THE UN-COMMON LAW: EMERGING DIFFERENCES BETWEEN THE UNITED STATES AND THE UNITED KINGDOM ON THE CHILDREN'S RIGHTS ASPECTS OF THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

I. INTRODUCTION

On November 22, 1999, thirteen Cuban nationals boarded a small boat attempting to reach the United States (U.S.).[1] The boat capsized off the shore of Florida in the midst of strong winds and rough seas, killing eleven of these individuals.[2] One of the survivors was a five year-old boy named Elian Gonzalez.[3] The public attention and legal drama that followed remains fresh in the memory of most of us; often conjuring up a myriad of images and deeply held opinions. Although Elian's case may have forced the public's attention onto the complexities involved in international custody disputes, one unavoidable legacy remains—his case is atypical.[4]

While the Elian Gonzalez case was unfolding, a Florida state court was considering a case more illustrative of typical international custody disputes, albeit with very little publicity. In 1995, Maria Pereria and Ibrahim Shanti married in Miami and moved back to Jordan, where they then had a baby boy.[5] In 1999, Maria and their son returned to Florida on vacation and subsequently refused to return to Jordan.[6] In 2000, ensuing legal action resulted in a Florida court ordering the two year-old boy returned to Ibrahim in Jordan, and further, that the courts in Jordan resolve any custody disputes.[7] It is precisely this type of case which gives rise to the many challenges inherent in international custody disputes.

---

1. *See Gonzalez v. Reno*, 212 F.3d 1338, 1344 (11th Cir. 2000), *cert. denied*, 530 U.S. 1270 (2000).

2. *See id.* Also, note there may be some disagreement over the number of individuals that drowned. *See id.*; *see also* Seam D. Murphy, *Contemporary Practice of the United States Relating to International Law: Return of Elian Gonzalez to Cuba*, 94 AM. J. INT'L L. 516 (2000) (stating that only ten of these individuals drowned).

3. *See Gonzalez*, 212 F.3d at 1344.

4. *See* Murphy, *supra* note 2, at 522 n.20. "Most cases concerning the return of children from one country to another involve competing claims by two estranged parents." *Id.*

5. *See Pereira v. Shanti*, 751 So.2d 1291 (Fla. Dist. Ct. App. 2000).

6. *See id.*

7. *See id.* at 1292 The court held that ordering the return of the child was proper because the courts in Jordan (the child's home state) possessed the appropriate jurisdiction to resolve any custody dispute. *See id.*

Rising divorce rates and increasing access to international travel have contributed to a rise in international child abductions.[8] These cases typically involve parents who hope to gain full custody of the child either by avoiding detection, or by establishing residence in a new nation.[9] As a result, the Hague Convention on the Civil Aspects of International Child Abduction of 1980 (Hague Convention) was drafted by the Hague Conference on Private International Law.[10] The Hague Convention was adopted primarily to curtail the tide of international parental abductions.[11] The Hague Convention has been met with both praise and controversy over the years.[12] It is certainly not hard to imagine that the same competing interests often present in domestic custody relations are also present in cases crossing international boundaries. This note will examine this overlap by exploring the principles of the Hague Convention and its impact on the area of children's rights.

The Hague Convention essentially provides that wrongfully abducted or retained children under the age of sixteen should be returned to the nation they resided in prior to abduction, and that any necessary custody hearings must take place in that nation.[13] There are exceptions to the general rule favoring

---

8. *See* Marcia M. Reisman, *Where to Decide the "Best Interests" of Elian Gonzalez: The Law of Abduction and International Custody Disputes*, 31 U. MIAMI INTER-AM. L. REV. 323, 324 (2000).

9. *See id.*

10. Hague Conference on Private International Law: *Hague Convention on the Civil Aspects of International Child Abduction of 1980*, 19 I.L.M. 1501 (1980) [hereinafter *Hague Convention*]. The Hague Convention was the final act of the Fourteenth Session of the Hague Conference on Private International Law, and convened at The Hague, Netherlands on October 6, 1980. *See id.* Delegates were present from the following nations: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, [Y]ugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Venezuela; with representatives of the Governments of Brazil, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as an observer. *Id.*

11. *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791 (1998).

12. For a recent illustration of Hague Convention criticisms, see Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125 (2000). Mr. Johnson's article was adapted from a presentation made during the New York University Journal of International Politics Annual Symposium, Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which was held in New York City on February 25, 2000. *See id.* at 125 n.a1. Mr. Johnson is an attorney with the U.S. Department of State, and spoke in his personal capacity as the father of a daughter who has been wrongfully retained in Sweden since 1995. *See id.* Mr. Johnson is especially critical of the "blind" compliance of the U.S. on one hand, and the noncompliance of other nations on the other hand. *See id.* at 134.

13. *See Hague Convention*, *supra* note 10, arts. 3, 4, and 12. Article 3 states that the removal or retention of a child is wrongful if such removal or retention violates the custody rights of another while those custody rights were still being exercised. *See id.* Article 4 states: "The Convention shall cease to apply when the child attains the age of 16 years." *Id.* Article

automatic return—most notably two which are articulated in Article 13. The first exception permits a nation to refuse returning a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[14] The second exception permits a nation to refuse returning a child if "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."[15] On its face, each of these exceptions appear to implicate the interests or rights of the child. But how are the world's various judicial bodies incorporating these principles?

This note will examine an emerging difference in application of these exceptions between courts in the U.S. and courts in the United Kingdom (U.K.); particularly in relation to considering the child's views. Part II will provide some information about the Hague Convention, including the purpose and background, the essential elements and concepts, and an overview of the affirmative defenses available. Part III will explore the rights of the child, with specific emphasis on international developments and their relationship with the United Nations Convention on the Rights of the Child (UN Convention).[16] Part IV will discuss the U.S. approach to the Article 13 exceptions, while Part V will examine the U.K. approach. Part VI will attempt to piece together the different approaches used by each nation and explore the consistencies of each approach (or lack thereof) with respect to the purposes of the Hague Convention, children's rights, and the UN Convention.

II. THE HAGUE CONVENTION

> *The states signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access . . . [H]ave agreed upon the following provisions.*
>
> —*Preamble to the Hague Convention*[17]

---

12 mandates that if the above two articles apply, then the child must be ordered to return. *See id.*

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

15. *Id.*

16. *See United Nations Convention on the Rights of the Child*, *infra* note 99.

17. *Hague Convention*, *supra* note 10, pmbl.

A. *Purpose & Background of the Hague Convention*

In 1980, the Hague Convention was drafted with hopes of reducing the rising trend of international child abductions.[18] Article 1 of the Hague Convention states that its objectives are to secure the prompt return of children that have been wrongfully removed or retained and to ensure that custodial and access rights of other nations are respected.[19] Accordingly, a primary aspiration of the Hague Convention is to deter a parent's temptation to abduct his/her child and then take the child to another nation in hopes of receiving a more favorable custody determination in the courts of that nation.[20] The Hague Convention is made up of six chapters and forty-five articles.[21] Currently, only sixty-eight nations are signatory members to the Hague Convention.[22]

The Hague Convention is primarily jurisdictional in nature.[23] Since the Hague Convention envisions the swift return of the child to the nation he/she was abducted from, its language is void of any suggestions pertaining to determinations of custody issues.[24] In fact, its design simply addresses the issue of whether a child has been wrongfully removed from one nation to another (or wrongfully retained in another nation), and if so, provides the procedural basis in which to secure the return of that child to his/her home nation.[25] Critics have argued that this structure ignores the civil rights of the child by assuring that the child's best interests will not be considered.[26]

---

18. *See* Starr, *supra* note 11, at 792.

19. *See Hague Convention*, *supra* note 10, art. 1.

20. *See* Starr, *supra* note 11, at 792.

21. *See* Linda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. INT'L L. & COM. REG. 137, 148 (1994). Herring's comment provides an excellent overview of the components of the Hague Convention, as well as a discussion of the Convention's key elements. *See generally id.* at 146-71.

22. *See Hague Convention*, *supra* note 10. The Hague Convention applies in the following nations : Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark (except the Faroe Islands and Greenland), Ecuador, El Salvador, Estonia, Fiji, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zimbabwe. *See id.*

23. *See* Herring, *supra* note 21, at 148.

24. *See id.*

25. *See id.* at 148-49.

26. *See* Starr, *supra* note 11, at 830. Professor Starr argued that the Hague Convention appears "retrograde" since it does not act on behalf of the child nor contemplate the civil rights of the child, especially when considering the international community's growing concern with children's rights over the last half century. *See id.*

The heart of the Hague Convention is set out in Articles 3 and 12.[27] Article 3 defines "wrongful removal or retention" as a breach of custodial rights pursuant to the laws of the abducted-from nation, while "Article 12 provides the remedy once a 'wrongful removal or retention' has been found to have occurred."[28]

B. Essential Elements & Concepts of the Hague Convention

In order for the Hague Convention to apply, the following three elements must be present (pursuant to Articles 3, 4, and 35): 1) a child under sixteen years of age; 2) who has been "wrongfully" removed from his/her state of "habitual residence" in breach of a left-behind parent's custody right (which the parent was exercising at the time of removal; 3) while the Hague Convention was in effect. [29] The first element is self-explanatory. In the second element, "wrongful removal" typically occurs when a child is taken to another nation by a non-custodial parent; while "wrongful retention" typically occurs when a custodial parent keeps a child in another nation for a period of time longer than (legally) permitted.[30] Defining "habitual residence" is slightly more complicated. The Hague Convention does not define the term "habitual residence," which according to commentators, was not an oversight.[31] Instead, the drafters regarded this as a question of fact and thought it best to afford some interpretive discretion upon the courts without constraining them with some type of standardized meaning.[32] The common meaning given to the term "habitual residence" is "the place which is the focus of the child's life, where the child is permanently and physically present, and where the child's day-to-day existence is centered."[33] When making this determination, courts have considered factors such as whether a custodial parent was honest about his/her intention to live in a separate nation; whether the custodial parent consented to the other parent leaving the nation with the child; and the amount of time the child has actually been a resident of the abducted-from nation.[34]

---

27. *See* Herring, *supra* note 21, at 149.

28. *Id.*; *see also Hague Convention*, *supra* note 10, Articles 3 and 12.

29. *See* Herring, *supra* note 21, at 151. Article 35 of the Hague Convention states: "This convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States." *See Hague Convention*, *supra* note 10, Article 35. Although one of the nations involved in an international custody dispute may not be a party to the Hague Convention, discussion of such ramifications is well beyond the scope of this note. Such cases tend to involve more than jurisdictional issues, often contemplating cultural and political aspects as well. For a good discussion of the concerns that can arise when a child is abducted from, or abducted to, a non-Hague Convention nation, see Starr, *supra* note 11, at 806-28 (discussing non-Hague abduction cases involving Islamic Law nations).

30. *See* Herring, *supra* note 21, at 151-52.

31. *See id.* at 152.

32. *See id.* at 152-53.

33. *Id.* at 153.

34. *See id.*

Commentators refer to this as a "settled purpose."[35] In other words, is there a sufficient degree of continuity in living where one does?[36] If so, habitual residence is likely to be found.[37]

If these elements are met, then Article 12 becomes applicable.[38] Article 12 mandates the judicial authority of the petitioned nation to order the immediate return of the child.[39] Again, this complies with one of the principle objectives of the Hague Convention—to secure the prompt return of wrongfully removed or retained children to the nation from which they have been removed from or kept from returning to.[40]

C. *Affirmative Exceptions Under the Hague Convention*

Based on the foregoing, if a child under the age of sixteen years of age has been wrongfully removed or retained from his/her nation of habitual residence (and a Hague Convention proceeding has been initiated within one year[41]), Article 12 mandates the court in the petitioned-to nation to order the return of the child.[42] However, the Hague Convention does provide six exceptions which permit the petitioned authority in the abducted-to nation to refuse ordering the return of a child.[43] A court may refuse to order the return of a child when: 1) the custodial parent consented or acquiesced to the removal

---

35. *Id.*

36. *See id.* at 153-54; *see also* Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief—Can Something More be Done?*, 8 N.Y. INT'L L. REV. 95, 106 (1995) (the child's habitual residence is the only place where the custody claim can be heard; and absent such, a court must dismiss an action for lack of jurisdiction). The first U.S. case to address "habitual residence" was the Sixth Circuit's decision in *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993). In attempting to define the term, the Sixth Circuit looked for international assistance, and incorporated principles espoused in the U.K. case of *In Re Bates*. *See id.* The court recognized that instead of establishing detailed or restrictive rules, it should instead look to the facts of the individual cases as well as the past experiences of the child. *See id.* Time is also not determinative, per se, in that the intention of the parents to reside in an area is also a key factor. *See id.* at 1401-02.

37. *See* Herring, *supra* note 21, at 152-53. Habitual residence is not the same as "domicile." *See id.* By regarding the term as a question of fact, the drafters sought to distinguish habitual residence from the rigidity of the term domicile. *See id.* Furthermore, the drafters of the Hague Convention feared that such rigidity, if applicable, would hamper the courts in determining the meaning of habitual residence while trying to maintain consistency with the purposes of the Hague Convention. *See id.* at 154.

38. *See Hague Convention*, *supra* note 10, art. 12. "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.*

39. *See id.*

40. *See id.* at art. 1.

41. *See id. at* art. 12. In order to invoke the mandate of Article 12, proceedings must be commenced within a year from the date of the wrongful removal or retention. *See id.*

42. *See* Herring, *supra* note 21, at 163.

43. *See id.* at 163-64.

or retention; 2) the custodial parent failed to exercise his/her custodial rights; 3) the child is settled in his/her new environment; 4) the return is not permitted by the requested nation's fundamental principles regarding human rights and fundamental freedoms; 5) the return poses a "grave risk" of exposing the child to physical or psychological harm or an intolerable situation; and 6) the child objects to returning and is old enough and mature enough to make such objections.[44] For purposes of this note, numbers one through four of the aforementioned will be briefly examined, while numbers five and six will remain the primary focus because they directly effect the interests and wishes of the child, and thus, become entangled with the area of children's rights.

First, where the custodial parent actually consented or subsequently acquiesced to the other parent's removal of the child, a ruling court may exercise its discretion in whether or not to order the child's return.[45] The presence of consent or acquiescence actually negates one of the fundamental elements of the Hague Convention—that the removal or retention be "wrongful."[46] Without a wrongful removal the applicability of the Hague Convention is directly at issue, and in such circumstances, courts are not mandated by the Article 12 duty to order the return of the child.[47] However, a claim of consent or acquiescence is narrowly interpreted by the courts, probably in order to refrain from undermining the purpose of the Hague Convention.[48]

Another exception to the Hague Convention's mandatory return ideal involves the issue of whether the petitioning parent was actually exercising his/her custody rights, in which the petitioning parent must establish not only that custody rights existed, but also that those rights were being exercised.[49] This exception is also interlinked with the fundamental determination of

---

44. *See id.*; *Hague Convention*, *supra* note 10, arts. 12, 13, and 20.

45. *See Hague Convention*, *supra* note 10, art. 13(a). Notwithstanding the mandate of Article 12, a court is not bound to order the return of a child when the party opposing the child's return establishes that the requesting party "had consented to or subsequently acquiesced in the removal or retention." *Id.*; *see* Herring, *supra* note 21, at 166-67.

46. *See* discussion, *supra* Part II B, at 6. Recall that in order for the Hague Convention to apply the child must be wrongfully removed or retained from his/her place of habitual residence. *See Hague Convention*, *supra* note 10, art. 1.

47. *See* Herring, *supra* note 21, at 166-67.

48. *See id.* Most courts addressing the issue of consent or acquiescence are reluctant to find it. *See id.* Commentators suggest that a broad interpretation may undermine the Hague Convention's purpose by placing a large amount of discretion in the hands of the courts. *See id.* This, then, might lead to abducting parents hoping to exploit the judicial discretion of the courts, which runs counter to one of the essential preventative goals of the Hague Convention. *See id.*; Starr, *supra* note 11, at 792 (an essential goal of the Hague Convention is to deter parents from abducting their children to another nation in hopes of getting a more favorable custody determination by that nation's courts).

49. *See Hague Convention*, *supra* note 10, art. 3(b); Herring, *supra* note 21, at 160.

whether the abduction or retention is wrongful.[50] The Hague Convention presumes that a person who actually has custody rights is also exercising them.[51] The burden in this exception falls on the abductor to prove otherwise, which usually means that "very little is required of the applicant to support an allegation that custody rights were actually being exercised prior to the abduction."[52]

Article 12 also contains a "child is settled" exception to mandatory return, which is dependant upon the time that has elapsed from the moment of abduction or retention to the filing of the Hague Convention petition.[53] The defense is that the child has settled into his/her new environment, and specifically calls into question the legitimacy of the mandate set forth in Article 12.[54] Thus, while Article 12's mandate applying to proceedings that have been commenced within one year appears dispositive, proceedings filed after the expiration of one year are permitted to escape the mandatory order of return if the child is settled in his/her new environment.[55] At issue here is the concern that "if the child remains too long in a new residence, the child will undergo another major uprooting if he or she is returned."[56] Thus, this defense attempts to benefit from a fundamental objective of the Hague Convention—that the child's best interest is to secure his/her prompt return.[57] The less prompt the return, the less likely the Hague Convention's goals are being preserved.

Finally, Article 20 permits a court to refuse to order the return of a child when, to do so, would violate the fundamental human rights principles held by

---

50. *See Hague Convention*, *supra* note 10, art. 3(b). In order for the removal or retention to be considered wrongful, Article 3(b) states that: "at the time of removal or retention those rights [meaning custody rights] were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Id.*

51. *See* Herring, *supra* note 21, at 160. The Hague Convention is built upon the presumption that "the person who has custody rights was actually exercising that custody." *Id.*

52. *Id.* at 160-61; *see also Hague Convention*, *supra* note 10, art. 8(c) (any person filing a petition pursuant to the Hague Convention must include in their application "the grounds on which the applicant's claim for return of the child is based"). This informal requirement is essentially all that is required in order to establish the proper exercise of custody rights. *See Herring*, *supra* note 21, at 160-61.

53. *See Hague Convention*, *supra* note 10, art. 12 (mandating an order of return if, among other things, the proceedings have been commenced less than one year from the date of wrongful removal or retention). If, however, the proceedings have been initiated after the expiration of one year, Article 12 still mandates an order of return, "unless it is demonstrated that the child is now settled in its new environment." *Id.*

54. *See* Herring, *supra* note 21, at 165-66.

55. *See Hague Convention*, *supra* note 10, art. 12.

56. Herring, *supra* note 21, at 166.

57. *See Hague Convention*, *supra* note 10, art. 1 (a primary objective of the Hague Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State"); *see also* Herring, *supra* note 21, at 165-66 ("The Hague Convention operates on the basis that it is in the best interest of the child to be returned to that jurisdiction with a minimum delay and thus emphasizes the immediate restoration of the status quo.").

the petitioned nation.[58] This exception reflects the possibility that cases could arise under the Hague Convention in which an ordered return, although mandated by Article 12, would lead to violations of the child's human rights.[59] However, there is currently no clear definition of what is meant by the terms "human rights" and "fundamental freedoms."[60]

The aforementioned exceptions have been presented for background and clarity purposes. The remainder of this note will focus primarily on the last two exceptions. Although the "human rights" exception of Article 20 also appears to raise the issue of children's rights, it nonetheless remains contingent on the policies of the requested nation (and that nation's stance on matters of human rights) rather than the interests, wishes, or rights of the child. Conversely, the "grave risk of harm" and "child's objections" exceptions[61] are directly connected to the interests of the child—one with respect to the child's views and the other with the child's well-being.

1. Grave Risk Of Harm Exception—Generally

Article 13(b) allows a court to refuse ordering the return of a child when the return poses a "grave risk" of exposing the child to physical or psychological harm or an intolerable situation.[62] This is the most commonly used defense under the Hague Convention.[63] Typically, this exception is construed narrowly, and was intended to be raised when it was established that the child itself (not the abducting parent) would be placed in an intolerable situation if returned to his/her nation of habitual residence.[64] The drafters

---

58. *See Hague Convention, supra* note 10, art. 20. A court may refuse to order a child's return "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." *Id.*

59. *See* Herring, *supra* note 21, at 170-71. During drafting, there was some controversy over the role, if any, that public policy should play in determining whether to order the return of the child. *See id.* Indeed, an earlier alternative draft permitted refusal when the return was "deemed 'manifestly incompatible with the fundamental principles of the law relating to family' issues." *Id.* However, the drafters concluded that such policy discretion could undermine the Hague Convention's effect. *See id.* Thus, the current version reflects a limitation on a nation's discretion by only affording such cultural incompatibility considerations when matters relating to the child's human rights are involved. *See id.*

60. *See id.* For example, as of 1994, there had not been a single case articulating definitions under Article 20. *See id.* ("[T]here has been no case law to date on this provision. [citation omitted] The test of Article 20 in the courts, thus, must come at a later date.").

61. *See* discussion, *infra* Part III B & Part III C, at 21-25.

62. *See Hague Convention, supra* note 10, art. 13(b). Notwithstanding the Article 12 mandate, a court can refuse to order a child's return when the party opposing return establishes that: "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." *Id.*

63. *See* Herring, *supra* note 21, at 167.

64. *See id.* at 168. Moreover, to illustrate the need to narrowly construe this exception, one need only refer to the now-famous "coach and horses" phrase as articulated in the U.K. case of *In Re E*, 19 Fam. Law 105, 106 (C.A. 1989), which pointed out that if this exception were construed broadly:

recognized that in some instances ordering a child to return to the abducted-from nation could be more disastrous than allowing a foreign jurisdiction to decide the matter.[65] Thus, the drafters wanted to afford some discretion to the courts in order to recognize the realities inherent in ordering a child to return to his/her place of habitual residence.[66]

The "intolerable situation" component requires that the posed risk go beyond mere trivial complaints, and calls for the situation to be "extreme and compelling" in nature.[67] Accordingly, courts usually require a high degree of risk that returning the child will likely lead to physical or psychological harm.[68] Simply claiming it would be better for the child (i.e., due to some financial or educational advantages) to stay in the abducted-to nation will not satisfy this requirement.[69]

When considering whether a "grave risk" exists, courts also look to the source of the harm.[70] In other words, is the potential for harm posed by the nation that the child would be returned to, or is the risk posed by the child's return to the non-abducting parent?[71] The general notion regarding this distinction is that if the risk is one posed by being returned to the non-abducting parent, then the issue before the court more closely resembles a custody matter.[72] Since custody determinations often entail findings of parental fitness, courts usually assume that the child's state of habitual residence is better suited to resolve such issues.[73] Thus, the abducting parent bears a heavy burden that requires more than claiming the other parent is unfit.[74] The Hague Convention was designed to deter parents from seeking more favorable international forums to resolve custody determinations, and as

---

> [T]he effect would have been to drive a coach and horses through the provisions of this Convention, since it would be open to any abducting parent to raise allegations under [A]rticle 13 and then to use those allegations as a tactic for delaying the hearing by saying that oral evidence must be heard, information must be obtained . . . .

Herring, *supra* note 21, at 168 n.264, *quoting In Re E*, 19 Fam. Law 105, 106 (C.A. 1989).

65. *See* Herring, *supra* note 21, at 168.

66. *See id.*

67. *See id.*

68. *See id.* (courts usually require a strong showing of intolerable harm).

69. *See id.* ("[T]he mere fact that a financial or educational disadvantage is created by the mandate of the child's return does not amount to an intolerable harm.").

70. *See id.* at 169.

71. *See id.*

72. *See id.*

73. *See id.* at 170 ("[I]ssues of parental fitness are appropriate only for the state of habitual residence.").

74. *See id.* Courts have tried to promote the goals of the Hague Convention by requiring a "substantial" showing of a risk of physical or psychological harm in order to demonstrate that the abducting parent will have to do more than simply assert that the other parent is unfit. *See id.*

such, courts are generally not willing to allow an abducting parent to benefit from a situation of their own creation.[75]

The more likely event in which a court will find the Article 13(b) exception to be applicable is when returning a child to his/her nation of habitual residence (not to the parent) poses the grave risk of harm to the child.[76] Practically, this only occurs when the child's return places him/her in danger due to some existent condition, such as war or a recent natural disaster.[77] Critics argue that this unnecessarily restricts the purpose of Article 13(b), since Article 20 permits a court to refuse returning a child in order to protect the child's human rights.[78] However, without such conditions, narrowly construing this exception remains intact in that the child will almost always be ordered to return.

2. *Child's Objection Exception—Generally*

Article 13 also permits a court to refuse to order the return of a child when the child objects to being returned and is old enough and mature enough

---

75. *See id.*

76. *See id.* at 169. By framing the "grave risk" exception as to whether the returned-to nation (and not the parent) will pose the risk of harm to the child, courts have created the most narrow view in which to interpret the Article 13(b) exception. *See id.* For example, the Family Court of Australia stated that Article 13(b) "is confined to the 'grave risk' of harm to the child arising from his or her return to a country . . . ." *Gsponer v. Johnstone*, (1988) 12 Fam. L.R. 755 (Austl. Family Reports). Although inappropriate conduct allegations of one of the parents may be an important custodial issue, it has "little or nothing to do with the question of the child's return" in a Hague Convention proceeding. *Id.*

77. *See* Herring, *supra* note 21, at 169 (a grave risk would exist if the nation of habitual residence was at war, going through the aftermath of a nuclear disaster, or experiencing a natural disaster).

78. *See id.* n.269, *quoting* Linda Silberman, *Hague International Child Abduction: A Progress Report*, NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES 7 (July 26, 1993) (criticizing the notion that Article 13(b) should favor the instance where the grave risk is posed by the returned-to nation, rather than the parent). Silberman stated:

> This interpretation though helpful in limiting the scope of 13(b), does not appear to be consistent with 13(b)'s focus on "conduct of the parties and the interest of the child." Moreover, such interpretation appears redundant in light of the Article 20 exception, which excepts return when return is inconsistent with fundamental principles of the requested State relating to protection of human rights and fundamental freedoms. Thus, Article 20—but not 13(b)—is directed to concerns about harms arising from the child's return to a particular country.

Id. Moreover, the concluding paragraph of Article 13 requires that some criteria be considered when applying this exception that is not wholly dependent upon the state of affairs of the abducted-from nation. *See Hague Convention*, *supra* note 10, art. 13 (when considering defenses offered under Article 13, courts must "take into account the information relating to the social background of the child").

to make such an objection.[79] This exception is closely related to the Hague Convention's age requirement.[80] The drafters were aware of the fact that there might be situations where the Hague Convention should be inapplicable to a child otherwise subject to it if, under the laws of the petitioned nation, the child would be free to choose his/her own place of residence.[81] Therefore, the drafters decided, albeit somewhat reluctantly, that the courts should retain some discretion to consider the views of the child.[82] The drafters could not agree on a minimum age trigger, however, but "were unanimous in bestowing discretion in the application of the Child's Objection Clause to the competent authorities."[83] It was believed that affording such discretion was more preferable than lowering the overall age of the Hague Convention's applicability.[84]

The child's objection exception essentially contains two issues that a court must consider: first, whether the child objects; and second, whether the child is old enough or mature enough to have his/her objection considered.[85] Generally, the first issue regarding the nature of the objection requires a demonstration that the child's objection is more than just a mere preference to remain with an abducting parent.[86] This reflects one of the major criticisms of the child's objection exception, which is that the objection could be the product of undue influence by the abducting parent.[87] The second issue involving the age and/or maturity of the child is more complicated. Essentially, a court must determine whether a child has reached an age or maturity level which satisfies the court that the child's views should be considered in the decision-making process.[88] However, since the Hague Convention specifies neither a threshold age nor objective assessment criteria,

---

79. *See Hague Convention, supra* note 10, art. 13. The second paragraph of Article 13 states that a court 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." *Id.*

80. *See* Herring, *supra* note 21, at 164.

81. *See id.* at n.229; *see also* Rania Nanos, *The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOK. J. INT'L L. 437, 443-44 (1996). Nanos argues that the "Child's Objection Clause represents a compromise of two significant competing interests—the desire to expand the scope and application of the Convention versus the situation of children under sixteen who have the right to choose their own place of residence." *Id.*

82. *See* Nanos, *supra* note 81, at 444.

83. *Id.*

84. *See id.* ("[G]ranting judicial discretion was preferable to a lowering of the overall age which would reduce the Convention's scope.").

85. *See Hague Convention, supra* note 10, art. 13.

86. *See* Herring, *supra* note 21, at 164.

87. *See* Nanos, *supra* note 81, at 447. Critics are concerned that the child's objection "may be the product of 'brainwashing' by the abducting parent." *Id.* This exception requires a case by case application of the facts in order to determine "whether the child is in fact expressing an objection that has arisen out of his or her own free will or whether the objection has been influenced by other parties." Herring, *supra* note 21, at 164

88. *See* Herring, *supra* note 21, at 165.

there is legitimate concern that the child's objection exception may be subject to arbitrary application.[89]

Such concern about arbitrary and inconsistent application is not without merit. Indeed, there have been cases holding that nine, ten, and twelve year-olds are not of sufficient age in order to merit consideration of their views under Article 13; while conversely, there have been cases holding that eleven, twelve, and thirteen year-old children are of sufficient age.[90] However, if the exception is to live up to its purpose,[91] then perhaps such decisions do not represent an absence of consistency, but instead reflect an independent application of the facts on a case-by-case basis.[92]

The criticisms of the child's objection exception are plenty, and for the most part are beyond the scope of this note. In addition to the aforementioned concern regarding the true nature of the child's objection (i.e., whether it is "the product of 'brainwashing' by the abducting parent"[93]), one major concern is that the exception could counter the effect of Article 19 and enable a petitioned court to actually resolve the merits of a custody dispute.[94] Perhaps the strongest criticism is the concern that the exception is subject to judicial abuse.[95] Particularly at issue here is the presiding judicial officer's temptation to favor the social and cultural conditions of the petitioned nation.[96] As the preceding indicates, the crux of concern surrounding the child's objection exception lies in the discretion afforded to judicial authorities and the potential for its abuse.[97] However, it is worth restating that the drafters of the Hague

---

89. *See id.* (Since the Hague Convention does not set forth a threshold age which triggers automatic consideration, such a determination is reserved to the courts); *see* Nanos, *supra* note 81, at 445. Article 13 fails to establish both a minimum age component and objective assessment criteria, and as a result "invites potential subjective and arbitrary decision making." *Id.*

90. *See* Herring, *supra* note 21, at 165 n.236, *citing Bickerton v. Bickerton*, No. 91-06694 (Cal. Super. Ct. 1991) (holding that a ten year-old boy and twelve year-old girl were not of sufficient age or maturity); *see Sheikh v. Cahill*, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989) (holding that a nine year-old is not of sufficient age, stating: "He is only nine years old."); *see* Herring, *supra* note 21, at 165 ("[I]t should be noted that several cases have refused to return the child, even though the child has expressed an objection, and thus allowed the exception to stand, involving 11, 12, and 13 year-old children.").

91. *See supra* note 81 and accompanying text.

92. *See* Herring, *supra* note 21, at 164 ("[C]onsideration must be given to the particular facts of each case.").

93. *See* Nanos, *supra* note 81, at 447; *see also supra* note 87 and accompanying text.

94. *See Hague Convention*, *supra* note 10, art. 19 (decisions pursuant to the Hague Convention are not dispositive of underlying custody disputes); *see* Nanos, *supra* note 81, at 446-47. Critics argue the child's objection exception "contravenes [A]rticle 19 of the Convention by enabling a tribunal to determine the merits of a custody dispute rather than leaving this resolution to the courts of the child's country of habitual residence." *Id.* (footnote omitted).

95. *See* Nanos, *supra* note 81, at 447.

96. *See id.*

97. *See id.*

Convention intended to bestow discretion upon judicial authorities by this exception's inclusion.[98]

Specific approaches in the way the U.S. and the U.K. courts interpret both the grave risk of harm and child's objection exceptions will be more specifically discussed in Parts IV and V, respectively. Before that, however, some attention must be given to the emergence and international developments surrounding the concept of children's rights.

III. THE RIGHTS OF THE CHILD & THE UNITED NATIONS CONVENTION

> *In all actions concerning children . . . the best interests of the child shall be a primary consideration.*
>
> *—UN Convention on the Rights of the Child*[99]

A. *International Aspects of the Children's Rights Movement*

The children's rights movement is the product of a long struggle, and is predominantly a creature of the twentieth century.[100] Historically, children were often viewed as nothing more than personal property, which is reflected in the legal history of both European and U.S. law and social policy dating back to the Middle Ages.[101] To illustrate this unfortunate historical reality, many point to what is commonly referred to as the "Mary Ellen affair."[102] The Mary Ellen affair involved the prosecution of New York parents in 1874 for chaining their daughter to a bed and giving her only bread and water.[103] Given the lack of legal precedence for child protection, the prosecutor relied heavily on drawing an analogy with an animal cruelty law.[104] This case is often used

---

98. *See id.* at 444. After concluding that an exception to consider the views of the child was "absolutely necessary," the drafters of the Hague Convention "were unanimous in bestowing discretion in the application of the Child's Objection Clause to the competent authorities." *Id.*

99. *Convention on the Rights of the Child*, U.N. GAOR, 45th Sess., 61st Plen. Mtg., at art. 3, U.N. Doc. A/RES/44/25 (1989), *at* http://www.un.org/documents/ga/res/44/a44r025.htm (last visited Nov. 12, 2001) [hereinafter *UN Convention*].

100. *See* Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 140 (1998) (providing a brief history regarding the rights of children). In 1924, the Declaration of the Rights of the Child was adopted by the Assembly of the League of Nations. *See id.* For the first time in history, an international agreement formally recognized that humanity owed its very best to the child. *See id.* This duty was meant to apply to the "men and women of all nations," as opposed to just States. *See id.*

101. *See id.* Even the period commonly referred to as "childhood" went unrecognized for centuries "because in most societies children were consistently treated as though they were invisible." *Id.*

102. *See id.*

103. *See id.*

104. *See id.*

to demonstrate that in both the U.S. and the U.K, laws against cruelty to animals were enacted before child abuse protection statutes.[105]

Perhaps questioning such social priorities sparked thoughts of reassessment and reflection concerning the area of children's rights. But regardless of rationale, the latter half of the twentieth century has unquestionably shown that the international community is concerned with the rights of children.[106] Many international treaties and procedures were implemented which reflected the growing desire to protect the rights of children.[107] The most significant development in the international advancement and recognition of children's rights occurred in 1959, when the UN General Assembly adopted the Declaration of the Rights of the Child (UN Declaration).[108] The task was not an easy one, and was actually the culmination of a drafting process that began in the late 1940's.[109] Many nations had their reservations, however, with most preferring to limit the declaration to the "essential" rights.[110] Nonetheless, the declaration incorporated fundamental human rights principles from the 1948 Universal Declaration of Human Rights;[111] a notably distinct approach from the days of the Mary Ellen affair.

Most UN member nations opposed the creation of a binding treaty at the time the UN Declaration was adopted.[112] However, in the twenty years that followed the UN Declaration's adoption in 1959, the international community began to recognize a need to focus on the human rights of children.[113] In 1979,[114] the UN formally began the process of creating a "comprehensive

---

105. *See id.*

106. *See* Starr, *supra* note 11, at 830.

107. *See id.*; *see also* Rios-Kohn, *supra* note 100, at 140-41 (discussing the progression of international recognition of children's rights from the aforementioned League of Nations Declaration, to the early endeavors of the UN's attempt to adopt a universal declaration regarding basic human rights).

108. *Declaration of the Rights of the Child*, U.N. GAOR, 14th Sess, U.N. Doc. A/RES/1386 (1959), *at* http://www.unhchr.ch/html/menu3/b/25.htm (last visited Jan. 22, 2002) [hereinafter *UN Declaration*]; *see also* Rios-Kohn, *supra* note 100, at 140 (referring to the UN Declaration as representing "a quantum leap in the development of children's rights").

109. *See* Rios-Kohn, *supra* note 100, at 140.

110. *See id.* ("The majority of States expressed a preference for a short text that would include the minimum essential rights").

111. *See id.* The UN Declaration consisted of a preamble and ten human rights principles that were incorporated from the 1948 Universal Declaration of Human Rights. *See id.; UN Declaration, supra* note 108. Among the rights included in the UN Declaration are the rights to adequate nutrition, housing, and medical services; the right to a free education; and the right to be protected from "all forms of neglect, cruelty and exploitation." *UN Declaration, supra* note 108, Principles 4, 7, and 9; *see generally Universal Declaration of Human Rights*, adopted by the UN General Assembly on Dec. 10, 1948, *available at* http://www.un.org/Overview/rights.html (last visited January 22, 2002).

112. *See* Rios-Kohn, *supra* note 100, at 140.

113. *See id.*

114. 1979 was the International Year of the Child. *See id.*

charter that would be binding on States."[115] The task of drafting this charter was assigned to the UN Commission on Human Rights,[116] and would take approximately ten years to complete.[117] The Commission's result was a binding international treaty that boldly introduced the international community to the concept that the child's best interests were now a matter of paramount concern.[118]

B. The United Nations Convention on the Rights of the Child

In 1989, the UN General Assembly unanimously adopted the UN Convention which subsequently went into effect (in record time) by September of 1990.[119] No other international treaty has ever been welcomed with the near universal acceptance that the UN Convention has.[120] In fact, the only UN member nations that have not ratified the UN Convention are Somalia and the U.S.[121] The international accord seeks to "build consensus for the concept of children as holders of their own human rights," and is responsible for changing the "deeply rooted historical attitudes toward children that have prevented them from enjoying their rights."[122] The UN Convention is often regarded as

---

115. *Id.*; *see* Starr, *supra* note 11, at 830. Interestingly, this task was assumed during the same time representatives to the Hague Convention were drafting their agreement to deal with the aspects of international child abduction. *See id.* As Professor Starr noted:

> While one group of lawyers and lawmakers was meeting at the Hague in 1980 to draw up a Convention to prevent parental abduction of children to other countries, another group of child advocates and lawmakers . . . was convening to develop a draft copy of the Convention on the Rights of the Child.

Id.

116. *See* Rios-Kohn, *supra* note 100, at 140 (the Commission on Human Rights reported to the Economic and Social Council of the UN). The actual drafting of the UN Convention was assumed by the "Working Group for the Rights of Children," which would meet one week per year just prior to when the UN Commission on Human Rights would meet. *See* Starr, *supra* note 11, at 830.

117. *See* Rios-Kohn, *supra* note 100, at 140.

118. *See* Starr, *supra* note 11, at 831 ("[T]he concept of the child's best interests was boldly introduced to the Convention.").

119. *See id*; *see* Rios-Kohn, *supra* note 100, at 140.

120. *See* Rios-Kohn, *supra* note 100, at 141. "The treaty's importance has been attributed to the speed with which States universally accepted it and its comprehensive nature." *Id.*

121. *See id.* at 140-41. The UN Convention has been "ratified or acceded to by every country in the world with two exceptions: Somalia (which does not currently have a recognized government) and the United States (which has signed but not yet become a State Party to the Convention)." *Id.* U.S. refusal to join the UN Convention is apparently rooted in a policy of reluctance to bind the U.S. to international treaties pertaining to human rights. *See* Barone, *supra* note 36, at 120; *see also id.* at n.211 (expressing U.S. concern over the effect human rights treaties might have on domestic policy); Reisman, *supra* note 8, at 349 (pointing out that the U.S. reluctance to ratify the UN Convention is due to concerns that the provisions might "conflict with national security concerns").

122. Rios-Kohn, *supra* note 100, at 141.

the "most comprehensive and detailed international human rights charter to date."[123]

The UN Convention is made up of a preamble and fifty-four articles.[124] Its logistics reflect an attempt to protect all children as well as to recognize the child as having human rights interests.[125] Essentially, the document combines political, civil, economic, and social rights in order to "improve the situation of children."[126] The UN Convention applies to every child below the age of eighteen (unless a younger age of majority applies), and member nations are required to guarantee the rights set out in the treaty.[127] The heart of the treaty is found in Articles 2, 3, 6, and 12—collectively referred to as the "soul of the treaty."[128] For purposes of this note, articles 3 and 12 are noteworthy.

Article 3 of the UN Convention is widely responsible for solidifying the concept that in all matters which concern a child, the "best interests" of the child are to remain the primary concern.[129] This concept is a frequently employed idea within many nations' family law structures, including custody cases. The term "best interests" is not defined in the UN Convention, but remains one of its "core values", assuring that in every action affecting a child, his/her best interests are given due consideration.[130] The intent of the "best interests" component is not to guarantee that a child's best interests will prevail in adjudicatory proceedings, but rather to ensure that the child's interests are given the appropriate consideration in light of any competing interests.[131] This approach acknowledges the recognition of the child as possessor of certain rights which entitles him/her to consideration of any interests that may be affected.[132] In other words, "best interests" represents the

---

123. *Id.*

124. *See UN Convention*, *supra* note 99.

125. *See* Rios-Kohn, *supra* note 100, at 141 (the child is a "holder of human rights and fundamental freedoms").

126. *See id.* at 141-42 (incorporating these rights into the UN Convention "provides a holistic framework to improve the situation of children").

127. *See UN Convention*, *supra* note 99, arts. 1 & 2. Article 1 defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." *Id.* at art. 1. Article 2 sets forth the duty imposed upon signatory nations as one that "shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind . . ." *Id.* at art. 2.

128. Rios-Kohn, *supra* note 100, at 143.

129. *See UN Convention*, *supra* note 99, art. 3. Article 3 states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." *Id.*

130. *See id.*; Rios-Kohn, *supra* note 100, at 144 (Article 3 "reaffirms a core value of the treaty").

131. *See* Rios-Kohn, *supra* note 100, at 144-45 (noting the difficulty often involved in balancing the competing interests of society, family, and children).

132. *See id.* at 143.

guiding principles upon which primary consideration should be made in all matters affecting the child.[133]

Meanwhile, Article 12 requires that signatory nations create mechanisms to ensure that children have opportunities to be heard and considered in all decision-making procedures which affect their lives.[134] The intent behind this "right to participate" is to make sure that the child's views play a relevant role in the decision-making process during proceedings having a direct affect on a child's life.[135] The fundamental significance of Article 12 is to "stress that no implementation system may be carried out and be effective without the intervention of children in the decisions affecting their lives."[136] Accordingly, the child maintains the right to express his/her views in relation to family matters, which changes the traditional manner that children were viewed in such situations.[137] Indeed, the delicate balance may lie between "the child as the holder of fundamental rights and freedoms and the child as the recipient of special protection designed to ensure his/her harmonious development as individuals and to help the child play a constructive role in society."[138] Thus, what underlies Article 12's significance is its recognition of a child's right (and ability) to participate; sharing the "new vision" that children are no longer viewed as mere by-standers, but instead are "full participants in all activities that affect them."[139]

C. *Incorporated Principles of the UN Convention & the Children's Rights Concept*

The UN Convention's principles overlap with other areas of international law. For example, the child's best interests concept permits a nation to actually play a role in matters arising from the illegal transfer of a child abroad.[140] The child now has the internationally recognized right to express his/her views in all matters that affect him/her in conjunction with that child's age and maturity level.[141] Because of the near universal acceptance of this concept, even nations not participating with the UN Convention may nonetheless incorporate its principles. Indeed, there is suggestion that these

---

133. *See id.* at 144.

134. *See UN Convention*, *supra* note 99, art. 12. Article 12 requires that: "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." *Id.*

135. *See* Rios-Kohn, *supra* note 100, at 143.

136. *Id.*

137. *See id.*

138. *Id.* at n.41, *quoting* Martos Santos Pais, *The Convention on the Rights of the Child*, MANUAL ON HUM. RTS. REPORTING 393, at 75, U.N. Sales No. GV.E.97.0.16 (1997).

139. Rios-Kohn, *supra* note 100, at 143.

140. *See* Starr, *supra* note 11, at 830-31.

141. *See id.*

principles may "move into the realm of universally binding customary international law that will apply irrespective of the treaty basis of children's rights and whether or not a State has ratified or acceded to the [UN] Convention."[142]

In the U.S., the universal nature and acceptance of the UN Convention may afford U.S. courts the ability to use the treaty as persuasive authority.[143] In fact, U.S. courts often use best interests standards in resolving many domestic law custody disputes.[144] However, when the nature of these disputes involve international implications, U.S. courts tend to abandon the UN Convention's persuasiveness even though the Hague Convention may permit such considerations.[145] This approach has led some commentators to suggest that new legislation in the U.S. (maybe legislation which adopts the essential principles of the UN Convention) could help in the area of international custody disputes by recognizing that even when parents do battle, children still have civil rights—"especially the right to have their best interests represented in custody battles."[146] The next two sections of this note take a comparative look at how the overlap of children's rights concepts are evolving with respect to Hague Convention cases in the U.S. and the U.K.

IV. THE UNITED STATES APPROACH

A. *Overview*

The U.S. enacted legislation giving statutory effect to the Hague Convention by passing the International Child Abduction Remedies Act (ICARA) in 1988.[147] Without a doubt the U.S. implements the Hague

---

142. Rios-Kohn, *supra* note 100, at 156. The universal nature of the UN Convention may very well place the treaty within the category of customary international law. *See Id.*

143. *See id.* at 160.

144. *See* Starr, *supra* note 11, at 829 (noting that "every state in the U.S. has custody laws enacted that rely on the 'best interests of the child' in making custody determinations").

145. *See Hague Convention, supra* note 10, art. 13. Recall that both the grave risk of harm and the child's objection exceptions both afford discretion upon the court to consider matters affecting the child, which if proper under the circumstances, will permit the court to refuse ordering a child's return to its place of habitual residence. *See id.* However, since the Hague Convention is primarily jurisdictional in nature, the U.S. tends to "punt" on certain aspects of its domestic child custody system. *See* Starr, *supra* note 11, at 832.

146. Starr, *supra* note 11, at 832. Lagging behind in the promotion of children's rights, Starr suggested that new "U.S. federal law could lead the way towards giving children a voice in international custody disputes." *Id.* Others have suggested that the U.S. should adopt the UN Convention. *See* Barone, *supra* note 36, at 120 (suggesting that U.S. adoption of the UN Convention would have the most "significant impact" on children's rights with respect to international child abductions in the U.S.).

147. International Child Abduction Remedies Act (ICARA), 42 U.S.C.A. §§ 11601, *et seq.* (West 2000). The U.S. ratified the Hague Convention in 1986, however, it did not become officially adopted until Congress passed (and President Reagan signed) the ICARA in 1988. *See* Gary Zalkin, *The Increasing Incidence of American Courts Allowing Abducting Parents to*

Convention according to a return the child "at all costs" approach.[148] The trend with respect to the grave risk of harm exception is that even if the potential for harm is found to exist, courts will look to potential safeguards provided by the requesting nation so that it can still send the child back.[149] Denying a return request under the child's objection exception is virtually non-existent in the U.S., with courts ordering the return of children approximately ninety percent of the time in Hague Convention cases filed in U.S. courts.[150] While remaining religiously committed to the Hague Convention's goal of securing the "prompt return" of abducted or wrongfully retained children, U.S. courts tend to neglect one of its other purposes—"to protect the interests of children who have been abducted."[151] Unlike the trend now emerging in the U.K. (which is discussed in Part V), Part IV will illustrate how the U.S. courts pay little attention to the way the interests of the child should be handled in a Hague Convention proceeding.

B. Judicial Interpretations

Judicial holdings in the U.S. interpret the Hague Convention exceptions sparingly in order to avoid dealing with underlying custody issues, to secure the prompt return of the child, and to reinforce the Hague Convention's intent of deterring parents from forum shopping for more favorable treatment.[152] U.S. courts do not adopt a uniform interpretation, and in order to satisfy either the grave risk or child's objection exceptions, the parent objecting to an ordered return must offer clear and convincing evidence.[153]

Use the Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction, 23 SUFFOLK TRANSNAT'L L.REV. 265, 273 (1999). For clarity purposes, although Hague Convention cases are initiated in the U.S. pursuant to the ICARA, subsequent reference will be made only to the Hague Convention.

148. *See* Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 687-88 (2001) (suggesting the likelihood of dangerous implications resulting from the U.S. "return at all costs" approach; especially since the U.S. is looked upon as a leader in interpreting Hague Convention cases).

149. *See id.*

150. *See* Johnson, *supra* note 12, at 134. Accusing U.S. courts of adopting a "nationally blind" view in Hague Convention cases, Johnson notes that the U.S. "returns roughly 90% of the children in Hague cases brought in U.S. courts and sometimes simply hands over children to foreign parents through ex parte maneuvers not even involving a Hague hearing or any other semblance of due process of law." *Id.*

151. Nelson, *supra* note 148, at 688; *see also Hague Convention*, *supra* note 10, Preamble (the opening line to the Hague Convention acknowledges that "the interests of children are of paramount importance").

152. *See* Zalkin, *supra* note 147, at 273-76.

153. *See* ICARA, 42 U.S.C.A. § 11603 (West 2000); *see also Sheikh v. Cahill*, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989) ("finding that an exception under article 13(b) exists must be based upon clear and convincing evidence"). The *Cahill* case was significant in that it was the first New York case to address the Hague Convention. *See id.* at 172.

1. *Determining Grave Risk of Harm*

The Hague Convention expresses that a requested court is under no duty to order the return of a child if, in doing so, there exists a grave risk of exposing "the child to physical or psychological harm."[154] Where the risk clearly implicates physical harm (i.e. physical or sexual abuse), courts generally agree that this exception is met.[155] However, where the risk posed involves potential psychological harm, the consensus breaks down.[156] This is due in part to the clear and convincing evidentiary standard that must be satisfied, and the subsequent difficulty in meeting this burden that is encountered by many courts.[157] The U.S. approach can be broken down into two realms: 1) the traditional rule as espoused by the Sixth Circuit in *Freidrich v. Friedrich*;[158] and 2) the modern "further analysis approach" recently set forth by the Second Circuit in *Blondin v. DuBois*.[159]

The *Freidrich*[160] decision is an often-cited case on the use of the Article 13(b) exception to the Hague Convention.[161] The *Freidrich* court began its analysis by noting that the exception must be proven by clear and convincing evidence.[162] In addition, the court sought to remain vigilant to the objectives of the Hague Convention by placing emphasis on the use of the term "intolerable situation" within the exception's language.[163] The court refused to interpret the exception as one that looks at which location offers the child greater opportunities or makes the child happiest.[164] Instead, the court opined that "[t]he exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence."[165]

---

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

155. *See* Nelson, *supra* note 148, at 677. "Most courts agree that if the child is physically harmed, through assault or sexual abuse, the grave risk exception is met." *Id.*

156. *See id.* Regarding the psychological harm component, "no one seems to be sure what fits within the exception." *Id.*

157. *See id.* at 677-78.

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

159. *Blondin v. DuBois*, 189 F.3d 240 (2d Cir. 1999).

160. *Freidrich* involved a mother who wrongfully abducted her two-year old child from Germany to Ohio. *See Freidrich*, 78 F.3d at 1063. The mother's Article 13(b) claim relied primarily on the claim that since her son had become so attached to friends and family in Ohio, that returning him to Germany would be too traumatic for him, and that he was much happier living in Ohio. *See id.* at 1067.

161. *See* Zalkin, *supra* note 147, at 277.

162. *See Freidrich*, 78 F.3d at 1067.

163. *See id.* at 1068-69.

164. *See id.* at 1068. The court noted that such considerations are irrelevant by stating: "We are not to debate the relevant virtues of Batman and *Max and Moritz*, Wheaties and *Milchreis*." *Id.*

165. *Id.*

The Eighth Circuit's interpretations are similar; the court is not to consider custody matters or the best interests of the child.[166] It is not relevant whether the abducting parent has a good reason for fleeing.[167] Article 13(b) only "requires an assessment of whether the child will face immediate and substantial risk of an intolerable situation if he is returned."[168] Courts must assume that courts in the abducted-from nations are just as capable of resolving custody disputes as are courts in the U.S.[169] Accordingly, the grave risk of harm exception can exist in only two situations: 1) when return puts the child in imminent danger prior to custody resolution; and 2) in serious cases of abuse or neglect, or when the court in the returned-to country is unwilling or incapable of affording adequate protection to the child.[170] Evidence, therefore, "is only relevant if it helps prove the existence of one of these two situations."[171] Allegations and proof of mere adjustment problems (if the child is ordered to return) simply do not rise to the level of the grave risk exception, and are not to be considered in resolving Hague Convention proceedings.[172]

Building upon these notions, the Second Circuit recently added a subsequent analysis to this approach, specifically in relation to what a court is supposed to do once grave risk is found to exist. In *Blondin*, the court set forth what is referred to as the "further analysis approach."[173] Prior to the *Blondin* decision, most U.S. courts that found a grave risk of harm to exist refused to order the return of the child "if abuse or severe neglect would be awaiting them on return."[174] The Second Circuit began its approach by noting that a paramount purpose of the Hague Convention is to preserve comity among nations, and to deter an abducting parent from crossing international lines seeking more sympathetic courts.[175] The court found that a grave risk of harm did exist,[176] however, this did not end the court's inquiry. The court stated that further inquiry was needed and looked at whether it could nevertheless honor the Hague Convention by affording certain protections

---

166. *See Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995).

167. *See id.*

168. *Id.*

169. *See Freidrich*, 78 F.3d at 1068.

170. *See id.* at 1069. The court opined that the grave risk of harm exception could only exist in these two situations. *See id.*

171. *Id.*

172. *See id.* at 1067 (court noted that the mother's allegations amounted to "nothing more than *adjustment* problems that would attend the relocation of most children"); *see Tice-Menley*, 58 F.3d 374, 378 (8th Cir. 1995) ("We instruct the court not to consider evidence relevant to custody or the best interests of the child.").

173. Nelson, *supra* note 148, at 688.

174. *Id.* at 687.

175. *See Blondin*, 189 F.3d 240, 248 (2d Cir. 1999).

176. In *Blondin*, the mother wrongfully removed her two children from France in order to protect them from a physically abusive environment. *See id.* at 242. The mother had been the victim of domestic violence, and the children had been subjected to physical abuse on occasion as well. *See id.* at 242-44.

which allow the custodial decisions to still be made by the home nation.[177] The court opined that for the sake of comity, courts must be able to presume that the courts in another nation will be capable of safeguarding children.[178] In other words, even if the court finds the grave risk of harm exception to be applicable, *Blondin* has imparted an additional duty upon the courts to inquire into potential protective processes that may be available in order to permit the court to return the child to its habitual residence and still allow the resolution of any custody matters to take place there.[179] However, critics worry that this "further analysis" approach only imposes additional limitations on an already limited application of the grave risk exception.[180] It is argued that if the drafters of the Hague Convention had intended an additional analysis, they would have required one in the language of Article 13(b).[181] Nonetheless, the "further analysis" approach reflects the modern trend in interpreting the grave risk of harm exception in the U.S.[182]

2. *Considering a Child's Objection*

Article 13 of the Hague Convention allows courts to refuse ordering the return of a child if that child objects to being returned and is old enough and mature enough to have his/her views considered.[183] In the U.S., analysis under the child's objection exception is fairly straightforward —for the most part, it does not exist. U.S. courts are not likely to defer to a child's objection as a reason for denying a Hague Convention petition.[184] Of course, the unique attribute of this exception is its direct entanglement with principles of the UN Convention.[185] For example, this exception affords a child the opportunity to

---

177. *See id.* at 242. The court concluded "that the Hague Convention requires a more complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they were (concededly) wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody." *Id.*

178. *See id.* at 249.

179. *See id.* at 242. The Second Circuit believes that by requiring courts to perform the additional duty of examining all potential safeguards that the requesting nation may have in place to protect children in potentially dangerous situations, U.S. courts can still fulfill the intentions of the Hague Convention by: 1) returning children to their nations of habitual residence; and at the same time 2) protect children from any grave risk of harm they might otherwise be subject to. *See id.*

180. *See* Nelson, *supra* note 148, at 687.

181. *See id.* at 687-88. "It is hard to believe, based on the plain meaning of the [Hague] Convention, that it was the intent of the [Hague] Convention that a further analysis be done after a finding of grave risk. Once grave risk is found, that should be the end of the analysis." *Id.*

182. *See id.*

183. *See Hague Convention*, *supra* note 10, art. 13.

184. *See* Nanos, *supra* note 81, at 448.

185. *See UN Convention*, *supra* note 99, art. 12. Recall that the UN Convention conveys a "right to participate" upon the child. *See id.* A child capable of forming his/her own views has the right to express those views, and to have those views given consideration according to his/her age and maturity. *See id.*

communicate his/her views in a matter that will directly affect his/her welfare.[186] Even though this is a fundamental right according to the UN Convention (of which the U.S. is not a part of), decisions regarding this exception in the U.S. lack any resemblance to suggestive inquiries, and typically "address issues concerning the child's views within the framework of the 'grave risk of harm' exception."[187]

The Hague Convention does not set forth a specific age for when this exception applies, and commentators have suggested that no such threshold age should be applied.[188] Nonetheless, when applying this exception U.S. courts tend to "assume" when a child is mature enough or old enough to have his/her views considered with very little, if any, supporting analysis. For example, in *Tahan v. Duquette*,[189] a New Jersey state court acknowledged that the Hague Convention does not suggest determinations under this exception be made according to any threshold determination on age, but then makes the blanket statement that the maturity and views exception simply does not apply to a nine year-old.[190] In *In re Nicholson v. Nicholson*,[191] a federal court judge in Kansas at least afforded a ten year-old the opportunity for an in-camera interview, but the court cited to *Tahan* regarding the age of the child and then added that the child had no "valid" objection; yet failed to explain why.[192] Likewise, in New York's first Hague Convention case, the court refused to consider the views of a nine year-old child stating simply: "He is only nine years old."[193]

The U.S. approach to the child's objection exception reinforces concerns that critics have expressed concerning the Hague Convention's willing disregard to afford some consideration to the child's point of view.[194] Although the U.S. is not a member, the U.S. approach essentially ignores basic human rights guarantees bestowed upon many nations by the UN Convention. The U.S. appears to be simply unwilling to consider the views of the child in connection with a Hague Convention case. Furthermore, it should be clear from the aforementioned that even if U.S. courts were to begin taking consideration of a child's objections, no process exists by which to gauge the manner such considerations are to be given due consideration.

---

186. *See id.*

187. Nanos, *supra* note 81, at 448-49.

188. *See* Herring, *supra* note 21, at 165.

189. *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992).

190. *See id.* ("This standard simply does not apply to a nine-year old child."). Based on this assumption, the court refused to find that the trial judge erred by refusing to interview the child. *See id.*

191. *In re Nicholson v. Nicholson*, 1997 WL 446432 (D. Kan. 1997) (Unpublished Opinion).

192. *See id.*

193. *Sheikh v. Cahill*, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989).

194. *See* Starr, *supra* note 11, at 830. Arguing that parts of the Hague Convention appear retrograde, Professor Starr stated that the Hague Convention "does not act on behalf of a child, nor does it address the civil and human rights of a child." *Id.*

C. *Selected U.S. Case Law*

Two recent U.S. cases illustrate the trends discussed in Part IV of this note. The first, *Turner v. Frowein*, is a decision that reiterates the *Blondin* "further analysis approach" with respect to the grave risk exception.[195] The second, *England v. England*, demonstrates the continued reluctance of the U.S. to take a child's views into consideration.[196]

In *Turner v. Frowein*, the mother (a U.S. citizen) and father (a Dutch citizen) were married in Connecticut but spent a significant amount of time living apart, splitting their residence between New York City and Connecticut.[197] The couple had only one child who, by the time the Hague Convention proceedings were initiated, was seven years-old.[198] The marriage experienced several episodes of domestic violence over the years, but when the mother indicated she was going to file for divorce, the husband retaliated by taking the child and telling the mother she would never see their son again.[199] However, the couple managed to begin reconciliation and subsequently moved to Holland.[200] What happened next was unconscionable. The father commit-ted several acts of sexual abuse against his son, at which time the mother attempted to institute divorce and custody proceedings in Holland.[201] Finding no success, the mother fled to the U.S. with her son and filed for divorce, at which point the father then initiated Hague Convention proceedings.[202]

The court had no problem recognizing the existence of a grave risk of harm in the form of sexual abuse.[203] However, the court made clear that this would not end the inquiry.[204] Referring to the importance of guaranteeing that a court in the child's place of habitual residence retain proper jurisdiction over custodial matters, the court mandated the adoption of *Blondin's* "further analysis approach."[205] The court held that a judge cannot deny a Hague Convention petition under the grave risk of harm exception unless it has evaluated the "full range of placement options and legal safeguards that might facilitate the child's repatriation under conditions that would ensure his or her

---

195. *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

196. *England v. England*, 234 F.3d 268 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001).

197. *See Turner*, 752 A.2d at 961.

198. *See id.* at 961-62.

199. *See id.* at 962.

200. *See id.*

201. *See id.* at 962-63.

202. *See id.*

203. *See id.* at 968. In review of the record, the court concluded that the mother had proved "by clear and convincing evidence that the defendant had sexually abused his son." *Id.*

204. *See id.* at 969.

205. *See id.* at at 971. The Supreme Court of Connecticut acknowledged that although this was a case of first impression, the court relied heavily on the Second Circuit's decision in *Blondin*. *See id.*

safety."[206] The court further suggested that possible considerations included whether the abducting parent or an acceptable third party could retain supervision if the child were ordered returned, and whether the requesting nation was able to enforce any conditions attached to an order of return.[207] The court then ordered the case remanded for such "further analysis."[208]

In *England v. England*, both parents were U.S. citizens and were married and lived in Texas until 1997.[209] The couple had two daughters, ages thirteen and four.[210] In 1997, the father took a job in Australia and the family moved there.[211] In 1999, the family came back to the U.S. on vacation, but when the mother's father became seriously ill, both the mother and the children remained in the U.S. after the vacation ended while the father returned to Australia.[212] Shortly thereafter, the mother filed for divorce in Texas and advised the father that neither she nor the children would be returning to Australia.[213] The father then commenced Hague Convention proceedings seeking return of his daughters to Australia.[214]

The mother affirmatively employed the grave risk of psychological harm exception and asked the court to consider the express wishes of the oldest daughter.[215] The court quickly disposed of the grave risk of harm claim by noting there must be more evidence presented than simply that ordering the return will somehow unsettle the children.[216] As far as the child's objection exception, the court overruled the lower court's finding that the thirteen year-old, who had clearly objected to being returned to Australia, was old enough and mature enough for the court to consider her views.[217] Moreover, the court's only basis for reaching its conclusion was that since the oldest child was adopted, was diagnosed with Attention Deficit Disorder (ADD), possessed certain learning disabilities, and had prior parental figures in her life, that she must be confused by her present situation.[218]

---

206. *Id.* at 969.

207. *See id.* at 974.

208. *See id.* at 978.

209. *See England*, 234 F.3d 268, 269 (5th Cir. 2000).

210. *See id.* Note that the thirteen year-old daughter was adopted—a point that would actually seem somewhat determinative in the court's conclusion that she was not mature enough to have her objections considered by the court. *See id.*; *see infra* note 218 and accompanying text.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

215. *See id.* at 269-70.

216. *See id.* at 271. The court noted that proof of a grave risk of psychological harm must be more than showing that removal would somehow unsettle the children—"That is an inevitable consequence of removal." *Id.*, *quoting Walsh v. Walsh*, 221 F.3d 204, 220 n.14 (1st Cir. 2000).

217. *See id.* at 272.

218. *See id.* at 273.

Concerned about this assumption, the dissenting judge questioned why such little deference was given to the trial court's determination.[219] The dissent was further troubled by the majority's disregard for the fact that if the child's objection exception is "to have any meaning at all, it must be available for a child who is less than 16 years old."[220] The dissent warned of the "frightening precedent that the majority opinion in this case will set," obviously distressed by the majority's indifference to the fact-specific attention enjoyed by the trial court judge.[221]

V. THE UNITED KINGDOM APPROACH

A. *Overview*

The Child Abduction and Custody Act 1985 is the enabling legislation giving statutory effect to the Hague Convention in the U.K.[222] In part, the U.K. approach to the children's rights aspects of the Hague Convention is similar to that of the U.S., but only with respect to the grave risk of harm exception. The courts in the U.K. require the grave risk of harm be of some caliber beyond that caused by the inherent unpleasantries resulting from the abduction.[223] This reiterates the usual concern over not wanting to reward the abducting parent for his/her actions. However, with respect to the child's objection exception, the U.K. is said to provide the most "extensive analysis."[224] Unlike in the U.S., the determination of whether the child is old enough or mature enough to have his/her objections considered is not determined by a judge's interview (or assumptions for that matter) with the child.[225] Instead, a child welfare officer is appointed by the court to examine the child and then present the findings to the court.[226] This is by no means dispositive, though, since even if an objecting child is found to assert a valid

---

219. *See id.* (DeMoss, J., dissenting). In dissent, Judge DeMoss stated that the court should show deference "to factual findings and credibility decisions made by the district court" unless the court has clearly erred in making those decisions. *Id.*

220. *Id.* at 274.

221. *Id.* at 277.

222. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998). The Child Abduction and Custody Act states: "Subject to the provisions of this Part of this Act, the provisions of that Convention [meaning the Hague Convention] set out in Schedule 1 to this Act shall have the force of law in the United Kingdom." *Child Abduction and Custody Act 1985* (c 60), Part I, Section 1, (2) (1986).

223. *See Re S* (abduction: intolerable situation: Beth Din), 1 F.L.R. 454, (Fam. 2000). In addition to requiring proof by "clear and compelling evidence," the grave risk of harm must be of such severity "which is much in ore than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence." *Id.*

224. *See* Nanos, *supra* note 81, at 450.

225. *See id.* at 451.

226. *See id.*

objection and is old enough or mature enough to have that objection considered, the court retains discretion as to whether or not to order the child's return.[227]

Although, the resulting orders may not differ greatly from the U.S., the U.K. courts certainly afford greater attention to a child's views. Recall that the U.K. has ratified the UN Convention.[228] Thus, one reason for the U.K.'s extensive consideration of a child's views may arise from its duty to guarantee the child's right to participate in matters and proceedings directly affecting the child as enunciated in the UN Convention.[229]

B. Judicial Interpretations

This section of the note will examine several Hague Convention holdings of the U.K. courts[230] in order to compare the U.K. approach with that of the U.S. courts. The differences will become clear with respect to the child's objection exception where, as noted earlier, the U.K. provides perhaps the most detailed analysis.[231] In fact, the general rule used by the U.S. and other nations regarding the child's objection exception was actually espoused by the U.K. in *Re R*, which stated that the child's views had to go beyond the simple "wishes" of the child.[232] However, although this rule is still used by other nations, it has been overruled by the later U.K. decision of *Re S*[233], which is now considered the leading U.K. case involving the child's objection exception.[234]

---

227. *See id.*

228. *See* Rios-Kohn, *supra* note 100, at 140-41. Recall that the UN Convention has been ratified by every UN member nation except Somalia and the U.S. *See supra* note 121 and accompanying text.

229. *See UN Convention* , *supra* note 99, art. 12; *see also supra* text accompanying note 139 (discussing the significance of a child's right to participate according to the UN Convention).

230. Most of the U.K. cases discussed herein arise from either the Court of Appeal Civil Division (C.A.) or the High Court of Justice-Family Division (Fam.). For a discussion of how the U.K. courts are structured with respect to dealing with children, see Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239 (1992). The High Court of Justice has a rich history dating back to the Norman Conquest, and is divided into three divisions: Queen's Bench, Chancery, and the Family Division. *See id.* at 258. The High Court of Justice-Family Division "exercises jurisdiction over private law actions of matrimony, paternity, adoption and guardianship, and exercises appellate jurisdiction over adoption, child custody and child protection actions . . ." *Id.*

231. *See* Nanos, *supra* note 81, at 450.

232. *See Re R* (A Minor: Abduction) 1 F.L.R. 105 (Fam. 1992). The court held that the "word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute." *Id.*

233. *See Re HB* (Abduction: Children's Objections), 1 F.L.R. 392 (Fam. 1997), *citing Re S* (A minor)(Abduction: Custody Rights), Fam 242 (C.A. 1993).

234. *See Re HB* (Abduction: Children's Objections), 1 F.L.R. 392 (Fam. 1997). In *Re HB*, the court noted two particular points of significance in the holding in *Re S*:

> The main points in that decision are first that this part of Art[icle] 13 is quite

Similar to the approach taken in the U.S., the child's best interests are not paramount in a Hague Convention case because it is presumed that the child's best interests are best served by returning the child to his/her place of habitual residence.[235] U.K. courts do attempt to avoid the underlying custody issues involved in Hague Convention proceedings by framing the fundamental issues in which they are confronted with to focus on whether the abducting parent should be compelled to start at the point that he/she "should" have started in the first place, rather than deciding who is entitled to custody.[236] Thus, the purpose of the Hague Convention is to protect children from the harmful effects caused by their wrongful removal, not to protect the child's personal interests.[237] Accordingly, while the U.K. courts' adherence to the Hague Convention's purposes may closely resemble the principles articulated by the U.S. courts, the bottom-line remains that the U.K. analysis is more exhaustive than the U.S. approach.

1. Determining Grave Risk of Harm

In the U.K., the grave risk of harm determination is not equated with considering the welfare of the child—the judge is not deciding where the child should live.[238] Instead, the courts adopt an approach similar to the U.S. *Blondin* approach; that the paramount concern is limited to the extent courts can guarantee protection for the child until the courts of the other nation can determine the custody matters.[239] Again, the presumption is that all nations participating in the Hague Convention are capable of ensuring principles of fundamental fairness in determining a custody situation.[240] This jurisdictional

---

> separate from Art[icle] 13(b) and does not therefore depend on there being a grave risk of physical or psychological harm or the children being placed in an intolerable situation if their views are not respected; and, secondly, that the words are to be read literally without any additional gloss, such as the suggestion made in an earlier case of Re R [citation omitted], that an objection imports a strength of feeling going far beyond the usual ascertainment of the wishes of a child in a custody dispute.

Id.

235. *See Re M* (A minor)(child abduction), 1 F.L.R. 390 (C.A. 1994).

236. *See Re B* (children)(abduction: new evidence), 2 F.C.R. 531 (C.A. 2001).

237. *See K v. K* (child abduction), 3 F.C.R. 207 (Fam. 1998).

238. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995). In *Re: K* the mother abducted her two daughters from the U.S., upon which her husband then commenced Hague Convention proceedings. *See id.* The court noted that a claim under Article 13(b) was a high one. *See id.* The judge stated: "I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the [Hague] Convention for their future speedily to be decided in that jurisdiction." *Id.*

239. *See B v. B* (Abduction: Custody Rights), 1 F.L.R. 238 (1993). A petitioned court's concern "should be limited to giving the child the maximum possible protection until the courts of the other country... can resume their normal role in relation to the child." *Id.*

240. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995), *quoting P v. P* (Minors)(Child Abduction) 1 F.L.R. 155, 161 (1992) (the assumption is that Hague Convention nations are capable of providing "that both parties receive a fair hearing, and that

deference is strong, and the claimant's high burden requires proof greater than a mere disruption or inconvenience to the child or abducting parent.[241] Indeed, the abducting parent cannot generate the potential psychological harm by refusing to return to the requested nation if ordered.[242] In *K v. K*, the mother fled Greece with her two young children due to a domestic violence situation.[243] Rejecting the mother's Article 13(b) claim, the court made clear that it was not ordering a return to the abusive husband, but instead was ordering a return to Greece, which according to a faithful examination by the court, was the proper forum for determining custody of the minor children.[244]

Essentially the U.K. courts view the grave risk of harm exception in the same manner the *Freidrich* and *Blondin* courts did in the U.S.[245] The courts are primarily concerned with whether an order of return will expose the child to physical or psychological harm in the abducted-from nation, and place additional emphasis on the seriousness or immanency of such harm that an order of return would create.[246] Therefore, as is the case in the U.S, establishing the grave risk of harm exception in the U.K. remains an equally difficult task indeed.

2. *Considering a Child's Objection*

Considering a child's objection is the area where the U.S. and the U.K. approaches differ. Unlike the often unsupported presumptions made by judges in the U.S., the U.K. approach is much more involved. *Re R* (a case relied on by many other nations when applying this exception) held that the word "objects," as used in Article 13, suggested more than simply accounting for the child's wishes in relation to a custody dispute.[247] However, *Re S* subsequently

---

all issues of child welfare receive a skilled, thorough and humane evaluation." *Id.*

241. *See Re S* (abduction: intolerable situation: Beth Din), 1 F.L.R. 454, (Fam. 2000).

242. *See K v. K* (child abduction), 3 F.C.R. 207 (Fam. 1998). In *K v. K*, the court stated:

> Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return.

Id.

243. *See id.*

244. *See id.*

245. *See supra* note 170 and accompanying text. Recall that in addition to the "further analysis" approach generated by the *Blondin* court, the *Freidrich* court envisioned only two situations that could conceivably satisfy an Article 13(b) claim. *See id.*

246. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995). A petitioner will likely only satisfy an Article 13(b) defense if he/she can show that an order of return creates a serious risk "of exposing the children to physical injury or serious psychological harm" in the returned-to nation. *Id.* Furthermore, the drafters of the Hague Convention must have meant to cast a certain degree of severity or seriousness to the risk posed, which is reflected in Article 13(b) by use of the words "otherwise place the child in an intolerable situation." *K v. K* (child abduction), 3 F.C.R. 207 (Fam. 1998).

247. *See supra* note 232; *see* Nanos, *supra* note 81, at 450.

overruled this interpretation and held that the child's objection exception is completely separate from the grave risk of harm section of Article 13, and should be read literally.[248] To determine whether the child is old enough or mature enough, the U.K. employs the use of a court welfare officer.[249] The court welfare officer (as opposed to separate representation) is utilized for objectivity purposes.[250] It is believed that this officer can objectively assess the child's views and thus convey those views to the court for consideration.[251]

Although the U.K. adheres to the idea that the Hague Convention conveys no threshold age for application of the child's objection exception, the courts have suggested as a guidepost that the younger the child is the less likely it is that he/she will possess the requisite maturity which allows the court to take his/her objections into account.[252] The U.K. courts will not rely on blanket assumptions concerning the maturity level of a child, but instead will analyze the views and maturity levels of the children who claim this defense by using the independent court welfare officer. However, this is not dispositive. The objections of the child, even if mature enough and old enough to matter, must be balanced against the purpose of the Hague Convention.[253] In other words, finding a child old enough and mature enough to have his/her views considered merely "unlocks the door" for the court's ability to exercise its discretion.[254]

When applying the child's objection exception, U.K. courts adopt a two-step process. The first step is determining whether the child objects to being returned.[255] This will be determined by the court welfare officer and will usually be determined rather easily.[256] If the child does object, the second step is determining whether the child is of an age and maturity level for which it is appropriate to consider the child's views.[257] Again, the court welfare officer will report these findings to the court, and will look to such factors as whether

---

248. *See supra* note 233; *see* Nanos, *supra* note 81, at 450.

249. *See Re M* (A minor)(child abduction), 1 F.L.R. 390 (C.A. 1994).

250. *See id.*

251. *See id.* The benefit in using the court welfare officer is the belief that he/she "can perform the dual role of assessment and conveying the children's views to the court." *Id.*

252. *See The Ontario Court v. M and M* (Abduction: Children's Objections), 1 F.L.R. 475 (Fam. 1997), *quoting Re R* (Child Abduction: Acquiescence), 1 F.L.R. 716, 729 (1995) ("the younger the child is the less likely is it that it will have the maturity which makes it appropriate for the court to take its objections into account").

253. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995). The judge has to consider the facts of the case and then balance the child's objection "against the purpose of the Convention which itself imports the concept that it is in the interests of children for them to be promptly returned to their country of habitual residence for their future to be decided there." *Id.*

254. *See id.*

255. *See Re HB* (Abduction: Children's Objections), 1 F.L.R. 392 (Fam. 1997).

256. *See id.* (The objection is to be read literally, with "no additional gloss.").

257. *See id.*

the "intellectual and emotional development" of the child is appropriate for his/her age.[258]

If the child is old enough or mature enough to have his/her views considered, then the court must exercise its discretion in determining whether to still order the child's return.[259] Some factors the court will consider are: whether the child's views are unduly influenced by the abducting parent (i.e., are the child's views sincere/genuine?); and whether the child's objections are valid (i.e., are the reasons why the child does not want to return based on objecting to returning to the nation or to the non-abducting parent?).[260] Typically, if the reasons seem more in the nature of a custodial dispute (like objecting to being returned to the non-abducting parent), then the court is likely to side with the general assumptions of the Hague Convention and order the child's return.[261] Either way, the court must balance the child's objections against the interests and policies set forth by the Hague Convention.[262] Regardless of the result, the U.K. approach to the child's objection exception is more comprehensive than the approach taken by U.S. courts.

C. *Selected U.K. Case Law*

Two relatively recent U.K. cases highlight the trends discussed in Part V of this note. The first, *Re S*, is a progressive decision in the area of children's rights that went so far as to suggest children might actually be entitled to separate representation in certain Hague Convention cases.[263] The second, *Re M*, is a decision which shifted the traditional Hague Convention focus by acknowledging that the effect on, and interests of, the child are factors that must be considered by the court.[264]

Re S involved two children, ages fourteen and twelve, and two parents with a long history of "strife and litigation."[265] The mother was a British citizen, the father from New Zealand, and the couple was married in England.[266] The children were born in New Zealand, where they resided until the marriage began to break down.[267] Both children held tremendous amounts of hostility toward their father, but nonetheless, the New Zealand courts

---

258. *See id.* For example, it would be "difficult indeed to suggest that a 13-year-old of normal intelligence and maturity should not have his views taken into account." *Id.*

259. *See id.*

260. *See id.*

261. *See id.*

262. *See id.* (The child's objections must be balanced against the "whole policy of the [Hague] Convention.").

263. *See Re S* (Abduction: Children: Separate Representation), 1 F.L.R. 486 (Fam. 1997).

264. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998).

265. *Re S* (Abduction: Children: Separate Representation), 1 F.L.R. 486 (Fam. 1997).

266. *See id.*

267. *See id.*

refused to allow the mother to move back to England with the children.[268] The mother utilized some rather extravagant means and took the children to England.[269] The father then commenced Hague Convention proceedings seeking return of the children.[270] The court welfare officer reported that the children had strong objections to returning to New Zealand, and believed them to be old enough and mature enough to have their views considered.[271] The court noted that this case was somewhat unusual since if ordered to return to New Zealand, the children would likely return to a foster home situation due to the strained relationship with their father, while in England the mother had remarried and the children apparently had new step-siblings.[272] Because of this, the court became especially concerned with the interests of the children and noted the need "for the children to have a voice independent of their mother."[273] The court drew an analogy to domestic proceedings which would entitle the children to separate representation, and ordered that the children be afforded such representation and then joined as parties to the proceedings.[274] In this case, the court clearly found the child's objection exception applicable.[275] As a result, not only did the court exercise its discretion to refuse ordering the children's return to New Zealand, but the court also incorporated consideration of the children's best interests.[276] Although the court did not say so specifically, it appears the court incorporated principles of the UN Convention by guaranteeing that the children were active participants in the proceedings that would certainly affect their immediate futures.[277]

In *Re M,* the parents had two children, ages nine and eight, and were married and resided in Greece until their marriage fell apart.[278] This case actually represents the second time the mother wrongfully removed the children from Greece and had Hague Convention proceedings commenced against her.[279] The court first stated that in order to successfully use the child's

---

268. *See id.*

269. *See id.* The mother apparently obtained passports with false names for the children and had the children removed via Hong Kong en route to England. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *Id.*

274. *See id.* The judge noted that if these proceedings were brought under a conventional domestic custody dispute, "I have no doubt at all that these children would be separately represented." *Id.*

275. *See id.* The court found "not only that the children clearly object to being returned but that they are of an age and degree of maturity at which it is appropriate to take account of their views." *Id.*

276. *See id.*

277. *See UN Convention, supra* note 99, art. 12; *see also* Rios-Kohn, *supra* note 100, at 143 (the significance of Article 12 is its recognition of children as active participants in all matters which affect them).

278. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998).

279. *See id.*

objection exception, the defending party must first make a prima facie showing, at which point the court then must "consider in the exercise of its discretion whether to send the child back."[280] The court clearly accepted that the children were objecting to being returned and were mature enough to understand their situation.[281] Moreover, the court appeared concerned over the psychological harm that could result if the children were returned to Greece.[282] Given the children's deep attachments to their mother and their unquestionable objections to returning to Greece, the court concluded that a "return at this stage to Greece is of greater consequence than the importance of the court marking its disapproval of the behaviour of the mother by refusing to allow her to benefit from it."[283] Thus, the court balanced the goals of the Hague Convention against the needs of the children, and further acknowledged its strong disapproval toward the behavior of the mother.[284] However, the court noted that the reality of Hague Convention cases involves more than just the conduct of parents.[285] The fact that the drafters included provisions such as those in Article 13 indicates that sometimes the specific welfare of a child outweighs the need to preserve comity.[286]

VI. ANALYSIS & CONCLUSION

The distinguishing characteristic emerging between the U.S. and U.K. approaches to the children's rights aspects of the Hague Convention revolve around the consideration—or lack thereof—of the child's views in accordance with Article 13. Usually the Hague Convention focuses on jurisdictional issues and remains inept in the promotion of civil rights for children.[287] With respect to the grave risk of harm exception, both the U.S. and U.K. seem willing to show a tremendous amount of deference to the guarantees and safeguards afforded by the petitioning nation. Thus, the spirit of comity (which is undoubtedly necessary for the success of any international agreement) remains intact. However, each nation's approach to the child's objection exception highlights a growing-apart. The U.K. approach is more exhaustive and is consistent with the Hague Convention, the UN Convention, and U.K. law. The U.S. approach, however, is arguably inconsistent with the Hague Convention, U.S. law, and is certainly incompatible with the UN Convention.

---

280. *Id.*
281. *See id.*
282. *See id.*
283. *Id.*
284. *See id.*
285. *See id.*
286. *See id.* This court appeared rather unpleased with the Hague Convention's structure itself—referring to its "adherence to the summary return of children whose needs should be dealt with in another jurisdiction" as "Draconian." *Id.*
287. *See* Starr, *supra* note 11, at 832.

The U.S. approach to the child's objection exception is troubling in that the courts tend to pay little attention to it—offering little, if any, legal analysis to support decisions claiming to consider a child's objections. By not ratifying the UN Convention (or at least adopting certain key principles) children will be frequently left without a voice in the U.S. in matters pertaining to international child abductions. At a minimum, U.S. courts should consider showing some consistency by affording some attention to the impact these cases have on children; as it undoubtedly would if the matter were purely domestic. The U.K. approach is more progressive and is consistent with the children's rights premise. Although not dispositive, the U.K. courts are increasingly analyzing and considering the child's views in accordance with the child's degree of maturity and age—principles recognized by both the Hague Convention and the UN Convention.

The emerging differences between the approaches taken in the U.S. and the U.K. are not dependent upon whether the child is actually ordered to return despite his/her objections, but rather, involves the level of consideration given to the child's views. The U.K. approach is more exhaustive and finds children as young as nine years-old to be considered mature enough to have their views considered.[288] The U.S. appears unwilling to adopt a similar position, doing little to refute what some critics have dubbed the "return at all costs" mentality.[289] This approach does little to support the rights of children who, through no fault of their own, have become entangled in the jurisdictional nightmares often inherent in resolving international custody disputes.

By Brian S. Kenworthy[290]

---

288. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998) (finding a nine year-old and an eight year-old mature enough and old enough to have their objections considered by the court).

289. *See* Nelson, *supra* note 148, at 687-88.

290. J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; B.A., Political Science, 1996, Indiana University—Fort Wayne. I would like to thank my wife, Susan, and my family for their support and guidance. I would also like to thank my editors for their invaluable assistance during the editing process.