2011] EWCA Civ 361.
[34] Para. 65 of the opinion.
[35] [2011] UKSC 27.
[36] Para. 27 of the decision.
[37] (see *Foxman vs. Foxman*, Personal Status File 2898/92, District Court of Tel Aviv, 29 October 1992; C.A. 527/92,

providing the abducting parent with an incentive to claim that the child's separation from him/her would constitute a grave risk constituting a violation of the European Convention on Human Rights. By refusing to comply with a court order to return a child to the State of habitual residence and delaying long enough, she can succeed in preventing a return. *Neulinger* also means that if the appropriate authority in a requested state enforces a court order to return a child to a requesting State, the requested State is at risk that years later the European Court of Human Rights will find it violated the European Convention on Human Rights and order damages. In effect, if a requested State complies with one convention (the Hague Abduction Convention) it runs a risk that it will later be found to have violated another convention (the European Convention on Human Rights).

The damage done in *Neulinger* to the implementation of the Hague Abduction Convention, in addition to the damage done to the child, is twofold. First, it undermined what was *stare decisis* until then as to the nature of the Article 13b defense. Whereas some States-parties, such as the United States and Israel, have a statutory requirement of a higher standard of proof for this defense, it was accepted case law that a full analysis of the child's best interests was to be left to the State of habitual residence and not conducted within the framework of an Hague Abduction Convention procedure. Despite the best efforts of the British courts, as well as the extra-judicial denials of President Costa, that is precisely what the European Court of Human Rights now calls for in *Neulinger* and its progeny.[38]

The other negative impact of *Neulinger* is on the attempt to create an autonomous definition of Hague Abduction Convention terms. Had the *Neulinger* judgment been delivered by the court of a member of the Council of Europe, its impact would have been minimal. The case law is clear and widely accepted as to the limited nature of the grave risk defense, and it surely would have been viewed as an anomaly by the other member States. However, all 47 member states of the Council of Europe are bound by the rulings of the European Court of Human Rights. The meaning and implementation of Hague Abduction Convention terms in those 47 States has been uncoupled from the case law that applies to the other States-parties to the Hague Abduction Convention.

The grave risk defense was the initial, but not the only, Hague Abduction Convention term which has been redefined by a supranational court of Europe. The 28 members of the European Union are subject to the interpretation of European Union laws as determined by the European Court of Justice. Although the Hague Abduction Convention itself is not a European Union instrument, its terms, such as habitual residence, are used in the Brussels II Revised Regulations,[39] which came into effect on 1 March 2005 and apply to abduction cases. While the States-parties to the Hague Abduction Convention have taken a different approach to defining habitual residence, they are all clear that it is distinguished from domicile. The courts have differed in the balance between the physical presence and parental intent tests. That balance was best summed up by the United States Court of Appeals for the Ninth Circuit in *Mozes vs. Mozes*, which held that one's habitual residence means that you are in some sense settled in the jurisdiction, but it need not mean "that's where you plan to leave your bones".[40]

Supreme Court of Israel, 19 November 1992).

38 See *X vs. Latvia*, application no. 27853/09, Grand Chamber, 26 November 2013.

39 EC no. 2201/2003.

40 239 F.3d 1067 (9th Cir. 2001).

The European Court of Justice, in determining the habitual residence of a child for purposes of Brussels II revised, has defined the term more restrictively than Hague Abduction Convention case law, with a greater emphasis on parental intent than the physical presence test. It has ruled that habitual residence must reflect some degree of integration by the child in a social and family environment. Reference must be made to the conditions and reasons for the child's stay. Before habitual residence can be changed, the person or persons with parental responsibility must intend to establish their habitual or permanent center of interests there.[41]

The Supreme Court of England has adopted the European Court of Justice definition, explicitly abandoning the definition long held by United Kingdom courts and widely accepted as the prevailing definition, which placed more emphasis on the physical presence of the child in a particular State. That definition, although taken from a case which had nothing to do with child abduction, took into account that a child's perspective of habitual residence is less far reaching than that of an adult. In determining habitual residence, it required a regular habitual mode of life in a residence that was voluntary and for a settled purpose.[42]

In the Matter of A (Children)[43], Lady Hale, Deputy President of the Supreme Court of the United Kingdom, declared that the *Shah* test should be abandoned when deciding the habitual residence of a child. This turnabout can drive a wedge between the autonomous definition of the non European Union member States and the European Union specific definition. In effect, there are now two autonomous definitions of habitual residence, the one applied by the states subject to European Court of Justice rulings and that of all the other Hague Abduction Convention States. To further confuse matters, the non European Court of Justice member States definition of habitual residence is still largely rooted in *Shah,* a case no longer applicable in the jurisdiction in which it was handed down. This could create the rather anomalous situation in which a European requesting State will find that the non-European requested State applies the autonomous definition of a term based on Hague Abduction Convention case law which the requesting State once followed but no longer does due to the judgments of a European supranational court.

The contradictions which this situation could potentially create may seriously undermine the uniformity of definitions among the Hague Abduction Convention States. Will requested States hearing a petition from a State-party to the European Convention on Human Rights continue to apply autonomous Hague Abduction Convention definitions or will they be inclined to apply definitions of the said European Court? The application of different standards of interpretation could significantly disturb the balance of judicial returns between European and non- European States.

Should the European Court of Human Rights or the European Court of Justice rule on the definition of custody in the framework of an abduction matter, it is unclear how the European States will contend with any variances which may occur as a result of the rulings of either of those two supranational courts. The English courts have so far not let the European Court of Human Rights derail its treatment of the grave risk defense. The European Court of Justice definition of habitual residence, on the other hand, has been

[41] See, for example, Case C-497/10 PPU *Mercredi vs. Chaffe* [2010] ECR I-14309.
[42] *R vs. Barnet London Borough Council, ex parte Shah*, [1983] 1 All ER 226.
[43] (AP) [2013].

wholly adopted by the Supreme Court of England. It is difficult to predict how the European Court of Human Rights, for instance, would define a violation of a father's custody rights under Article 8 of the European Convention on Human Rights. Conceivably, it could find that the narrow definition as posited by The Netherlands or Germany is a violation of their rights to family life. On the other hand, the European Court of Human Rights extends what it calls a "margin of appreciation" to the definitions applied by each State. It may find that the States are not in violation of any fundamental right by requiring some type of formal registration in order for an unwed father's parental rights to be recognized by law.

CONCLUSION

There is a growing body of Hague Abduction Convention case law which is developing an autonomous Convention definition of custody rights. The synthesis between domestic law definitions and Hague Abduction Convention definitions, as to custody rights as well as to other terms, is a work in progress. The Hague Abduction Convention provides, under Article 15, for a procedure in which the requesting State may be asked to submit an opinion as to the rights of the left-behind parent under its domestic law. Many courts in Hague Abduction Convention proceedings will simply apply the requesting State definition of custody rights as decisive of the outcome, rather than apply a Hague Abduction Convention analysis to the rights described in Article 15. This is precisely what the House of Lords did in *Re D. (A Child) (Abduction: Rights of Custody)*.[44]

The United Kingdom court had requested an Article 15 decision from the Romanian authorities. The Court of Appeals rejected the definition of custody rights by the Bucharest Court of Appeal and allowed additional evidence to be produced. The United Kingdom court concluded that the petitioner possessed custody rights under Romanian law and made a return order.[45] The Court of Appeals suggested that Article 15 opinions would be more useful if they were directed solely to ascertaining the rights which existed under the domestic laws of the requesting State, rather than the classification of those rights. The House of Lords overturned the judgment.

While on the one hand calling for a uniform interpretation in all the Member States of the concept of rights of custody, the House of Lords held that foreign courts are much better placed to understand the true meaning and effect of their own laws in Convention terms. Their Lordships held that the Article 15 opinion is therefore almost always conclusive, the rare exception being where the characterization of parental rights was clearly out of line with the international understanding of the Hague Abduction Convention terms. The decision did not clarify as to why the court of the requested State was capable of identifying a characterization that was clearly out of line but not in a position to apply Hague Abduction Convention law where a characterization was simply not in tune with international understanding.

The evolution of Hague Abduction Convention case law has had an impact on States-parties in their own internal definition of custody rights. As the precedents take on a clearer definition, some States-parties have replaced the narrower domestic definition with the broader Hague Abduction Convention definition. The United Kingdom, for

[44] [2006] UKHL 51.
[45] *Deak vs. Deak,* [2006] EWCA Civ 830.

example, has broadened its definition of the custody rights of unmarried fathers, no doubt being influenced at least somewhat by the Hague Abduction Convention definition of the term.[46] Perhaps as the Hague Abduction Convention definition of custody rights becomes more widely accepted and enforced, the States-parties will change their domestic law accordingly, thus ending the dichotomy between State law and Hague Abduction Convention law.

[46] See Adoption and Children Act 2002, s 111.