

# THE HAGUE CHILD ABDUCTION CONVENTION: DIMINISHING RETURNS AND LITTLE TO CELEBRATE FOR AMERICANS

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## I. INTRODUCTION

For Americans today, the Hague Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention) is too rarely a remedy in foreign courts and too often an instrument of terrible injustice in United States courts. Recent indications that there are serious problems with implementation of the Child Abduction Convention from an American standpoint include:

Three major congressional hearings on implementation of the Child Abduction Convention and the U.S. Government response to international child abduction;

A statutory requirement that the State Department submit annual reports to Congress on compliance with the Child Abduction Convention by other States Parties;

A June 2000 concurrent resolution of Congress urging full compliance with the Child Abduction Convention by States Parties and citing European civil law countries such as Austria, Germany, and Sweden as consistent violators of the Convention;

An investigation by the General Accounting Office (GAO) (the investigative arm of Congress) of the State and Justice Departments concerning the U.S. Government response to international child abduction;

A GAO investigation of parental child abductions to Germany, Sweden, and Austria; and

The substantial media coverage since early 1999 of problems for Americans in Hague and other child abduction cases.

While too infrequently enjoying the benefits of the Child Abduction Convention, Americans are its principal victims both at home and abroad. Domestically, Americans are victims of the Child Abduction Convention in both federal and state courts—courts intentionally kept ignorant by the U.S. Department of State regarding the dire consequences of sending children to most of the other States Parties (i.e., civil law countries) whose legal systems *cannot* provide enforceable access or visitation for American parents. That is the situation in civil law countries even *before* the local parent is inevitably granted de facto sole custody (even if it is called “joint custody” under new laws in countries that are consistent Hague violators, such as Germany and Sweden), let alone afterward. And, except in common law countries, Americans are victims of the Child Abduction Convention abroad because they too often forego other options and rely to their detriment on the usually false hope of gaining an enforceable (and enforced) Hague return order from legal and social welfare systems that are fundamentally incompatible with the principles and purpose of the Child Abduction Convention.

This Article will support these provocative statements, which contradict, or at least challenge, the “party line” on the Child Abduction Convention as a great success story. It will also identify some of the reasons that the Child Abduction Convention, while perhaps in theory a cause for celebration by its drafters and academic observers, has increasingly failed most left-behind American parents. In particular, as State practice under the Child Abduction Convention evolves, it is becoming apparent (and reasonable to assert) (i) that the Child Abduction Convention is not as much of a remedy for fathers as it should be (when civil law countries are involved), (ii) that the Child Abduction Convention does not really support joint custody or custody arrangements based on agreements (despite Child Abduction Convention language recognizing and legitimizing such agreements in Article 3), (iii) that the second of the Child Abduction Convention’s objectives stated in Article 1 (respect for the custody and visitation laws of other States Parties) has no practical meaning or effect, and (iv) that the access provisions in Article 21 are a nullity.

As the senior State Department official responsible for Hague cases acknowledged during her October 1999 testimony before Congress, “[t]he world has changed since the Convention was conceived 19 years ago when the majority of taking parents were fathers. Now, 70% of taking parents are mothers, and courts in some countries are reluctant to compel children’s return to their fathers in the United States.” That is an excessively diplomatic understatement in view of what confronts left-behind American parents (mostly fathers) in European civil law countries.

Finally, while it is always easy to complain without offering remedies, or at least to suggest only costly remedies, this Article attempts to identify relatively cost-free global and American remedies to address the unacceptable status quo under the Child Abduction Convention, which guarantees more successful abductions and wrongful retentions abroad of American children while at the same time being used as an instrument of injustice against American children and parents in U.S. courts.

## II. A TWO-FRONT WAR FOR AMERICAN PARENTS

American parents whose children have been abducted or wrongfully retained abroad must fight a two-front war. In fact, it may be difficult or impossible to find another situation where the Executive Branch of the U.S. Government has put its citizens in a worse position than that of abducted American children and their left-behind parents. Whether or not the Child Abduction Convention is applicable in a given case, most of these children never come home and never have enforceable visitation with their left-behind American parents. On the other hand, children abducted to or wrongfully retained in the United States are almost certain to be sent to foreign countries in Hague cases, even if they are brought or retained here because their parents know that fair treatment from the courts of civil law countries in regular custody cases is highly unlikely and that enforceable access and visitation is impossible.

The State and Justice Departments have done little to educate U.S. courts about the consequences of foreign custody jurisdiction over American children. For example, although the State Department website dealing with child abduction has “flyers” on many countries, there are none for Austria and Sweden despite the State Department itself reporting to Congress in April 1999 and October 2000 that both countries have demonstrated a pattern of noncompliance with the Child Abduction Convention. In short, the overwhelming majority of American children and left-behind parents involved in Hague cases at home or abroad ultimately have nothing to celebrate.

With the prominent exception of left-behind American parents engaged in Hague litigation in common law countries (such as the United Kingdom), Americans face a two-front war in both incoming and outgoing Hague cases. American parents opposing a Hague application in U.S. courts may not even get a hearing before their children are summarily handed over to foreign parents. But even with a hearing, American parents are in trouble in Hague cases, as indicated by the 90% return rate from the United States. Except for attorneys they may hire at their own expense, American parents are alone in dealing with either incoming or outgoing cases involving civil law countries.

In contrast, foreign parents seeking their children in the United States are supported by their governments, the U.S. Government, and the National Center for Missing and Exploited Children (NCMEC), which serves as a contractor for the U.S. Department of Justice by handling incoming cases. In addition, the U.S. implementing legislation for the Child Abduction Convention, the International Child Abduction Remedies Act (ICARA), often enables foreign parents to pursue Hague applications in federal courts, thus largely eliminating any possibility of the sort of local bias faced by American parents abroad. In fact, with an approximately 90% overall

return rate, both federal and state courts in the United States have given foreign parents and their governments little to complain about in recent years, especially since NCMEC assumed day-to-day responsibility for “incoming” cases. Even Sweden, one of the worst Hague violators from a U.S. standpoint, concedes it has no complaints about U.S. compliance with the Child Abduction Convention.

In outgoing Hague cases, the American parent is also essentially alone in dealing with civil law countries. The State Department has a virtual monopoly on information in such cases, but refuses to act as a vigorous advocate for left-behind American parents while also preventing NCMEC or anyone else from playing that role. For example, when one senior State Department official with Child Abduction Convention responsibilities was reminded by the author that she works for the American people, her immediate response was: “I don’t work for the American people; I work for the Secretary of State.” This is an indication of the Department’s inherent conflict of interest (i.e., a desire to maintain “good” bilateral foreign relations for their own sake that overrides assertive and effective advocacy on behalf of American citizens).

Although a lack of political will on the part of the State Department—not a lack of resources—is the problem, left-behind American parents in Hague and other abduction cases were rightly outraged at the millions of dollars and thousands of hours of government time spent on the Elián González case. In comparison, Congress has had to enact a statute directing the State Department to reduce the current caseload of abduction cases per caseworker from well over a hundred to no more than seventy-five. Meanwhile, the Executive Branch is potentially willing to use its resources to extradite American parents who rescue their abducted/retained children to countries that will neither extradite their nationals nor consistently return children under the Hague Child Abduction Convention. The Executive Branch is also willing to negotiate bilateral child support enforcement agreements that lack the obvious safeguards necessary to exclude cases where U.S. civil or criminal law has been violated, the American parent has no enforceable visitation, U.S. custody orders have been ignored, or the Child Abduction Convention has been violated.

When the left-behind American parent seeking to utilize the Child Abduction Convention is confronted by the legal and social welfare systems of most States Parties, the situation worsens.

### III. THE SWEDISH GOVERNMENT CHILD ABDUCTION/RETENTION SYSTEM

Left-behind American parents attempting to use the Child Abduction Convention in European civil law countries must overcome legal and social welfare systems in most cases that facilitate, finance, otherwise support, and ultimately reward international child abduction. Such systems cannot consistently be compartmentalized into a Convention process and a regular child custody process. There is inevitable spillover, with disastrous effects for most Hague applicants (i.e., no possibility of a voluntary return), especially for those facing a determined local mother in European civil law countries. And, the case of Lady Catherine Meyer in Germany shows that national bias operates when gender bias does not. These are *governmental* systems that demonstrate that these abduction and retention cases are not merely “private custody disputes.” Moreover, the “independent judiciary” defense is not available to these countries, since the judges have not received proper Hague training, and adequate implementing legislation has not been passed.

Although the Swedish Government probably sponsors the world’s most sophisticated and well-financed system that supports international abduction/retention, as can readily be seen from the following partial list of the “pillars” of the Swedish system, only one or two such elements are needed in other countries to ensure a successful abduction/retention in a given case:

Extreme national and gender bias throughout the legal and social welfare system—specifically, bias against non-Swedish fathers living outside Sweden;

No comity or respect for non-Swedish custody/visitation laws and court orders despite the plain language of Article 1 of the Child Abduction Convention;

No effective means of enforcing the return of a child, or even access or visitation while a Swedish return order is pending, or under a Swedish custody order if return under the Convention is denied (i.e., nothing comparable to contempt of court, which means that Swedish judges cannot control the conduct of Swedish parents or protect the parental rights of non-Swedish parents);

Payment of all legal fees for Swedish abductors in all proceedings in Sweden (in both Hague and regular custody cases) and in other countries (including challenges to U.S. custody orders by Swedish abductors in state appellate courts);

Refusal to extradite Swedish citizens to face criminal charges for parental child abduction (or any other offense);

Aggressive use by police and prosecutors of a Swedish criminal law that targets non-Swedish parents attempting to exercise their sole or joint custody rights even under Swedish law;

Payment of “child support” and maintenance to Swedish abductors/retainers even while Hague proceedings are pending;

“Address and Identity Protection” (i.e., disappearance with government assistance) supplied to Swedish abductors/retainers on request;

Government child psychologists/psychiatrists available to testify on Article 13(b) “grave risk” matters for the Swedish abductor/retainer; and

A primitive legal system without due process of law (i.e., no rules of evidence, no right to confront witnesses, usually no sworn testimony, no authentication of documents, and lay “judges” outnumbering real judges three to one).

#### IV. THE CHILD ABDUCTION CONVENTION AS A “SUCCESS”

Many commentators on the Child Abduction Convention, including speakers at the Symposium, have described the Child Abduction Convention as a great success story. And from a “world government” or “nationality blind” point of view, it may be. The United States 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. Thus, even with a very low return rate of children sought by left-behind American parents, an overall majority of children involved in U.S. Hague cases (combined incoming and outgoing) are sent back to their place of habitual residence. And is that not a good thing? As discussed in this Article, the answer is a resounding “No!” for the overwhelming majority of American children and parents involved in Hague cases.

No one should question the objectives, purposes, and basic principles of the Child Abduction Convention (although critics in Scandinavia reportedly now do), the very real need it is intended to meet, or the good faith of the drafters. One is entitled, however, to question the good faith of the majority of States Parties (i.e., civil law countries). Many of them knew at the time of ratification that they could not and would not fully comply with the Child Abduction Convention because they have no effective means of enforcing their own civil court orders. They knew that the full weight of their government and social welfare systems (including legal aid, child maintenance, law enforcement authorities, and government child psychologists) would confront Hague applicants. They also knew that they would not change their culture, domestic legislation, or regular child custody systems that normally doom foreign parents, particularly fathers, to the complete loss of their children.

Elimination of the Child Abduction Convention is not the issue, since it should be preserved even if it gains the return of only one child each year who would not otherwise come home. Consistent and predictable compliance with the Child Abduction Convention, however, *is* the issue. For Americans, the State Department has allowed the Child Abduction Convention to become a one-way street, enabling our treaty “partners” to benefit from the Child Abduction Convention through the return of children from the United States—ironically at a virtually 100% rate to some of the worst violators of the Child Abduction Convention publicly identified by the U.S. Government, such as Austria and Sweden. Many of these children should arguably not be returned to civil law countries on Article 13(b) (grave risk) grounds because there will be no enforceable access or visitation for the American parents. Due to the absence of anything comparable to contempt of court from these civil law systems, the theoretical solution of U.S. and foreign “mirror” custody orders governing access and visitation is actually a legal situation where the orders are fully enforceable against the American parent and completely unenforceable against the foreign parent. In these cases, the child will thus completely lose the American parent, unless the local parent decides otherwise. That is far more of a “grave risk” than most of those cited by foreign courts to deny returns to the United States. At the same time, civil law countries fail to return requested children to the United States in most cases, although contempt of court is available to enforce access and visitation for non-U.S. parents.

It would be helpful to Americans if their own government, and others interested in promoting adherence to the Child Abduction Convention, would recognize the reality that the problem goes well beyond the fact that foreign governments are violating their treaty obligations to the United States with impunity, refusing to return American children under the Child Abduction Convention, stealing custody jurisdiction from U.S. courts, and awarding de facto or de jure sole custody to their citizens who have committed federal and state felonies. Even at that point, one might reasonably assume, as most American parents do (and as I did), that the worst case scenario is being a non-custodial parent with only four to six weeks of visitation in the United States each year.

Unfortunately, except in a few common law countries with the means and the will to enforce visitation orders (such as the United Kingdom), refusal of a U.S. return application by another State Party, followed by its exercise of regular custody jurisdiction, means the total loss of the children concerned. At that point, American parents have a clear choice: abandon their children until they are older or conduct a rescue operation. But, in fact, it is probably already too late for the latter option in most cases, both from a practical standpoint (civil law countries typically have outrageous delays that assist the abducting parent in “resettling” the child and alienating the child from the left-behind parent) and from a legal standpoint (the United States will extradite its citizens for parental child abduction to countries that will not extradite their citizens to the U.S. and will not consistently return children to the U.S. under the Child Abduction Convention).

## V. A CASE STUDY

In the case of my daughter Amanda, who has been wrongfully retained in Sweden since early 1995 by Swedish Foreign Ministry employee Anne Franzen, the Government of Sweden engaged in multiple and systemic violations of the Child Abduction Convention and also of the applicable human rights treaties (the U.N. Convention on the Rights of the Child and the European Convention on Human Rights ) as discussed below. In the words of Assistant Secretary of State Mary Ryan, the senior State Department official responsible for Child Abduction Convention cases, when testifying before the House International Relations Committee in October 1999: “The Swedish judicial system has allowed Amanda’s mother unilaterally to violate a mutually agreed-to custody order, after Mr. Johnson allowed Amanda to travel to Sweden honoring the agreement. He put his faith in the Hague [Child Abduction] Convention to protect his child, and his faith has been violated.”

Amanda’s case has the dubious distinction of involving separate and distinct Hague violations by two dif-

ferent Swedish courts in Hague litigation that made a mockery of the Child Abduction Convention's six-week timeframe, since it involved eight proceedings in six courts over a seventeen-month period. Amanda's case was the principal reason that Sweden was cited for a "demonstrated pattern of noncompliance" with the Convention in the State Department's 1999 report to Congress on the Child Abduction Convention (along with Austria, Honduras, Mauritius, and Mexico).

With regard to the assertion that the Child Abduction Convention has become an instrument of injustice for Americans at home and abroad, another commentator cited Amanda's case and declared:

In *Johnson v. Johnson*, a Swedish court, on appeal, used the language in the Hague Abduction Convention to completely subvert the most thorough, clear, and unequivocal agreement incorporated into a divorce and subsequent enforcement order between the parents (who were both diplomats). The agreement stipulated that any and all custody and visitation disputes were to be adjudicated in Virginia. Sweden applied the Convention to justify its decision to ignore the U.S. orders and shift habitual residence, and ultimately jurisdiction. The court used a combination of an Article 13(b) "psychological harm" argument that the child should not be separated from the mother who retained her in contempt of a Virginia order, as well as a rationale that the child's time spent in Sweden, under the mutually agreed American shared parenting order, constituted a change in the "habitual residence" of the child. Such decisions have a "chilling effect" on parents who try to avoid litigation and act in the best interests of the child by assuming that the international rule of law will support their own mutual agreements. Such successfully argued decisions as *Johnson* also encourage unstable and vindictive parents to flout their own legal agreements.

Official commentaries on Sweden's conduct were no less harsh. Prior to the Swedish Supreme Administrative Court decision of May 1996, the U.S. Government submitted a Statement of Interest (in the nature of an amicus brief). As confirmed by one of the judges, this detailed brief was disregarded by the Swedish court, despite its assertion that the case "raises issues relevant to the integrity and future success" of the Child Abduction Convention.

After the decision, the U.S. Government transmitted a lengthy diplomatic protest to the Swedish Government on June 20, 1996 that reiterated many of the points in the Statement of Interest and included the following unusually blunt statements:

"The United States finds this decision inconsistent with the plain language of the Hague Convention as well as the overall object and purpose of the Convention."

The decision "disregards Sweden's obligations under Articles 1, 3, and 16 of the Hague Convention."

The decision's "reasoning turns the Convention on its head by rewarding the very type of conduct that it is designed to deter."

The decision "not only derogates from Sweden's obligations under Articles 1, 3, and 16 of the Hague Convention, but also threatens the greater objectives of the Convention."

The decision "will also tend to discourage voluntary settlement between parents of all Hague Convention Contracting States."

"The decision can be expected to have an immediate, negative effect on transnational custody disputes among nationals of Convention States—a result that is manifestly and significantly contrary to the Hague Convention and to the best interests of the affected children."

Not satisfied with just violating the Child Abduction Convention, Sweden has tried to put a legal gloss on its wrongful conduct by challenging American custody orders in costly, bad faith appellate litigation in the United States. This has occurred in the courts of Virginia (*Johnson* case), Utah (*Larson* case), and California (*O'Donohue* case). Sweden has no intention of respecting a result adverse to the Swedish abductor in

such litigation, but hopes to exhaust the American parent's financial resources and to use U.S. law, especially the Uniform Child Custody Jurisdiction Act (UCCJA), against American parents.

The UCCJA argument is an effort to persuade the U.S. courts to defer to Swedish jurisdiction because its legal system supposedly meets UCCJA standards. Fortunately, in a unanimous decision written by the Chief Judge of the Court of Appeals of Virginia, this and all other Swedish arguments were rejected in Amanda's case. The case has become somewhat of a landmark decision in the field. A further appeal was dismissed by the Supreme Court of Virginia. Julia Larson's father also prevailed in Swedish-financed litigation that went to the Utah Court of Appeals<sup>1</sup>, but Sweden ultimately achieved its objectives in the federal courts in the *Larson* case (with regard to the issue of jurisdiction over the case under the Child Abduction Convention) and in the California courts in the *Benson* and *O'Donohue* cases because of the State Department's failure to educate U.S. courts on the nature and consequences of foreign custody jurisdiction (especially by civil law countries) over American children. For example, in the 10th Circuit case concerning Hague jurisdiction in the *Larson* case, the two misguided judges who formed the majority in deferring to Swedish jurisdiction almost certainly would have been brought into agreement with their correctly dissenting colleague by only a very short U.S. Government amicus brief or statement of interest. Such a submission should simply have explained that Mr. Larson did precisely what the U.S. Government advises left-behind parents to do when he pursued his Child Abduction Convention remedies in Sweden after it became obvious that he had no effective remedy in U.S. courts because Sweden would ignore U.S. court orders. In Virginia, the author prevailed in litigation against the Swedish Government, but only at personal expense of more than \$20,000 for the appellate litigation alone. To add insult to injury from the refusal of the State and Justice Departments to assist left-behind American parents, the State and Justice Departments *do* file amicus briefs and otherwise assist foreign parents at U.S. taxpayer expense in Hague-related litigation in U.S. Courts.

While "shuttle agreements" and court orders of the kind in Amanda's case were criticized by Sweden and a few other countries at the 1997 review conference on the Convention, as well as by some academics and other individuals who hope to "save" the Convention by interpreting it as narrowly as possible (thus defeating its principal goals), Sweden violated the Child Abduction Convention in the case in numerous ways that are beyond question, starting with the objectives of the Child Abduction Convention set forth in Article 1.

#### VI. FEW HAPPY RETURNS TO CELEBRATE

Amanda's case is not an isolated example. In the most recent statistics in its April 2000 report, the General Accounting Office (GAO) reported only a 24% combined rate of return or some form of visitation abroad in all U.S. abduction cases. Since visitation abroad is a more likely result than an actual return to the United States, this statistic means that the return rate is presumably well below 20%. The State Department has previously attempted to embellish the return rate by including "court-ordered returns" (whether or not they are ultimately enforced) and voluntary returns (which occur even from the most difficult non-Hague countries and are largely irrelevant).

The return rate in Hague cases may be marginally higher than in non-Hague cases, but there is no evidence to suggest it is substantially higher. For example, even in a letter by Assistant Secretary of State Mary Ryan presenting the most favorable picture possible, in response to an article in *Insight Magazine* that was highly critical of the State Department and Ryan's performance, Ryan claimed only a 52% combined rate for returns, visitation abroad, or consular access abroad. Hence, even with these self-serving statistics, actual returns obviously occur in only a small minority of the cases. This is an extremely unsatisfactory situation, in light of the fact that the only statistic that matters is actual returns to the United States. Visitation abroad is unenforceable except in a few common law countries, and consular access does not involve the left-behind parent.

In any event, no one will ever be able to form an accurate and complete statistical picture of returns and visitation rights for the left-behind parents until the State Department relinquishes the lead responsibility and transfers the case files for outgoing cases to an organization, such as NCMC or another government agency with a mandate to play an assertive advocacy role for American children and their left-behind parents, without first considering “the big picture” and foreign policy concerns (i.e., the overall bilateral relationship with the country in question).

#### VII. THE U.S. GOVERNMENT APPROACH TO THE CHILD ABDUCTION CONVENTION

As indicated by the recent developments listed above, the status quo already described regarding “implementation” of the Child Abduction Convention is unacceptable to Congress, the media, and the public. But that is the status quo to which the State Department has acquiesced and which is now very difficult to change. A major reason for this difficulty is that our European civil law treaty “partners” are very pleased with the status quo. Their parents, parliaments, and media are satisfied with the current situation. Austria, Germany, Sweden, and other consistent violators of the Child Abduction Convention are doing a superb job for their citizens. They will never change their current practices unless given concrete incentives to do so. And, regrettably, if foreign governments are content, then all too many officials at the State Department are also satisfied.

The most common problematic outgoing Hague cases facing the United States are abductions by European (and sometimes American) mothers to Hague Parties with civil law systems. These countries have conclusively demonstrated that they will rarely treat an American father better in Hague litigation than they will treat their own fathers in regular custody litigation. There are exceptions, but the low overall return rate indicates that these exceptions are rare. Although the Hague process and the regular custody system are sometimes sufficiently compartmentalized to produce a return order at the trial level, enforcing such orders and prevailing in the seemingly endless appellate process are another matter. In Sweden, as noted above, the leading child custody decision of the regular supreme court (as opposed to the supreme administrative court that handles Hague cases) declares that “foreign custody orders have no validity in Sweden.” This decision is used against non-Swedish applicants in Hague appellate cases. Such an absolute rejection of foreign custody law and orders (despite Article 1 of the Child Abduction Convention) impedes Hague implementation. And there have been repeated difficulties in Sweden and elsewhere with enforcement of Hague return orders.

But the emphasis in the Executive Branch of the U.S. Government, and in U.S. academic and legal circles, has been almost exclusively on ensuring U.S. compliance with the Child Abduction Convention. Foreign government compliance (or non compliance) and the growing disparity in return rates from and to the United States were largely ignored until 1998, when Congress and the media began to respond to the outcry from American parents. Specifically, on October 1, 1998, the Senate Foreign Relations Committee held the first of three major congressional hearings on the subject, with Senators Helms and Biden taking a very bipartisan approach.

The mutuality of interests that clearly existed when the Child Abduction Convention was first proposed and that persisted through the drafting, entry into force, and early implementation phases of the Child Abduction Convention’s history has remained strong among the principal common law States Parties (Australia, Canada, U.K., U.S.). This is evidenced by the very high rates of return from countries such as the United States and the United Kingdom, even with a significant decline in reciprocity from civil law States Parties in recent years.

For most international treaties, the mutuality of interest and commitment to the objectives and purposes of the treaty that resulted in its drafting and entry into force in the first place means that each State Party can simply concentrate on its own implementation measures and do whatever is necessary to ensure a good compliance record in order to avoid complaints from other States Parties. Each Party can usually rely on each of the other Parties to do the same. Ultimately, in such situations, the overall treaty compliance record is good, and problems are narrow and infrequent enough to be addressed relatively quickly.

For Americans dealing with civil law countries, however, this model no longer applies to the Child Abduction Convention. The U.S. State Department has done everything possible to maintain a very high



return rate of children from the United States. This has included providing an information package about the Child Abduction Convention to each U.S. court (federal or state) handling a Hague case. Among other things, this package (and follow-up measures by NCMEC) pressures U.S. courts about the Child Abduction Convention's six-week timeframe for return, but does not include information about the consequences of returning children to all but a few common law countries (i.e., no enforceable access or visitation for the American parent in the civil law countries that comprise virtually the entire list of Parties to the Child Abduction Convention).

In short, the provisions and underlying principles of the Child Abduction Convention are fundamentally incompatible with the legal and social welfare systems of most States Parties. The drafters may have believed in good faith (but naively) that the Parties would change their cultures and domestic legislation. However, most States Parties assumed they would not have to, since the majority of abductions/retentions at the time of drafting were by fathers. Now that the overwhelming majority of abductions are by mothers, the situation has changed, and cultural and legislative change is necessary.

In view of the governmental support systems for international child abduction/retention facing left-behind parents in most civil law countries, it is absurd to think that the Child Abduction Convention can be implemented without major problems in countries such as Austria, Germany, and Sweden, where the underlying legal and social welfare systems (let alone political and public opinion) are fundamentally hostile to everything the Child Abduction Convention represents, starting with its objectives set forth in Article 1.

For example, Sweden still applies its 1901 *hemvist* law and tries to mold "habitual residence" within the meaning of the Child Abduction Convention to this ancient law, rather than vice versa. In Sweden, and in other such countries, the Child Abduction Convention is an overlay on a domestic system that has not changed and does not wish to change, especially since their citizens benefit from the Convention and they do not have to reciprocate. In a series of May 2000 meetings in Washington, D.C., requested by the Swedish Government to reduce U.S. criticism of Sweden, the Head of the Swedish Central Authority acknowledged that Sweden has no complaints about U.S. performance under the Child Abduction Convention while maintaining that there are no problems with Sweden's conduct and no plans for remedial actions. Unfortunately for his credibility, his own written reports on Hague return applications rejected by Sweden showed on their face a pattern of abuse of Article 13(b) and other problems with Swedish compliance. Moreover, three days after he told congressional staff members that "[i]t is impossible to hide a child in Sweden" in response to complaints about Sweden's "inability" over several years to find certain abducted American children, and two days after a unanimous vote by the U.S. House of Representatives citing Sweden as a consistent violator of the Child Abduction Convention, one of the children missing for years was miraculously "found" by Swedish authorities and returned to the American father. No one, not even the State Department was fooled, but the Department later attempted to use this case to justify upgrading Sweden in the 2000 Child Abduction Convention compliance report to Congress.

In attempting to make progress against international child abduction/retention, it is a fatal error to assume that the Child Abduction Convention exists in a near vacuum. A comprehensive approach has to be taken to a comprehensive problem. To do otherwise allows the continued abuse of the Child Abduction Convention by both abductors/retainers and the governments that support them directly or indirectly. For example, a country like Sweden can maintain its legal system with no enforceability of civil court orders and extreme national and/or gender bias, structure its social welfare system to support its abductors/retainers financially (through legal aid and maintenance payments), and to provide government child psychologists or social workers to testify against the return of children, and allow its law enforcement system to target non-Swedish parents who attempt to exercise their custody rights even under Swedish law.

While any product of human endeavor can be improved, the problems with the Child Abduction Convention are not the fault of the drafters and the text they formulated. Rather, they are the fault of certain States Parties who refuse to carry out their treaty obligations, whose point of departure in each case is to determine how to avoid taking a child away from one of their citizens, and who show bad faith by making the narrowest

possible textual interpretations (except with regard to the “grave risk” basis for refusing returns in Article 13(b) ) while knowing full well the consequences for the child and foreign parent under the local child custody system.

These countries, such as Austria, Germany, and Sweden, have made the Child Abduction Convention an instrument for ensuring the success of their abductors through endless delays and appeals financed by government legal aid, through alienation of the child by denial of enforceable access even while return orders are pending from their own courts, and through giving their abductors de facto all the benefits of sole custody (including child support and police protection). Time is always on the side of the child abductor. Governments such as the United States have an obligation to provide their left-behind parents with sufficient information to make an informed decision about whether to pursue a Hague application. That information is needed before a parent’s life savings are gone, with nothing to show in return except foreign court orders that attempt to put a legal gloss on kidnapping, and while there is still time to pursue other options (including the very personal decision of self-help).

#### VIII. CONCURRENT RESOLUTION OF THE U.S. CONGRESS URGING COMPLIANCE WITH THE CHILD ABDUCTION CONVENTION

As a result of extreme frustration with the low rate of return to the United States under the Child Abduction Convention, the overall conduct of many States Parties, and the poor performance of the State Department in responding to international child abduction, Congress formulated a concurrent resolution that was adopted by the House of Representatives on May 23, 2000, by a unanimous vote. On June 23, 2000, the United States Senate joined the House in unanimously adopting the resolution. Just as no other State Party has issued a compliance report, it is unlikely that any other national legislature has adopted anything comparable to this resolution.

Among other things, Congress unanimously:

Noted that the situation has worsened since the 1993 adoption of the International Parental Kidnapping Crimes Act when Congress estimated there were 10,000 abducted/retained American children abroad;

Described abuse of Article 13 by Germany and others;

Criticized States that fail to order or enforce normal visitation for parents of abducted/retained children not returned under the Convention;

Urged all Parties, “particularly European civil law countries that consistently violate the Hague Convention such as Austria, Germany, and Sweden, to comply with both the letter and spirit of their international legal obligations under the Convention;”

Urged all Parties “to ensure their compliance with the Hague Convention by enacting effective implementing legislation and educating their judicial and law enforcement authorities;”

Urged the Secretary of State to disseminate the annual Hague compliance report “to all federal and state courts;”

Urged all Parties to educate their central authorities and law enforcement authorities regarding the Child Abduction Convention; and

Urged all Parties to “honor their commitments” on return and access.

#### IX. CONSEQUENCES OF FOREIGN CUSTODY JURISDICTION

As mentioned repeatedly, the consequences of not gaining the return of a child from most Parties to the Convention (i.e., civil law countries that cannot enforce visitation for the foreign parent) are so severe that those who care about the Child Abduction Convention need to press relentlessly at every opportunity (in Hague review conferences, bilateral consultations, regional meetings, and so on) for consistent and uniform compliance with the Child Abduction Convention. If they fail to do so, they risk a substantial backlash and

perhaps the Child Abduction Convention's collapse when the courts, legislatures, media, and people of a country such as the United States fully realize the extent to which their citizens are being victimized by the Child Abduction Convention. Today, however, thanks to the State Department's failure (or rather refusal) to inform U.S. courts, most American judges are woefully ignorant of the realities of foreign custody jurisdiction over American children, which may include some or all of the "pillars" of the Swedish Government's system of child abduction/retention listed above.

#### X. HAGUE COMPLIANCE REPORT

Massive publicity and the threat (or reality) of practical consequences are certainly the only hope for remedial actions and for improved Hague compliance by the many States Parties that have grown accustomed to enjoying the benefits of the Child Abduction Convention without having to reciprocate (at least in their treaty relations with the United States).

These countries need to be pressured either to engage in sweeping reform of their legal and social welfare systems *or* to withdraw as Parties to the Child Abduction Convention and the Convention on the Rights of the Child (which has numerous provisions that are violated by the conduct of European and other civil law countries in international child abduction/retention cases). In all too many cases, American citizens fatally rely on the mere fact that a country is a Party to the Child Abduction Convention and presumed to comply with it. The State Department has an obligation to set the record straight at home and abroad, just as it does with country-specific travel advisories covering crime, disease, and terrorist threats. The probable permanent loss of children virtually guaranteed by the legal systems of most Hague countries is just as serious as matters covered in the current advisory system.

Recognizing that the State Department will not voluntarily inform Congress, U.S. judges, family law attorneys, law enforcement authorities, and the public about the current unacceptable state of affairs for many Americans under the Child Abduction Convention, Congress has enacted an annual reporting requirement that represents a breakthrough in this field, just as the annual country reports on human rights did more than two decades ago. As was the case then with reporting on human rights abuses in general, no other government or organization has produced a country-by-country report on performance under the Child Abduction Convention. The U.S. Congress has again created a potentially unique and vitally important source of information available worldwide (on the State Department website) to parents, courts, governments, and attorneys that may actually prevent or help remedy international child abductions. First, however, the State Department must comply with the law and annually supply an accurate and complete report. Regrettably, the first two reports utterly fail to meet those standards.

In April 1999, the State Department issued under congressional mandate the 1999 Hague Compliance Report (1999 Report) that violated nearly every paragraph of the law other than correctly listing Austria and Sweden as consistent violators of the Child Abduction Convention. In November 1999, Congress harshly criticized the report for failing to comply with the intent of Congress and imposed new reporting requirements for the 2000 Hague Compliance Report (2000 Report). The 2000 Report was issued by the State Department in early October 2000 and, as discussed below, blatantly violated five of the seven paragraphs of the amended law.

Section 202 of H.R. 3194, the Omnibus Appropriations Act of 2000, extends and supplements the existing reporting requirement on strengthening implementation of the Child Abduction Convention. The Conference Committee Report declared that the State Department's April 1999 Report on the Child Abduction Convention:

[F]ailed to provide information consistent [F] with the intent of Congress to have a full accounting of cases of violations of, and a listing of countries that are non-compliant with, the Convention. Specifically, the report's finding that there are only 58 cases unresolved after 18 months, which fails to mention the country involved, renders the report almost useless. While stipulating that this listing of unresolved cases does not include those cases considered closed by the U.S. Government, the report fails to include the criteria by which the decision to close a case is made.

This was an especially foolish and bad faith attempt by the State Department to mislead Congress in the 1999 Report, since Congress itself estimated there to be 10,000 abducted American children abroad when it passed the seldom-used 1993 International Parental Kidnapping Crimes Act. Congress knows that even the State Department admits to 500 to 1000 new cases annually, and that NCMEC estimates more than 15,000 per year. These numbers include both Hague and non-Hague cases, but nevertheless indicate the extent of the Department's fraudulent reporting to Congress with a report of only fifty-eight "unresolved" cases in the 1999 Report and, as if to taunt Congress, the even lower figure of thirty in the 2000 Report.

The Conference Report for the amended law also made clear that the new reporting requirement "expands the scope of the report to elicit information that will adequately inform parents and judges." In particular: The new information that Congress is requesting is intended to highlight the probability that an abducted, or wrongfully retained, child can be reasonably expected to be returned from a country that is a party to the Hague Convention based on its past record of compliance, and whether access to a child, either through the orders of that country's courts, or through U.S. court orders, has been enforced by the government concerned in the past.

Before submission of the 2000 Report to Congress, the Chairman of the House Committee on International Relations, Congressman Benjamin A. Gilman of New York, wrote to Secretary of State Madeleine Albright on September 13, 2000, to remind her that the 1999 Report "engendered a high level of criticism because of shortcomings in meeting the intent of Congress in mandating this report" and that the amended legislation on Hague compliance "emphasized the aspects that are of most importance to the Congress, and to the American people, in addressing the many concerns we have heard on this subject from our citizens."

In like manner, the founder and Chair of the House Caucus on Missing and Exploited Children (Congressman Nick Lampson of Texas) wrote to Secretary Albright on September 15, 2000, to make clear that "Congress takes this reporting requirement quite seriously" and to express concern that:

I have received word that the Department of State is considering submission of a 2000 report to Congress that I believe could be potentially more inaccurate and more incomplete with the statutory reporting requirements than the State Department's 1999 Report. Such a report would be unacceptable to Congress.

Congressman Lampson went on to tell the Secretary of State that:

I want to avoid any misunderstanding with the Department of State that might result in a deficient report and that would represent a step backward from the substantial efforts by Congress to improve compliance with the Hague Convention for the sake of American children and their parents, including major hearings by the Senate Foreign Relations (SFRC) and House International Relations Committees (HIRC), a unanimous Joint Resolution, statutory requirements to reform the Office of Children's Issues, the work of the Congressional Missing and Exploited Children's Caucus and individual senators and representatives, and a General Accounting Office investigation (showing very low return rates to the U.S. of abducted or retained American children).

With regard to the Hague compliance report in particular, Lampson declared to Secretary Albright that: I sincerely regret the two-year struggle with the State Department over this reporting requirement. Congressional efforts in 1999 to clarify, broaden, and extend the reporting requirements were made substantially more difficult by State Department opposition. Nevertheless, the legislation was substantially amended in ways that should eliminate the Department's violations of many paragraphs of the reporting requirement last year.

As will be evident to anyone even minimally familiar with the subject matter who examines the 2000 Report, it is painfully obvious that the Secretary of State (to whom the two letters were hand-delivered) and her subordinates ignored these congressional leaders.

Paragraph 1 of the law again required the State Department to inform Congress of the number of Hague applications for the return of children submitted by applicants in the United States that remain "unresolved"

more than eighteen months after the date of filing.

The State Department violated this provision in the 1999 Report by including only cases in which the foreign country had not yet definitively rejected a U.S. application for return, thereby failing to inform Congress of many of the worst and most longstanding violations of the Child Abduction Convention; that is, precisely the cases in which Congress is most interested. In taking this approach, the State Department failed to take into account the American children it was abandoning and the fact that the underlying conduct constitutes federal and state felonies. Chairman Gilman addressed this point as follows in his letter to the Secretary of State:

The manner in which the Department determined the number of “unresolved” cases in last year’s report elicited a great deal of criticism. The Congress and the American people need to know the number of American children who are either returned to the United States under the Hague Convention (or through other means by the authorities of a Hague signatory), or to whom access for the left-behind parent is granted and *enforced*. The Congress clearly did not intend that cases in which the Hague process has been exhausted, but the child(ren) *not* returned to the U.S., and/or to whom the left-behind parent has been *unable* to gain access on a regular and enforceable basis, would be classified by the Department as being resolved. This is particularly true for cases in which a U.S. court has determined at the outset that an abduction or retention is wrongful, under the Hague Convention, or has awarded custody to the left-behind parent, or otherwise maintained U.S. jurisdiction over the case, or has made the determination that the abducted or wrongfully retained child is a U.S. citizen or resident. Cases where there is a federal or state arrest warrant for the abducting or retaining parent must also clearly be considered “unresolved.”

Congressman Lampson echoed this point in his letter to the Secretary:

I sincerely hope that such cases appear in the 2000 report, since it is not acceptable for the State Department merely to defer to foreign courts and declare a case resolved or closed as soon as a foreign country gives a final rejection of an application for return of an American child.

As noted above, the State Department disregarded these congressional concerns, to say the least, in its 2000 Report. As Congressman Gilman stated in his October 11, 2000, press release that was highly critical of the report, “it is disappointing that we still have a method of accounting for cases by the State Department as being resolved, and therefore ‘closed’ which presents an inaccurate picture of the level of compliance by all signatories of the Hague Convention.”

Under the State Department’s absurd definition of “unresolved” for the 1999 and 2000 Reports (supposedly only fifty-eight and thirty cases, respectively), the State Department did not inform Congress, pursuant to Paragraph 1 of the law, of any case where there is a final rejection of a return application by the foreign country:

*even* if a U.S. state supreme court (or the Supreme Court of the United States for that matter) has held that the Child Abduction Convention has been violated *and/or* the United States retains jurisdiction *and/or* the left-behind American parent has sole custody;

*even* if there is a federal or state felony arrest warrant; and

*even* if there is a U.S. extradition request pending.

In other words, the State Department closes the case as soon as the foreign government does, and considers it “resolved” within the meaning of the statute. Countries that expeditiously deny U.S. Hague applications would thus not have any unresolved cases listed against them. Clearly, the State Department’s definition of “unresolved” defies logic, common sense, good faith, the law, and Congress.

Few, if any, frivolous Hague applications are filed by American parents. Real American children are missing from real American parents, families, and homes. For the American children and left-behind parents in such cases, they are not suddenly “resolved” when a foreign country makes a final decision to deny a return application. These are ongoing tragedies for the American citizens involved, and the State Department must tell Congress and the American people about each such case where an abducted or wrongfully retained child has not come home.

Paragraph 2 of the law, as amended, requires the State Department to list for Congress the countries to which children in unresolved Hague applications described in Paragraph 1 are alleged to have been abducted, are being wrongfully retained in violation of U.S. court orders, or have failed to comply with any of their obligations under the Child Abduction Convention.

By adding references to cases where children are being wrongfully retained in violation of U.S. court orders and cases where there has been any violation of the Child Abduction Convention with respect to applications for return or access in the amended legislation, Congress made clear that it does not consider Hague cases closed or “resolved” as soon as the other country definitively rejects an application for return of an American child.

The reference by Congress to any violation of the Child Abduction Convention is clearly intended to cover the systemic problems inherent in countries that cannot (or will not) enforce even their own court orders for return of, or visitation with, American children. This is due to a lack of any enforcement mechanism comparable to our contempt of court. These countries sometimes claim to be unable to find abducted American children and violate the objectives and purposes of the Child Abduction Convention set forth in Article 1 by showing no respect for U.S. law (obviously including U.S. court orders) concerning custody and visitation. Countries such as Austria, Germany, and Sweden must be listed pursuant to Paragraph 2 of the law because of the numerous cases that clearly fall within its terms. For example, Julia Larson and Amanda Johnson are being wrongfully retained in Sweden in violation of U.S. court orders upheld by the highest courts of Utah and Virginia, respectively. But, in an extraordinary demonstration of the State Department’s contempt for Congress and refusal to recognize the revisions in the law, none of these countries are listed under the section discussing Paragraph 2 in the 2000 Report. The State Department’s deference to foreign courts and its lack of respect for U.S. law and U.S. courts dramatically make the case for removing the lead responsibility for combating the international abduction of American children from the State Department, and shifting it to a strengthened NCMEC preferably, or perhaps the Civil Division of the Justice Department.

Paragraph 3 of the law, as amended, requires the State Department to provide Congress with a list of the countries that have demonstrated a pattern of noncompliance with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States. With the criteria for noncompliance in the 2000 Report broadened by the amended legislation to include applications for access, the case for the listing of Austria, Germany, Sweden, and perhaps others is even stronger than in 1999.

The State Department clearly violated this provision in the 1999 Report by failing to include Germany, and, arguably, Switzerland and others. The State Department also violated this provision in the 2000 Report by listing Germany and Sweden as “partially compliant” and Switzerland as “of concern” rather than all three rightly joining Austria as “noncompliant.” While the reasons Sweden was listed as noncompliant in 1999 remain valid, there were far more reasons for listing Sweden as a violator in 2000 than those cited by the State Department in 1999. The case for listing Sweden in the 2000 Report is even stronger as more information about the Swedish legal and social welfare systems (and their negative impact on virtually all aspects of Child Abduction Convention compliance in most cases) has emerged. There was certainly no justification for a report to Congress that fails to list Sweden as a country with a demonstrated pattern of noncompliance.

Before issuance of the grossly deficient 2000 Report, Chairman Gilman wrote the Secretary of State on September 13, 2000 that:

Based on information my and other Congressional offices have received from parents and other organizations such as the National Center for Missing and Exploited Children, the list of countries deemed as non-compliant in the report should be expanded, particularly because the new standard for non-compliance includes problems with access as well as non-return. There is no basis, in my judgment, for removing any country listed in last year’s report, and, additionally, Germany and Switzerland, among others, should be considered for inclusion.

In like manner, Congressman Lampson notified Secretary Albright in his September 15, 2000 letter that “[i]nsofar as the listing of violators, I would expect to see Austria, Sweden, and Germany listed as Congress

identified the three in the joint resolution, and we've seen and heard so much evidence against them on both specific cases and systemic problems, Congressional hearings, and media reports.”

Disregarded by the State Department on this point as well as so many others, in his press release on the 2000 Report, Chairman Gilman expressed particular disappointment with “the height of the bar that appears to have been set for Germany and Sweden to move from the non-compliant category to the partially compliant.” Congressman Gilman continued on to explain:

It is distressing that Sweden and Germany, who have had a very poor compliance record in the past, and were cited accordingly in [House Concurrent Resolution] 293 adopted unanimously by the House of Representatives in May 2000, are now considered to be in partial compliance by the authors of this report. With regard to Germany's case, justification is made that it has established a binational Commission of Experts with the United States which may produce some remedies for its poor compliance in the future. In the case of Sweden, the report cites the return of one child, which occurred immediately following the adoption by the House of H. Con. Res. 293. Also cited, is the cooperation by Swedish authorities in the case of another child, believed to have been in Sweden for a number of years, who eventually was returned from a third country. This ‘cooperation’ only occurred, when a Hearing in October 1999 by the International Relations Committee focused Swedish media attention on the case.

The amended version of Paragraph 3 concerns noncompliance with the Child Abduction Convention regarding access, as well as return, to emphasize the position of Congress that these cases are *not* closed or “resolved” as soon as the other country denies a U.S. return application. Congress also made clear that it wants to know about cases where countries have also denied or ignored formal U.S. access applications (as Austria did in the *Sylvester* case and as Sweden did in the *Johnson* and other cases), and/or have denied access (or cannot enforce access) to American children even when a return order has been issued (whether or not an appeal is pending), and/or continue to deny access after a U.S. return application is finally rejected.

By looking at Sweden's own report on Hague cases with countries other than the United States (Sweden nearly has more cases with the United States than with the rest of the world combined), there is a clear pattern of non compliance, especially through abuse of the “grave risk” basis for refusing to return a child. Most recently, Sweden's noncompliance is evident in a Belgian case (Philippe Paqay) that caused the Belgian Minister of Justice to declare that Sweden violates the Child Abduction Convention.

In the 1999 Report, the State Department mentioned only a few of the numerous reasons that Sweden must be listed as a Hague violator in order for the State Department to comply with the statutory reporting requirement. As summarized above, an overwhelming argument has been made during congressional hearings. The evidence against Austria, Germany, and Sweden is based not only on individual cases but also on the substantive and procedural aspects of their systems that support and ensure the success of most of their citizens who abduct American children. Indeed, Congress identified these countries in the Concurrent Resolution of May-June 2000 as European civil law countries that consistently violate the Child Abduction Convention.

Paragraph 4 of the law, as amended, requires the State Department to provide detailed information on each unresolved Hague case and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the U.S. Chief of Mission in the country to which the child is alleged to have been abducted.

Wholly apart from the State Department's ludicrous and shameful attempt to deceive Congress with a claim of only fifty-eight “unresolved” cases, Paragraph 4 of the law was completely nullified (and thus violated) in the 1999 Report, since the “detailed information” required on each “unresolved” case was rendered utterly “useless” (the word used by Congress) by the Department's failure to include country names, let alone names or even initials of the parents and children involved. In the 1999 Report, it was virtually impossible for a left-behind parent to find his or her case even if it was listed as “unresolved” with “detailed” information.

Failure to provide usable information pursuant to Paragraph 4 benefits only the child abductors, the

offending countries, and perhaps the State Department for “diplomatic” reasons, as well as a desire to avoid more congressional and media criticism. There are no privacy issues with reporting country names and, moreover, it is difficult to find left-behind American parents who want any privacy about their case; they want the world to know what the abductors and their supporting governments have done. The 2000 Report did include country names in the “detailed” information provided on each of the thirty cases listed pursuant to Paragraph 4. But the names of American parents, abductors, and children should also be listed unless the State Department can show that the left-behind American parent in a given case has refused to sign a Privacy Act waiver. In failing to recognize that left-behind American parents have an absolute right to know everything that their government has done or has failed to do to gain the return of their children, the State Department is almost always only covering up its own dereliction of duty and incompetence by invoking privacy considerations or abusing the Freedom of Information Act.

In his aforementioned letter to the Secretary of State, Congressman Lampson vainly tried to bring about State Department compliance with Paragraphs 1, 2, and 4 of the law:

One of the principal purposes of the legislation was for Congress to be fully informed of the kind of long-term, outrageous cases that came to light in the SFRC hearings of October 1998 and in the HIRC hearings of October 1999 from witnesses invited to testify before the committees; i.e., cases such as Tom Sylvester’s with Austria and Tom Johnson’s with Sweden. These are precisely the kind of cases Congress wants to know about and certainly considers “unresolved”, but the 1999 Report excluded these cases.

Paragraph 5 of the law requires information on what the State Department has done to encourage other countries to become Parties to the Child Abduction Convention. In view of the low level of compliance with the Child Abduction Convention (except by the United States and other common law countries), as well as the fact that many American parents have relied to their detriment on the Child Abduction Convention, Congress would no doubt appreciate State Department views on whether it is a good idea to create additional Parties that are likely to benefit from U.S. compliance while failing to reciprocate.

Paragraph 6 of the law is both new and extremely important because it essentially requires the State Department to provide Congress with a list of countries that do not have a prompt and effective method for enforcement of civil court orders, and/or do not respect the doctrine of comity, and/or have other problematic factors in their legal or social welfare systems. The presence of any or all of these factors has prevented left-behind American parents from securing prompt enforcement in these countries during the reporting period of Hague Child Abduction Convention return or access orders, as well as access or visitation under regular custody orders issued by the courts of these countries. Enforcement of, or any form of respect for, U.S. custody or access or visitation orders is out of the question. In open defiance of Congress and the plain requirements of the law, the State Department failed to list Austria and Sweden after spelling out pursuant to Paragraph 3 that enforcement is a key problem with these countries. For example, earlier in the 2000 Report, the State Department declared that:

The lack of effective measures in the Swedish judicial systems to grant and enforce access rights compounds the negative consequences for the left-behind parent of a judicial decision not to return a child under the Convention. Swedish courts appear reluctant even to consider permitting access in the United States, in spite of the fact that judicial arrangements could be made in the United States to help ensure the return of a child to Sweden. In the absence of contempt of court sanctions, the abducting parent can, in any case, effectively disregard court ordered access.

Austria and Sweden obviously belong on a list under Paragraph 6, but Congress needs a complete list from the State Department in order to alert U.S. courts and the general public. If the State Department wished to show at least a minimal level of good faith, it would list all Parties to the Child Abduction Convention that do not have anything comparable to contempt of court in their legal systems, starting with most European civil law countries. There is no way to overstate how the absence of effective enforcement in a given legal system undermines and often prevents compliance with the Convention.



Paragraph 7 of the law is also new and requires the Secretary of State to report on efforts to encourage other Parties to the Child Abduction Convention to promote non-governmental organizations that assist left-behind parents in utilizing the Child Abduction Convention, along the lines of what NCMEC does in the United States for foreign parents. Largely through the efforts of NCMEC, U.S. courts are returning children to other countries in about 90% of Hague cases, even when the American parent will have no enforceable access or visitation in the future. As suggested below, NCMEC should focus on helping American children and left-behind parents because no one else does. Aside from a few common law countries, it appears that other Parties to the Child Abduction Convention have not created (and funded) organizations like NCMEC to assist American parents. The information required by Paragraph 7 is needed to evaluate the future role for NCMEC and the pressing need for American children and their left-behind parents to have an advocate.

As Congressman Lampson tried to persuade the Secretary of State in his September 15, 2000, letter: In summary, the entire purpose of this Hague Compliance Report is to educate judges, attorneys, and the public to promote remedial actions in current cases and to prevent as many new cases as possible. This depends on full disclosure by the State Department of the information sought by Congress and the sort of widespread dissemination of the report that was called for in the Joint Resolution of Congress (i.e., to all U.S. courts, as well as family law practitioners, law enforcement authorities, and parents). Once Congress is satisfied that your 2000 Report is complete, accurate, and in full compliance with every paragraph of the law, I trust such dissemination will be made by the State Department, including on the internet at the Department's website.

The 2000 Report is in fact available at the Department's website. Unfortunately, it violates all but two of the law's seven paragraphs.

#### XI. MEDIA COVERAGE

Throughout 1999 and 2000, there has been substantial media coverage of international child abduction in general and the failings of the Child Abduction Convention for Americans in particular. The growing media interest and attention was fueled by congressional hearings, publicity about the wrongful retention in Germany of the children of Lady Catherine Meyer, and the Elián González<sup>2</sup> case. Perhaps better than anything else could, Elián's case showed the stark contrast between the tremendous effort and great expense on behalf of a Cuban child and father by the United States in a case where neither the Child Abduction Convention nor the Convention on the Rights of the Child applied, compared to the sweeping violations of both treaties by "friends and allies" that are Parties to both conventions with respect to abducted or retained American children and their left-behind parents.

Among the many news organizations that have devoted significant time and energy to the scourge of international child abduction, and the inadequate U.S. Government response to it, are *The Washington Post*, *Insight Magazine*, ABC News (in particular *Nightline*), and the Associated Press. Appropriately and ironically, *The Washington Post* published a major, front-page story on Christmas Eve 2000 entitled "Indifference Adds to Parents' Horror." As the title indicates, the focus was on the poor performance of the U.S. Government, but the story also describes the anger of left-behind American parents toward other targets, notably the Convention:

The Hague Convention on the Civil Aspects of International Child Abduction is the source of much of the anger. Designed to reduce international abductions by insisting that custody cases be decided in the child's country of "habitual residence," the treaty is easily circumvented by signatory countries that suffer no repercussions for violating its terms. The GAO report in March said that parents either get their children back or are granted visitation rights, at least on paper, in only 24 percent of cases. On December 28, 2000, *The Washington Post* also published an editorial entitled "Returning America's Children" that, inter alia, emphatically declared:

It's hard to see why the U.S. government would treat with indifference—sometimes even contempt—the efforts of parents seeking the return of children who have been illegally abducted and spirited overseas during custody disputes. An international treaty, after all, calls for the repatriation of

abducted children to their country of previous residence and further requires that custody be decided there . . . . America's posture toward countries that defy their obligations under the Hague Convention ought to be to apply as much pressure as possible within the constraints of our bilateral relations with those countries. The general message ought to be clear: Children improperly removed from the United States must be returned, and the government should stand ready to prosecute kidnapping parents aggressively. Do the top people at the departments of State and Justice not agree with that?

## XII. HUMAN RIGHTS VIOLATIONS IN HAGUE CASES

It should be borne in mind that there may be human rights violations (notably of Articles 9, 10, 11, and 18 of the U.N. Convention on the Rights of the Child and numerous provisions of the European Convention on Human Rights) not only when there is a failure to return children under the Child Abduction Convention (e.g., American children not returned from civil law countries that cannot enforce visitation) but also when children *are* returned from the United States to such countries (for the same reason).

First Lady and now Senator Hillary Clinton has repeatedly asserted that international child abduction is a human rights matter, most notably in her April 1999 remarks at the British Embassy on the occasion of the inauguration of the International Center for Missing and Exploited Children. Even if her statements were based on common sense and moral considerations, she was also correct from a technical, legal standpoint.

Both the U.N. Committee on the Rights of the Child (UNCRC) and the European Court of Human Rights have issued reports and decisions, respectively, that address child abduction/retention as a human rights matter. In response to complaints from fathers of abducted children when Sweden's most recent report on its implementation of the Convention on the Rights of the Child was under consideration in 1999, the UNCRC urged Sweden (concerning respect for foreign custody orders) to "review its existing legislation to ensure its conformity with the principles and provisions of the Convention." In the U.N. human rights context, Sweden was clearly being told that its domestic legislation did not meet the standards of the Convention on the Rights of the Child in this area.

Hypocrisy by the U.S. State and Justice Departments was also on display in the Elián González case in April 2000, when the U.S. Government made an extensive human rights argument in its appellate brief. After refusing for years to assert human rights considerations on behalf of abducted American children and failing to address, in the annual human rights country reports, the basic human rights issues involved (e.g., the right of the child to have access to both parents even if they live in different countries and the right of both parents to participate significantly in raising a child), the U.S. brief cited Article 17 of the Universal Declaration of Human Rights as the source of the "sacred bond between parent and child as a universally shared principle in the international community." The brief went on to cite relevant provisions of the Convention on the Rights of the Child in addition to those listed above, specifically Articles 3, 5, 7, and 14.

In addition, a recent press release by the American Embassy in Vienna concerning one of the worst violations of the Child Abduction Convention involving an American child (the case of Carina Sylvester's abduction to Austria) cites the fundamental human right of a parent being able to raise a child.

"Of course the Hague Convention is a human rights treaty" was the immediate response of Adair Dyer (one of the principal drafters of, and for many years the leading Hague Academy expert on, the Child Abduction Convention) when told in a November 1995 telephone conversation with the author that there were those in the State Department who rejected the assertion that there are important human rights elements in international child abduction/retention cases, especially those with significant government support or other involvement. The relevance of the Child Abduction Convention to a variety of human rights is now readily apparent since the entry into force and widespread dissemination of the Convention on the Rights of the Child, which contains several provisions directly related to parental child abduction/retention.

What may not be as apparent is that human rights violations may result not only from denial of return applications but also from granting applications and returning the children in question, most notably from the

United States or other common law countries to civil law countries where they cannot be guaranteed the basic right, for example, to have access to both parents even when they live in different countries (as set forth in Article 10 of the Convention on the Rights of the Child).

The Child Abduction Convention is, of course, many things in addition to being a human rights treaty. It is a treaty that attempts to utilize civil remedies for criminal conduct and is thus in one sense also a law enforcement treaty (broadly defined). While not attempting to bring about, on behalf of governmental authorities, the investigation, prosecution, and punishment of any criminal conduct that a particular case may entail, the Child Abduction Convention does provide potential remedies to the abducted/retained children and left-behind parents for what is in fact criminal conduct in most cases. Hence, just as the underlying conduct in these cases is likely to violate criminal laws whether or not formal charges are ever filed, it is even more apparent that the underlying conduct in child abduction/retention cases constitutes human rights abuses. Although beyond the scope of this Article, other commentators have made the case from a psychological (and common sense) standpoint that parental child abduction is child abuse.

### XIII. THE UNITED KINGDOM AND AUSTRALIA—UNDERTAKINGS, EXTRALEGALITY, AND GENDER BIAS

The United Kingdom (U.K.) has rightly been praised for its swift action in Hague cases, its well-trained judges and attorneys for Hague litigation, its payment of legal fees for both parties, and its record for granting a high percentage of Hague applications. Australia is generally placed in the same category as being nearly a “model” Party to the Convention. However, the picture is far from perfect.

In contrast with the systematic non-compliance of numerous Contracting States at one extreme and the mindless compliance of the United States at the other, Australia and the United Kingdom have chosen a middle course of compliance on *their* terms. Both often require left-behind parents to agree to “undertakings” or conditions for return before a Hague return order is granted. Both only began this practice when mothers began to abduct in large numbers. Gender bias was thus inherent in the practice of undertakings from the outset, and remains so. Australia and the U.K. essentially say to left-behind fathers, “We will return your child(ren), but only on the following conditions.” The words “duress” and “extortion” come to mind. It adds insult to injury that they are judicially imposed. Except for narrow protective “undertakings” specifically tied to a provision of the Convention (e.g., to prevent or minimize a potentially grave risk under Article 13(b)), there is no legal basis under the Child Abduction Convention for these often outrageous demands. They are extralegal. Nevertheless, in the *Lebeau* case, Mr. Lebeau was required, inter alia, to pay the abductor’s airfare back to the United States, provide her with expensive housing for several months, pay her a weekly allowance of \$200, agree not to seek enforcement of his Florida custody order for a lengthy period, and do whatever he could to get criminal charges against her dropped. Similarly, in the *Marinkovich* case in 2000, the father was required to agree that he would not press for criminal prosecution.

In other cases, left-behind American fathers have had to pay the abductor’s legal fees and provide an automobile for the duration of custody hearings. During the October 1999 congressional hearings, Assistant Secretary of State Mary Ryan testified that “[t]hese undertakings are not provided for in the Convention, have the effect of rewarding abduction, and impose additional hardships on the left-behind parent.” However, it is not clear that the State Department has done anything of a practical nature to dissuade the United Kingdom and Australia from continuing their wrongful conduct under the Convention in the form of these “undertakings.”

In the *O’Donohue* and *Lebeau* cases, the United Kingdom also engaged in significant gender bias in the handling of the cases and the treatment of American fathers compared to European mothers. In *O’Donohue*, children unquestionably abducted to Sweden from California (with the father obtaining a California custody order) were re-abducted by the American father after Sweden violated the Child Abduction Convention by essentially conducting a custody proceeding, calling it a Hague case, and invoking Article 13(b). At Swedish request pursuant to its criminal law that targets left-behind parents of abducted/retained children who try to exercise their custody rights, Mr. O’Donohue was arrested in transit at Heathrow Airport and detained. Knowing full well the consequences for the children and Mr. O’Donohue, the United Kingdom nevertheless refused

to take Hague jurisdiction over the case or to deliver the children to Mr. O'Donohue for return to California. Instead, Mr. O'Donohue was held in prison (for several months awaiting extradition to Sweden), the abducting Swedish mother was flown to London at U.K. expense, and the children were immediately turned over to her while the Hague hearing was pending.

In stark contrast to their vicious treatment of Mr. O'Donohue, U.K. authorities never even detained the Danish mother in the *Lebeau* case despite a U.S. extradition request. Moreover, she was also allowed to keep the children with her while the Hague proceeding was pending, despite the fact that her conduct was far more aggravated than Mr. O'Donohue's. After all, she had kept the children underground for two years and clearly intended to eliminate Mr. Lebeau from the lives of his children. As a practical matter, the mother could have fled to Denmark or elsewhere with the children at any time thanks to the United Kingdom's double standard in favor of European mothers. She refrained from doing so apparently for personal reasons, not because of any meaningful constraints imposed by the U.K. authorities. Surrender of her passport (and the children's) to a U.K. court, for example, hardly presents a significant obstacle to travel within the European Union. There is no evidence of an effective (or any) protest by the U.S. Government to the U.K. of either the U.K.'s failure to detain the Danish mother in connection with the U.S. extradition request, or its failure to hand over the children immediately to the left-behind parent (as the U.K. did in the O'Donohue case, even though that Swedish mother was also an abductor) or at least to take the children into protective custody.

As a practical matter, Australia and the U.K. have unilaterally amended the Convention with their "undertakings" regimes. Countries like the United States have looked the other way because American children do in fact come home from Australia and the U.K. Apparently the end justifies the means, especially since nothing else seems to work (e.g., the very low return rates from European civil law countries). In fact, undertakings probably are the best hope for the Child Abduction Convention, both in terms of gaining any significant and consistent compliance by persistent violators such as Austria, Germany, and Sweden *and* diminishing the injustices by U.S. courts in Hague cases (e.g., conditioning returns from the United States on the existence of future *enforceable* access abroad for the American parent and visitation in the United States for the children). Many American parents (including the author) who have unsuccessfully tried to gain the return of their children by means of the Child Abduction Convention undoubtedly wish that they had been dealing with Australia or the U.K., rather than civil law countries. And we wish that we had had the option to agree to extortionate demands under duress in order to regain our children. But, at least for the record, no one should lose sight of the fact that, for the most part, the use of "undertakings" to date has been extralegal and the embodiment of gender discrimination.

#### XIV. GLOBAL REMEDIES

For improved Hague results globally, all States Parties must take the measures necessary to bring about accountability, implementation, and effective remedial actions. In dealing with most civil law countries at the moment, there is no substitute for prevention.

##### A. *Prevention*

At least some cases, and perhaps many over time, can be prevented if parents, judges, family law practitioners, and law enforcement authorities have access to definitive and reliable sources of information that show the odds of children returning from each State Party. At a minimum, continuous dissemination of information via the internet, including an annual Hague compliance report, is needed. This can be under the auspices of a government or an organization such as NCMEC or ICMEC. But the database must contain objectives and factual information that answer key questions on each State Party's

Legal system: Is there comity for foreign custody orders or laws? Are civil court orders actually enforceable, including Hague return orders and access or visitation orders? Are there criminal laws that shield abductors/retainers and punish left-behind parents that exercise their custody rights even under local law?;

Social welfare system: Does the local government pay the legal fees of its abductors/retainers at home and abroad but not of their victims? Does the local government pay child support to abductors/retainers? Does the local government supply government-paid psychiatrists and psychologists to support abductors/retainers?;

Child custody practices: Are there statistics showing results of custody proceedings by gender and nationality?; and

Child Abduction Convention performance: What is the average duration of proceedings? What is the actual return rate? Are there relevant access issues?

Much wider use should be made of the U.N. Committee on the Rights of the Child by individuals, non-governmental organizations, and governments such as the United States whose citizens suffer disproportionately from abduction/retention. The goal would be to pressure states to change their domestic legal and social welfare systems to comply with the human rights standards in the Child Abduction Convention concerning the right of the child to have two parents even after a divorce or separation.

#### B. *Accountability*

Today, there is no meaningful accountability for any of the entities or officials in each State Party with the responsibility for dealing with international child abduction/retention. What is needed is a central clearing-house for information on the performance of States Parties' Central Authorities, foreign ministries, justice ministries, police, prosecutors, and so on.

#### C. *Improved Implementation of the Child Abduction Convention*

The following suggestions for improved implementation of the Child Abduction Convention address a variety of the problems present today:

Abuse of Article 13: The increasingly creative abuses of Article 13(b) should be compiled and publicized.

Psychological effect of abduction/retention on victims: Both the Stockholm Syndrome and the Parental Alienation Syndrome should be publicized.

Access/custody during the Hague process: The virtually complete failure of the Child Abduction Convention's access provisions and the practices of many countries in allowing abductors/retainers to control access to the child during the Hague process should be publicized, especially when return orders are stayed pending appeals by abductors/retainers (i.e., courts should shift temporary custody to the left-behind parent or at least enforce substantial access).

Training of judges: The Hague Parties that fall short in this area should be identified and provided with a model training package, perhaps based on the U.S. and British packages.

"Two track" court systems: The incompatibility with the Child Abduction Convention of legal systems that use a separate administrative court system for Hague cases while handling custody cases in the regular courts should be publicized, since the regular courts may proceed with jurisdictional and other disputes (albeit not the full merits of custody) that are used by the abductor in the Hague litigation.

Performance of Central Authorities: The performance should be evaluated by NCMEC or ICMEC, since some Central Authorities (e.g., Sweden) do far more for their citizens who abduct/retain children than they do for their victims.

Length of process: Statistics should be gathered and disseminated on the average duration of the Hague process in each country.

Enforcement: NCMEC or ICMEC should shine the spotlight on all countries with legal systems that do not permit effective enforcement of Hague return orders, access or visitation orders, etc.

Limit appeals: Systems that allow essentially unlimited appeals and/or the reopening of cases until the local abductor wins should be publicized.

Meaning of Article 1: NCMEC or ICMEC should publicize the extent to which the objectives and purposes of the Child Abduction Convention have been disregarded.

Legal aid: NCMEC or ICMEC should publicize the extent of legal aid provided by each Hague Party, especially situations where governments finance their nationals who engage in abduction/retention while their victims are up against that government's deep pockets in litigation in both countries.

Nullification by the European system: NCMEC or ICMEC should publicize the fact that abductors/retainers from *all* European countries may be able to nullify Hague return orders from the highest courts of their countries by utilizing the European human rights machinery in Strasbourg.

Entitlement of left-behind parents to information: NCMEC or ICMEC should press all governments to provide all information and documents in every case, including diplomatic notes.

#### D. Remedial Actions

The remedial actions listed below will also aid in more successful enforcement of the Child Abduction Convention:

Provide pressure to produce access/visitation regimes in both Hague and regular custody cases (i.e., post-Hague cases for most Americans) with effective sanctions and police assistance to deal with parents who obstruct the process.

Link the Child Abduction Convention to law enforcement treaties and child support agreements to prevent the worst offending countries from additional one-way benefits comparable to those they now enjoy under the Child Abduction Convention.

Create bilateral agreements on custody and visitation with the most difficult countries, as contemplated in Article 11(2) of the Convention on the Rights of the Child.

Include child abduction/retention as a major issue in bilateral relations.

Require extradition by all countries of their citizens for child abduction/retention.

Eliminate government financial support for abductors/retainers in the forms of unlimited legal fees at home and abroad, abusive and frivolous litigation in the left-behind parent's country, assistance to abductors/retainers from criminal legislation (and police and prosecutors), payment of child support to abductors/retainers, availability of government psychiatrists or psychologists to assist with bogus Article 13 defenses, and so on.

Enable left-behind parents to penetrate sovereign immunity and bring lawsuits in the courts of their country against governments that facilitate, finance, or otherwise support criminal conduct against them.

Pursue bilateral claims against governments that facilitate, finance, or otherwise support abduction/retention by their citizens or residents.

#### XV. AMERICAN REMEDIES

The following proposed congressional actions would generally cost nothing while rapidly improving the situation for American parents in Hague cases:

Shift the lead responsibility for "outgoing" U.S. cases from the State Department to NCMEC, with NCMEC to hold the case files and report directly to Congress and parents.

Direct the State Department to issue a definitive interpretation to all U.S. courts that the "grave risk" exception in Article 13 of the Child Abduction Convention (as a grounds for not returning a child to a foreign country) exists in any case where the other country cannot guarantee the American parent enforceable visitation in the United States.

Enact a permanent annual reporting requirement for the State Department (with NCMEC clearance required) on non-compliance with the Child Abduction Convention and on foreign legal systems that exhibit any of the pillars of a government child abduction system as in Sweden, with required dissemination to all U.S. courts and family law practitioners.

Prohibit the use by NCMEC of government funds to assist foreign governments and parents in Hague cases, and shift current funding to assisting left-behind American parents.

Revise Section 212(a) of the Immigration and Nationality Act to delete the provision making child abductors admissible to the United States so long as the abducted child is located in a country that is a Party to the Child Abduction Convention.

Require the State Department to include information on each country's child custody and visitation system in the children's rights section of the annual human rights reports.

Prohibit extradition of U.S. citizens for parental child abduction to countries that will not extradite their nationals for that offense or will not consistently return American children under the Child Abduction Convention.

Terminate the State Department authority in P.L. 104-193 (Section 459A) to negotiate child support enforcement agreements with foreign governments, or at least amend it to prohibit such agreements without several safeguards, including enforceable visitation in the United States for the children concerned.

Prohibit new law enforcement treaties/agreements or child support enforcement agreements with governments that support abduction/retention of American children.

Create a new exception to the Foreign Sovereign Immunities Act permitting American parents to sue foreign governments in U.S. district courts that are directly supporting or otherwise participating in the abduction/retention of their children.

\* This Article was adapted by the author from a presentation delivered at the NYU *Journal of International Law and Politics* Annual Symposium, *Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, held in New York City on February 25, 2000. Mr. Johnson was the luncheon speaker at the symposium. He has been an attorney with the U.S. Department of State for more than twenty years, working primarily in the fields of human rights, international organizations, refugees, and international law enforcement. He has served as the Counselor for Legal Affairs (1985-1990) at the United States Mission in Geneva and has been a U.S. negotiator for more than a dozen human rights instruments, including the U.N. Convention on the Rights of the Child. He has been head of the U.S. Delegation in numerous bilateral law enforcement treaty negotiations. Mr. Johnson's remarks at the Symposium and in this Article are in his personal capacity as the father of Amanda Kristina Johnson, a child wrongfully retained in Sweden since 1995. His remarks do not purport to represent the views of the Department of State. At the invitation of the chairmen, Mr. Johnson has testified before the Senate Foreign Relations Committee (October 1998) and the House International Relations Committee (October 1999) concerning implementation of the Hague Convention and the U.S. Government response to international child abduction. Amanda's case has been featured on ABC's *Nightline* (May 10, 2000), in the September 1999 edition of *READER'S DIGEST* (in the article *America's Stolen Children*), and in numerous other television and newspaper reports.

. Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter *Child Abduction Convention*].

. *United States Responses to International Parental Abduction: Hearing Before the Senate Comm. on Foreign Relations*, 105th Cong. (1998) [hereinafter *United States Responses*]; *Implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Hearing Before the House Int'l Relations Comm.*, 105th Cong. (1999) [hereinafter *Implementation of the Hague Convention*]; *International Parental Kidnapping: Hearing Before the Senate Comm. on the Judiciary, Subcomm. on Criminal Justice Oversight*, 106th Cong. (1999). Senate Judiciary Committee (Subcommittee on Criminal Justice Oversight) Hearing on (October 27, 1999).

. Omnibus Consolidated and Emergency Appropriations Act, Pub. L. No. 105-277, § 2803, 1998 U.S.C.A.N. (112 Stat. 2681) 846, amended by H.R. 3247, 106th Cong. § 202 (1999) [hereinafter *Omnibus Appropriations Act*].

. H.R. Con. Res. 293, 106th Cong., 146 CONG. REC. S5758 (2000) (enacted).

. GENERAL ACCOUNTING OFFICE, 106TH CONG., SPECIFIC ACTION PLAN NEEDED TO IMPROVE RESPONSE TO PARENTAL CHILD ABDUCTIONS, GAO RPT No. NSIAD-00-10 (2000) [hereinafter *GAO SPECIFIC*].

ACTION PLAN].

. GENERAL ACCOUNTING OFFICE, 106TH CONG., STATUS OF U.S. PARENTAL CHILD ABDUCTIONS TO GERMANY, SWEDEN, AND AUSTRIA, GAO RPT. NO. GAO/NSIAD-00-226BR B-285990 (2000).

. See, e.g., Timothy Maier, *Lady Meyer Struggles for Parental Rights*, INSIGHT MAG., Oct. 2, 2000, at 37, and numerous other articles by THE WASHINGTON POST, INSIGHT MAGAZINE, and the Associated Press.

. Child Abduction Convention, *supra* note 1, art. 1, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. at 98; see also *infra* note 52.

. *Id.* art 21, T.I.A.S. No. 11,670 at 11, 1343 U.N.T.S. at 102.

. *Hearing on Implementation of the Hague Convention on the Civil Aspects of International Child Abduction Before the House Comm. on Int'l Relations*, 106th Cong. (1999) (statement of Mary A. Ryan, Assistant Secretary of State for Consular Affairs, United States Department of State) [hereinafter Statement of Mary Ryan].

. See *infra* notes 25-27 and accompanying text for the situation in Sweden.

. See *supra* note 5 (only 24% of American children are either returned or have some form of visitation abroad).

. See Statement of Mary Ryan, *supra* note 10, at 3 (approximately 90%).

. See United States State Dep't, *International Parental Child Abduction: Country-Specific Abduction Flyers*, at <http://www.travel.state.gov/abduct.html> (last visited Nov. 21, 2000).

. SECRETARY OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 2-4 (1999) available at <http://travel.state.gov/compliance.html> (last visited Feb. 2, 2001) [hereinafter 1999 SECRETARY COMPLIANCE REPORT]; SECRETARY OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2000), available at [http://travel.state.gov/2000\\_Hague\\_Compliance\\_Report.html](http://travel.state.gov/2000_Hague_Compliance_Report.html) (last visited Feb. 2, 2001) [hereinafter 2000 SECRETARY COMPLIANCE REPORT].

. In Utah, a U.S. District Judge sent U.S. Marshals to take Julia Larson from her father Mark in 1995 after an ex parte meeting with attorneys hired by the Swedish government. The child was handed over to the Swedish mother, who violated a court order to remain in Utah by fleeing to Sweden the next day. For more information on this case, see *Ohlander v. Larson*, 1145 F.3d 1531 (10th Cir. 1997). In the *Yavelow* case in Maryland, two daughters were taken from Christopher Yavelow in 1999 by the Federal Bureau of Investigation in Houston (pursuant to a Maryland arrest warrant for Mr. Yavelow and a return order for the children) and handed over to the Swiss mother (residing in the Netherlands) who had made a Hague return request. There were no hearings in either case. See, e.g., The Stolen Children Network, at <http://www.stolenchildren.net> (last visited Nov. 21, 2000) (regarding the *Yavelow* case).

. International Child Abduction Remedies Act (ICARA), 42 U.S.C.S. §§ 11601–11610 (2000).

. See Statement of Mary Ryan, *supra* note 10, at 3.

. See Meeting with Johann Montelius, Head of the Swedish Central Authority for the Hague Convention, in the Office of Congressman Nick Lampson (D-Texas), Washington, D.C. (May 22, 2000) [hereinafter Montelius Meeting].

. Conversation with Catherine Brown, Assistant Legal Advisor for Consular Affairs, United States Department of State, Washington, D.C. (May 4, 1998).

. The Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act § 201, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

. Modern U.S. extradition treaties and old treaties reinterpreted under 1998 legislation include parental child abduction as an extraditable offense; however, most treaties do not require that the U.S. treaty partner extradite its nationals.

. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (authorizing the Secretary of State to negotiate reciprocal international child support enforcement agreements).

. See *United States Responses*, *supra* note 2, at 19-27 (1998) (statement of Lady Catherine



Meyer), *Implementation of the Hague Convention*, *supra* note 2 , at 99-115 (statement of Lady Catherine Meyer); *Evidence for a Hearing of the Senate Judiciary Comm. on the Issue of "International Child Abduction,"* 106th Cong. (1999) (statement of Catherine L. Meyer, Co-Chair, International Centre for Missing & Exploited Children), <http://www.senate.gov/~judiciary/102799cm.htm> (last visited Nov. 29, 2000);[need pincite] (statement of Lady Catherine Meyer); and the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee (October 27, 1999); *see also* CATHERINE L. MEYER, *THEY ARE MY CHILDREN, TOO: A MOTHER'S BATTLE FOR HER SONS* (1999).

. For example, Frederic Renstrom, a Swedish attorney, has stated that there is a tendency toward a national and gender bias throughout the legal system. In addition, Mr. Renstrom is unaware of any case in which a non-Swedish father living outside Sweden has ever been given sole custody of a child by a Swedish court. Interviews with Fredric Renstrom, Swedish attorney, in Stockholm, Sweden (June 2000).

. Indeed, a pre-Hague supreme court decision declaring that foreign custody orders have no validity in Sweden is still the leading child custody case in Sweden. Hogsta Domstolen [1974] N.J.A. 629 (Swed.).

. *See* THE SWEDISH PENAL CODE Ch. 7, § 4 (SFS 1984:13) (translation based on code as of July 1, 1984). **Ch. 7 § 4 Swed. Crim. Code. [is sweden common or civil law? ying, fix cite accordingly under rule 20]**

. Child Abduction Convention, *supra* note 1, art. 13(b), T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101. Article 13(b) permits a Contracting State not to return a child to the place of habitual residence when "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." Although the drafters intended for this to be a very high standard, it is common knowledge that the abuse of this provision by many Contracting States has done much to damage the credibility and effectiveness of the Convention. Instead of reserving the use of this provision for the most extreme, virtually life and death situations (or at least situations where the child will almost certainly lose one parent if returned, several Contracting States have allowed Hague proceedings to be transformed into regular child custody cases and have denied returns on "grave risk" grounds for reasons ranging from German not being the language of the place of habitual residence (Germany) to the child still being at the breastfeeding stage (Sweden).

. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

. European Convention for the Protection of Human Rights and Fundamental Freedoms, April 11, 1950, 213 U.N.T.S. 221.

. Statement of Mary Ryan, *supra* note 10.

. Franzen Johnson v. Johnson, No. 9141-1995 (Admin. App. Ct. Kammarratten 1995) (Swed.) (on file with author); Franzen Johnson v. Johnson, No. 7505-1995 (Sup. Admin. Ct. Regeringsratten 1996) (Swed.) (on file with author).

. 1999 SECRETARY COMPLIANCE REPORT, *supra* note 15, at 2-4.

. Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L.Q. 557, 561 (1998).

. *Swedish Custody Ruling Upsets USA*, SVENSKA DAGBLADET, July 8, 1996, at 10.

. STATE DEPARTMENT, STATEMENT OF THE UNITED STATES REGARDING HAGUE CONVENTION ISSUES OF GENERAL RELEVANCE PRESENTED BY THE PARTICULAR CASE OF AMANDA JOHNSON (filed with the Swedish Supreme Administrative Court (Regeringsratten) January 30, 1996).

. Diplomatic Note from the American Embassy in Stockholm to the Swedish Ministry of Foreign Affairs 1 (June 20, 1996).

. *Id.*

. *Id.* at 5.

. *Id.* at 7.

. *Id.* at 8.

. *Id.* at 8-9.

. Johnson v. Johnson, 493 S.E.2d 668 (Va. Ct. App. 1997).

. Larsen [sic] v. Ohlanderq [sic], No. 981054 (Utah C. App.), *cert. denied*, 982 P2d 88 (Utah 1998) (unpublished table decision).

. O'Donohue v. O'Donohue, No. ED 016608 (Super. Ct. L.A. County 1998) (on file with author).

. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999).

. Johnson v. Johnson, 26 Va. App. 135 (1997).

. Johnson v. Johnson, Ct. App. No. 2200-96-4 (Va. March 3, 1998) (dismissing petition for appeal).

1. Larsen [sic] v. Ohlanderq [sic], No. 981054 (Utah C. App.), *cert. denied*, 982 P2d 88 (Utah 1998) (unpublished table decision).

. Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997); Benson v. Benson, No. D446718 HRD (Super. Ct. San Diego County 1998) (on file with author); O'Donohue v. O'Donohue, No. ED 016608 (Super. Ct. L.A. County 1998) (on file with author).

. Third Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, held in The Hague on March 17-21, 1997. For more information, see *Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)*, Permanent Bureau of the Hague Conference (1997) (on file with the New York University *Journal of International Law and Politics*).

. The objects/purposes of the Convention were to secure the prompt return of wrongfully removed or retained children in Article 1(a) and to ensure that Contracting States respect the rights of custody and access under the laws of other Contracting States in Article 1(b). Child Abduction Convention, *supra* note 1, art. 1, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S at 98. Most of the Convention is devoted to fleshing out Article 1(a) with regard to standards and procedures for the return of children. Although Article 1(b) stands alone and is not further amplified, it is not a preambular paragraph. It is in the body of the Convention and must have some meaning. At the very least, it encourages the doctrine of comity in this field; that is, perhaps not automatic enforcement of foreign custody and access orders, but substantial deference and respect for them in the end. Contracting States such as Sweden that do not have the principle of comity in their legal systems and that may have decisions from their highest courts (as Sweden does) declaring that "foreign custody orders have no validity" in the country (*see supra* note 26) *cannot* comply with either the letter or spirit of Article 1(b).

. *See supra* notes 5 and 12.

. Letter from Mary Ryan, Assistant Secretary of State, to INSIGHT MAG., April 19, 1999, *available at* 1999 WL 8673805.

. Hogsta Domstolen [1974] N.J.A. 629 (Swed.).

. Child Abduction Convention, *supra* note 1, art. 1, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S at 98.

. *See, e.g., International Child Abduction: Implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Hearing Before the House Comm. on Int'l Relations*, 106th Cong. (1999), *available at* [http://www.house.gov/international\\_relations/106/full/106first/fullhear.htm](http://www.house.gov/international_relations/106/full/106first/fullhear.htm) (last visited Nov. 21, 2000); Dan Moffett, *Final Chapter of Father's Quest—A Happy Ending*, PALM BEACH POST, Dec. 20, 1998, at 1C.

. *See supra* hearings cited in note 2.

. *See, e.g.,* H. Con. Res. 293, 106th Cong., 146 CONG. REC. S5758 (2000) (enacted).

. *See* Statement of Mary Ryan, *supra* note 10.

. *Id.*

. *See, e.g.,* Johnson v. Johnson, 493 S.E.2d 668 (Va. Ct. App. 1997).

. *See* Montelius Meeting, *supra* note 19.

. *See generally* Swedish Ministry of Foreign Affairs (Regeringskansliet), The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; a report of cases under the Hague Convention in which children were abducted to Sweden from the United States between 1991 and 1999 (May 17, 2000).

. Montelius Meeting, *supra* note 19. The daughter of Ian McAnich had been ordered to be returned under the Child Abduction Convention, but the Swedish government claimed to be unable to find her for two years.

. 2000 SECRETARY COMPLIANCE Report, *supra* note 15.

. Child Abduction Convention, *supra* note 1, art. 13(b), T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

. H.R. Con. Res. 293, 106th Cong., 146 CONG. REC. S5758 (2000) (enacted).

. *Id.*

. 18 U.S.C. § 1204 (2000).

. H.R. Con. Res. 293, 106th Cong., 146 CONG. REC. S5758 (2000) (enacted).

. *Id.* at S5758-59.

. *Id.* at S5759.

. *Id.*

. *Id.*

. *Id.*

. H.R. Con. Res. 293, 106th Cong., 146 CONG. REC. S5759 (2000) (enacted).

. *Id.*

. Convention on the Rights of the Child, *supra* note 29.

. See Omnibus Appropriations Act, *supra* note 3.

. See 1999 SECRETARY COMPLIANCE REPORT, *supra* note 15, at 2-4.

. H.R. REP. NO. 106-479, at 20 (1999), *reprinted in* 145 CONG. REC. H12574 (1999).

. 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. Omnibus Appropriations Act, *supra* note 3.

. H.R. REP. NO. 106-479, at 20 (1999), *reprinted in* 145 CONG. REC. H12574 (1999).

. GAO SPECIFIC ACTION PLAN, *supra* note 5, at 3.

. Ernie Allen, CEO of the National Center for Missing and Exploited Children, Remarks at the Press Conference conducted by Congressman Nick Lampson (D-Texas) and other members of Congress, Cannon House Office Building, March 2000.

. 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. H.R. REP. NO. 106-479, at 20 (1999), *reprinted in* 145 CONG. REC. H12574 (1999).

. *Id.*

. Letter from Benjamin A. Gilman, Chairman of the House Comm. on Int'l Relations, to Madeleine K. Albright, Secretary of State 1 (Sept. 13, 2000) [hereinafter Gilman Letter].

. Letter from Nick Lampson, Congressman, to Madeleine K. Albright, Secretary of State 1 (Sept. 15, 2000) [hereinafter Lampson Letter] (emphasis in original).

. *Id.* at 1-2.

. *Id.* at 2.

. A personal meeting between Secretary Albright and Thomas Sylvester (American father of an abducted child) took place in September of 2000, during which the letters were delivered.

. Omnibus Appropriations Act, *supra* note 3.

. Gilman Letter, *supra* note 91, at 2.

. Lampson Letter, *supra* note 92, at 2.

. Press Release, U.S. House of Representatives Int'l Relations Comm., 106th Cong., Gilman Disappointed with Report on International Child Abduction (Oct. 11, 2000) [hereinafter Gilman Press Release] (on file with author).

. 1999 SECRETARY COMPLIANCE REPORT, *supra* note 15; 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. Omnibus Appropriations Act, *supra* note 3.

. See *Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997); *Johnson v. Johnson*, 493 S.E.2d 668 (Va. Ct. App. 1997).

. 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997); Johnson v. Johnson, 493 S.E.2d 668 (Va. Ct. App. 1997).

. 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. Gilman Letter, *supra* note 91, at 2.

. Lampson Letter, *supra* note 92, at 2.

. Gilman Press Release, *supra* note 99.

. *Id.*

. See Swedish Ministry of Foreign Affairs (Regeringskansliet), *supra* note 64.

. Davrell Tien, *Sverige skyddar kidnappare*, DAGENS NYHETER (Sweden), March 30, 2000.

. See 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. See hearings cited *supra* note 2.

. Omnibus Appropriations Act, *supra* note 3.

. 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15, Attachment A.

. Lampson Letter, *supra* note 92, at 2.

. Omnibus Appropriations Act, *supra* note 3.

. *Id.*

. See 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. See *id.*

. Omnibus Appropriations Act, *supra* note 3.need cite

. Lampson Letter, *supra* note 92, at 2.

. See 2000 SECRETARY COMPLIANCE REPORT, *supra* note 15.

. See Congressional hearings cited *supra* note 2.

2. Gonzalez v. Reno, 212 F.3d 1243 (11th Cir. 2000), *cert. denied*, 120 S. Ct. 2737 (2000).

. Cindy Loose, *Indifference Adds to Parents' Horror*, WASHINGTON POST, Dec. 24, 2000, at A1.

. *Id.* at A12.

. *Returning America's Children*, WASHINGTON POST, Dec. 28, 2000, at A22.

. Convention on the Rights of the Child, *supra* note 29, arts. 9, 10, 11, 18, 1577 U.N.T.S. at 47-50.

. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5.

. First Lady Hillary Rodham Clinton, Remarks at the Launch of the International Center for Missing and Exploited Children, British Embassy, Washington, D.C. (Apr. 23, 1999).

. *Concluding Observations on Sweden*, U.N. Comm. on the Rights of the Child, 20th Sess., 531st mtg. at 4-5, U.N. Doc CRC/C/15/Add.101 (1999).

. Judgment in the Case of Ignaccolo-Zenide v. Romania, European Court of Human Rights, 1999Affaire Ignaccolo-Zenide c. Roumanie, No. 31679/96 (Eur. Ct. H.R. Jan. 25,2000), *available at* <http://www.echr.coe.int> (last visited Jan. 1, 2001).

. *Concluding Observations on Sweden*, U.N. Comm. on the Rights of the Child, 20th Sess., 531st mtg. at 2, U.N. Doc CRC/C/15/Add.101 (1999).

. Brief for Appellees at 57-59, Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000) (No. 00-11424-D).

. *Id.* at 57.

. *Id.*

. See generally *Hearing on Implementation of the Hague Convention on the Civil Aspects of International Child Abduction Before the House Comm. on Int'l Relations*, 106th Cong. (1999) (statement of Thomas R. Sylvester), *available at* [http://www.house.gov/international\\_relations/106/full/106first/testimony/sylvester.htm](http://www.house.gov/international_relations/106/full/106first/testimony/sylvester.htm) (last visited Jan. 5, 2001).

- . Telephone Interview with Adair Dyer, Hague Academy (Nov. 1995).
- . *See, e.g.*, Convention on the Rights of the Child, *supra* note 29, arts. 9, 11, 35, 1577 U.N.T.S. at 55, 57, 58.
- . *Id.* art. 10, 1577 U.N.T.S. 3, 48.
- . *See* Nancy Faulkner, Parental Child Abduction is Child Abuse, Address Before the U.N. Committee on the rights of the Child (June 9, 1999).
- . Child Abduction Convention, *supra* note 1, art. 13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.
- . *Lebeau v. Lebeau*, 243 C.A. 1 (1998).
- . *See id.* at 3-4.
- . For more information on the abduction of Gabriel Marinkovich, see *Hearing on Implementation of the Hague Convention on the Civil Aspects of International Child Abduction Before the House Comm. on Int'l Relations*, 106th Cong. (1999) (statement of Paul Marinkovich) (on file with author).
- . *See* Statement of Mary Ryan, *supra* note 10.
- . *Id.*
- . Argument on behalf of the Government of Sweden, *Government of Sweden v. O'Donohue*, Case No. Ö 9710-96 (U.K. Mag. 1997) (on file with author); *O'Donohue v. O'Donohue* (Fam. U.K. 1997) (order declining to take Hague jurisdiction over case) (on file with author).
- . *Id.*
- . *Lebeau*, 243 C.A., at 1.
- . Child Abduction Convention, *supra* note 1, art. 13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.
- . *See, e.g.*, RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (1992); WILLIAM F. HODGES, *INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY* (1991).
- . Convention on the Rights of the Child, *supra* note 29, art. 11(2), 1577 U.N.T.S. at 48.
- . Child Abduction Convention, *supra* note 1, art. 13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.
- . Immigration and Nationality Act, Pub. L. No. 82-414 § 212(a), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1182) (Supp. IV 1998).
- . Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 459A, Pub. L. No. 104-193, 110 Stat. 2105 (1996).
- . 28 U.S.C. §§ 1330, 1602 *et seq.* (2000).