The Hague Child Abduction Convention: Past Accomplishments, Future Challenges

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For more than a century, the Hague Conference has attacked problems in the most challenging areas of private international law, including family law. In the specific area of international child abduction, its efforts over the past two decades have been noteworthy in two regards. First, it promulgated an unusually creative and effective tool, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Convention).[1] Secondly, this Convention is increasingly playing a distinctive role in the growth of international child law.

A. Past

Although family law was one of the first areas the Conference addressed and child abduction had been mentioned when a second round of family law treaties was drafted in the 1960s and early 1970s, the particular problems of child abduction took

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[1] The Convention is set forth at TIAS No. 11,670 and at 19 ILM 1501 (1980). As detailed *infra*, its innovations are due, in no small measure, to the efforts of Adair Dyer, former Deputy Secretary-General of the Permanent Bureau. Mr Dyer, who retired in autumn 1997, brought insight, vigour, humanity and craftsmanship to his two decades of work on the Convention.

centre stage only somewhat later.[2] By then, international travel had become easier and more couples were marrying or travelling across national borders. At the same time there was an increase in family separations and divorce, leading to a rise in international child custody disputes.

As the member of the Permanent Bureau who staffed the Hague Conference's child abduction work, Adair Dyer's first task was to study the legal and social dimensions of the problem. His 1978 questionnaire[3] and report[4] were a *tour de force* that set the groundwork for what was to become one of the Conference's most successful endeavours: the Child Abduction Convention.

Dyer's work identified what were then global problems without global solutions.[5] Overwhelming practical difficulties ranged from locating an abducted child, to the expense and logistics of handling an international dispute, to obtaining assistance from local and foreign authorities. Legal difficulties were equally daunting: even characterizing and labeling the problem were challenges, as was imagining how a treaty could operate successfully outside the courtroom, where most of the problems lay. But already at this stage, Dyer was on the mark when he focused on 'the factual activity of kidnapping'.[6]

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[2] For a fuller account of these developments, *see* Adair Dyer, 'The Internationalization of Family Law' in (1997) 30 *Univ. Calif. Davis L. Rev.* 625, at pp. 635–636. The events of 1961 are recounted in Adair Dyer, Report on International Child Abduction by One Parent ('legal kidnapping') (Preliminary Doc. No. 1 of August 1978), in (1980) 'Hague Conference on Private Int'l Law, 3 Actes et documents de la Quatorzième session: Child Abduction', at pp. 12, 26–27 (hereafter 'Actes et documents'). Fifteen years later, at a 1976 meeting held to consider subjects for the future work of the Hague Conference, T. Bradbrooke Smith, the Expert of Canada, first suggested that the Conference prepare an international treaty dealing specifically with the problem. Ibid., at p. 12.

[3] Actes et documents, *supra* note 2 at p. 9.

[4] Actes et documents, *supra* note 2 at p. 12.

[5] Indeed, the world-wide scope of the problem had prompted several countries then involved in the drafting of what became the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (ETS No. 105) to encourage the Hague Conference, with its broader membership, to take on the project. Dyer Report, Actes et documents, *supra* note 2 at p. 15. Regionally limited inter-jurisdictional co-operation had already been undertaken in Scandinavia, the US and Canada. *See* Nordic Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden Containing Certain Provisions of Private International Law on Marriage, Adoption and Guardianship, with Final Protocol, signed at Stockholm, Arts. 7–9 and 22, 126 LNTS 121 (including French and English translations at pp. 141–149); Nordic Convention of 11 October 1977 between Denmark, Finland, Norway and Sweden on Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Copenhagen; Uniform Child Custody Jurisdiction Act, Handbook of the National Conference of Commissioners on Uniform State Laws 194 (1968); 9 (Part I) Uniform Laws Annotated 115 (1988) (US); Uniform Extra-Provincial Custody Orders Enforcement Act, Proceedings of the Fifty-Sixth Annual Meeting of the Uniform Law Conference of Canada 29, 108–115 (19–23 August 1974) (Canada); *see* J.G. Castel, *Canadian Conflict of Laws* (1994, 3rd ed.), § 256.

[6] Dyer Report, Actes et documents, *supra* note 2 at p. 18.

Drafters were to put his insights to good use. The convention they wrote avoids legal quagmires and addresses extra-legal problems in exemplary fashion.[7] Very simply, it restores the child to its place of habitual residence upon a showing that the child was wrongfully taken from that place or, alternatively, was wrongfully retained abroad after an authorized visit.[8] An act's wrongful nature can be established by examining the law of the child's habitual residence; no court order is necessary.[9] Once this is done, the child is to be returned 'forthwith' unless one of a limited number of narrow exceptions applies.[10]

There are two primary advantages to this venue-like scheme:

(a) because the child will be returned to the place of its habitual residence, the merits of the case will generally be heard and decided by courts with maximum access to relevant information, and
(b) abductions will be deterred because parents will be deprived of the strategic benefits they might otherwise have sought through such self-help.

The second creative feature of the Convention lies in the governmental offices (Central Authorities) it establishes to administer Convention operations. The charge to these Authorities is broad indeed: far more than transmittal bodies (although they are that, too), they also assist across a full range of practical and educational tasks.[11]

From the beginning, the Convention worked remarkably smoothly. Most courts applied the Convention in the way the drafters had hoped, and children were indeed sent home, either by consent or following summary proceedings. In some countries questions arose about which courts or procedures should be followed, but these were gradually resolved. New countries increasingly clarified these matters through implementing legislation, thereby avoiding the dangers of getting off to an uncertain or weak start.[12] Educational activities, aimed not only at the legal community, but

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[7] Carol S. Bruch, 'How to Draft a Successful Family Law Convention: Lessons from the Child Abduction Conventions' in *Children on the Move* (Doek *et al.* (eds.)) (1996), at p. 47.

[8] Convention, *supra* note 1, Preamble, Arts. 1 and 3.

[9] Ibid., Arts. 3 and 14.

[10] Ibid., Arts. 12 (return is to be forthwith unless proceedings were commenced more than one year after the wrongful act and the child is settled in its new environment), 13 (party seeking return was not exercising custody rights or has consented or acquiesced to the removal or retention; return would cause child grave physical or psychological harm or place it in an intolerable situation; sufficiently mature child objects to its return), 20 (return would violate fundamental principles of requested state relating to human rights and fundamental freedoms).

[11] Ibid., Art. 7; Carol S. Bruch, 'The Central Authority's Role Under The Hague Child Abduction Convention: A Friend in Deed' in (1994) 28 *Fam. LQ* 35; Linda Girdner and Janet Chiancone, American Bar Association Center on Children and the Law, Survey of Central Authorities of the Hague Convention on the Civil Aspects of International Child Abduction (20 February 1997).

[12] Indeed, countries now benefit from the breaking-in experiences of earlier contracting states. A list of topics that countries considering joining the Convention might wish to address now exists. It ranges from domestic rules of venue, competence and appellate practice, to

also at the public, proved important. Publicity surely enhanced recourse to the Convention, and I think it likely that it may also have discouraged some would-be abductors.

If there was an Achilles heel in the first years, it appeared, as had been feared, when courts distended what were intended to be narrowly circumscribed exceptions. Sometimes, for example, they honoured a child's objection to return even when the child was much too young to provide cogent objections or when the objections actually concerned the child's preferred custodian rather than an objection to litigation in the habitual residence. In other unfortunate cases, return orders were refused on the theory that a return would remove the child from its primary caregiver, thereby exposing it to grave danger of psychological harm.[13] (A solution more in keeping with the Convention would have ordered return, but in the custody of the abductor.)[14]

These cases were in the minority, however. Most courts honoured both the letter and the spirit of the Convention, sometimes even returning children when the Convention did not require it. Here, British and Australian courts, in particular, took the lead. They applied the Convention by analogy where its terms did not control.[15] And in Convention cases, when a defence was established, these courts

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burdens of proof, assignment of costs, legal and social services, and privacy rules. For an early catalogue, *see* Carol S. Bruch, 'International Child Abduction Cases: Experience under the 1980 Hague Convention' in *Parenthood in Modern Society* (John Eekelaar and Petar Šarčević (eds.)) (1993), at pp. 353, 361–363. For a description of Finland's choice to precede ratification by addressing many of these issues as well as undertaking significant reforms of substantive custody law, *see* Matti Savolainen, 'The Hague Convention on Child Abduction of 1980 and its Implementation in Finland' in (1997) 66 *Nordic J. Int'l L.* 101.

[13] *See*, e.g., AG Saarbrücken, Beschluss vom 12. Juli 1991 – 40 F 177/91. This reasoning was rejected in *C v. C* [1989] 2 All ER 465, [1989] 1 WLR 654:

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

The German courts, too, later rejected arguments that returns should be refused because harm might result if the child were removed from the care of the abductor. *See*, e.g., opinions of the German Constitutional Court in 2 BvR 982/95 (10 October 1995), 35 ILM 529 (1996) (English translation); 2 BvR 233/96 (15 February 1996), 43 *FamRZ* 405 (1996); 2 BvR 1075/96 (15 August 1996), 43 *FamRZ* 1267 (1996).

[14] *See*, e.g., AG Nürnberg, Beschluss vom 27 February 1992 – Az. 8 F 186/92.

[15] This occurs either because the child's habitual residence was not in a Convention country, e.g., *Marriage of Van Huysduynen and Van Rijswijk*, No. B8176 of 1989, Fam. Ct. Australia, Brisbane, FLC 92–120 (29 November 1989) (return to the Netherlands before it was a Convention country); *Re K* (a Minor), Ct. App. (Civ. Div.) LEXIS, Comcas Library, Engcas File (24 June 1991) (return to Greece before it was a Convention country); *Re S* (Minors), Ct. App. (Civ. Div.), LEXIS, Comcas Library, Engcas File [1994] 1 FLR 297

increasingly exercised their discretion to nonetheless order the return. Sometimes they did so by accepting assurances ('undertakings') from the requesting parent that alleviated their concerns for the safety of the child.[16] This judicial receptivity in the early years, together with dedicated efforts by the central authorities and the Permanent Bureau, got the Convention off to a strong start.

B. Present

Ratifications and accessions, which mounted steadily from the beginning, have accelerated in recent years and now total 53 (52 countries plus Hong Kong). The two most recent accessions, those of Maldova and Paraguay, entered into force on 1 July

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(17 December 1992) (return to Pakistan, a non-Convention country); *Marriage of Van Rensburg and Paquay*, No. PT311 of 1992, Full Court, Fam. Ct. Australia, Melbourne, No. WA2 of 1993 (18 March 1993) (return to South Africa before it was a Convention country), or because the Convention had not yet taken effect in the state of refuge when the wrongful act occurred, e.g., Full Court, Fam. Ct. Australia, Adelaide, Appeal No. 185/1985 (18 October 1985) (returning child to Germany before Convention was in effect in Australia). *See also Lavitch v. Lavitch* [1986] 49 RFL (2d) 225 (Manitoba Ct. App. 24 December 1985) (Provincial implementing Act applied to the United States of America before it was a Convention country).

[16] For my analysis suggesting that this is a useful enhancement of the Convention in some cases, but contrary to its purposes in others, *see* Bruch, 'International Child Abduction Cases', *supra* note 12 at p. 358. *See also* my remarks concerning the special problems posed by undertakings in domestic violence cases, in the text accompanying notes 25–29 *infra*; Hague Conference on Private International Law, Special Commission on the Operation of the Convention on International Child Abduction (17–21 March 1997), Working Paper on Undertakings (Working Document No. 2, submitted by the United States delegation, with the concurrence of the Child Abduction Unit of the Lord Chancellor's Department of the United Kingdom (distributed 17 March 1997)) (hereafter Special Commission). Girdner and Chiancone, *supra* note 11 at p. 29, report affirmative responses from 60.7 per cent of the Central Authorities that answered the question, 'When ordering return under the Hague Convention, do judges in your country ever specify the terms or conditions for the return of the child?'. They interpret these responses as revealing a broad use of 'undertakings'. Unfortunately, their question does not distinguish between orders governing behaviour in the requested state (such as specifying the date and means of return or who will accompany the child) from 'undertakings', which purport to govern behaviour in the child's habitual residence following its return (such as orders concerning housing, support or custody of the child with the abductor pending trial on the merits). Nor do they indicate how many countries answered this question. Without this information, one cannot compute how many affirmative answers were received. As the authors warn, 'unless otherwise noted, [the] percentages shown reflect the percentages of responding countries that answered that particular question' – i.e., neither the percentage of all Convention countries, nor even the percentage of the countries that took part in the survey. *See* ibid., at p. 4.

and 1 August 1998, respectively.[17] This remarkable growth has been thanks to two interlocking influences: the Convention's record of success[18] and its implied endorsement by the 1989 United Nations Convention on the Rights of the Child (the UN Convention).[19]

These developments are part of a larger development in child law. As Adair Dyer has pointed out, legal solicitude for children has increased dramatically during the past century.[20] First came laws recognizing parental rights. Then came express protection for the child's interests. More recently, children's rights themselves have been articulated, most notably in the UN Convention.

Article 11 of that Convention endorses international agreements to combat 'the illicit transfer and non-return of children'. As the Hague Child Abduction Convention is the leading international vehicle for this purpose,[21] the UN language has enhanced accessions to the Hague Convention around the globe. This is exciting news. As fewer havens exist for would-be abductors, fewer children will be victimized.

However, the Convention is now a teenager and, as that analogy implies, new problems are now surfacing. The reasons are matters of some conjecture. Several of us have noticed that the predominant fact pattern in litigated cases seems to have shifted. Our earlier prototype (the one in the mind of the drafters) was one in which a non-custodial father became frustrated with the constraints of his visitation opportunities and removed the children from their mother. Although this model never explained all of the cases, it was certainly a common fact pattern. But in recent years, its presence has declined precipitously, at least in Convention cases. The Central Authority for England and Wales reports that 70 per cent of its Convention cases now involve mother-abductors, and 99 of the first 130 cases in which my assistants have recorded the gender of the abductor (fully 76 per cent) also involve mothers. This is not, however, because mothers have now become non-custodial parents. Rather, it is primary caretaking mothers who increasingly appear as abductors in Convention cases.

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[17] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Status as of 7 July 1998 (hereafter Status Report).

[18] Israel, for example, waited to see how the Convention would work in practice, which countries would join, and the degree to which returns of children to Israel could therefore be anticipated before ratifying the Convention in 1991. Interview with Professor Stephen Goldstein, The Hebrew University of Jerusalem, in Jerusalem, 30 December 1996.

[19] 28 ILM 1448 (1989).

[20] Adair Dyer, 'Childhood's Rights in Private International Law' in (1991) 5 *Australian J. Fam. L.* 103.

[21] Two other Conventions have been drafted, but their reach is limited. Membership in the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, ETS No. 105, is restricted to Council of Europe countries, and thus far only four countries have ratified the Inter-American Convention of 15 July 1989 on the International Return of Children, OASTS No. 70, 29 ILM 63 (1990).

Why this is so and what it means for the Convention are matters of some speculation.[22] In a provocative first look at figures from the United States of America (US), Adair Dyer has noted that caretaking mothers now constitute the substantial majority of abductors to Convention countries, whereas fathers are still the main abductors to non-Convention countries.[23]

Dyer suggests that many non-custodial parents, realizing that they would have no plausible defence to a return petition, either forego abductions to Hague countries or, having abducted, ultimately return the children voluntarily rather than incur the costs of a futile defence. This hypothesis also suggests why fathers are more likely to abduct to the non-Convention countries that were reflected in the US statistics: these were countries in which fathers, by virtue of their gender rather than their caretaking histories, have preferential custody or guardianship rights.[24] By removing their

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[22] Anne-Marie Hutchinson, Chair of Reunite, National Council for Abducted Children, the British child-find organization, suggests that this reflects less a change in the incidence of maternal abduction than an increase in the numbers of fathers who now have a legal basis for complaint. Discussion period remarks by Anne-Marie Hutchinson, Conference on the Globalization of Child Law, The Hague, 13 September 1997. These men's enhanced rights may stem either from reforms in substantive custody law or from the increasing use of Professor Elisa Pérez-Vera's theory that wrongfulness exists if the rights of the parent who is left behind have been disregarded, even if the abductor's actions were not in breach 'of a particular law'. Professor Pérez-Vera's view is set forth in her Explanatory Report, Actes et documents, *supra* note 2 at pp. 426 and 447, para. 71. It has been criticized persuasively, however. *See* Eric M. Clive, *The Law of Husband and Wife in Scotland* (1992, 3rd ed.), at p. 636; Savolainen, *supra* note 12 at pp. 104–105, note 12.

[23] *Adair Dyer*, 1994 USA Statistics (15 September 1995) (unpublished).

[24] The gender disparity that Dyer identifies was evident in the cases of abduction to Jordan that were being actively addressed by the embassy of the United States of America (US) in Amman during my research trip there in mid-June 1997. Mr Steven Maloney of the embassy's US American Services Office reported that out of ten incoming abduction cases then receiving his office's attention, nine involved Jordanian fathers who had returned to Jordan with their children. The tenth involved a Muslim woman with Canadian and US citizenship whose father, although not a Jordanian citizen, resided there. Telephone interview with Steven Maloney, Consular Officer, US American Services Office, US Embassy, Amman (12 June 1997).

The relative rights of men and women under Islamic law are more complex, however, than this generalization suggests. Under Islamic law mothers have preferential rights to the custody of young children, but generally must exercise them in the area where the father lives or, in some schools of Islam, in her own country if the couple was married there. The father, however, retains guardianship of the child's person and property at all times. In addition to direct custodial rights, it is possible, as in Jordan, that a father will have an absolute right to control whether or not the children or their custodian leave the country and whether he may remove the children from their mother's country without her consent. *See*, Jordanian Law of Personal Status 1976 (JLPS), Art. 166: 'The custodian shall not be permitted to travel with the ward outside the Kingdom unless the guardian agrees, and after the requirements of the child's interests have been examined.' Lynn Welchman, *Women's Centre for Legal Aid and Counselling, Islamic Family Law in the West Bank and Gaza Strip* (forthcoming, Jerusalem), at ch. 10 (hereafter *West Bank*) (providing a comprehensive discussion and noting that this Jordanian provision deviates from the

children to these havens, fathers almost always enhance their custody rights without fear of a return order. Although this may explain why fathers are unlikely to abduct to Convention countries, it does not explain why mother-abductors are not equally deterred. It appears that other demographic factors are also at work.

Many abducting mothers return to their home country and parents after a relationship fails[25] and their children follow. Either these mothers wrongly asssume they are free to leave or they, like many abducting non-custodial parents, deliberately flout the law. Certainly some of them have fully understandable reasons to leave. In addition to their search for familial support, opinions in Convention

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Hanafi school that is otherwise generally followed in the Islamic personal law of Jordan). For an earlier treatment, *see* Lynn Welchman, 'The Development of Islamic Family Law in the Legal System of Jordan' in (1988) 37 *Int'l & Comp. LQ* 868. The JLPS, which provides amendments to Islamic law in areas that are susceptible to such legislative action, applies directly only in the Islamic religious (Shari'a) courts; *see infra* note 47 for a description of the laws applicable in other Jordanian religious courts. For brief summaries of the laws of several Islamic schools and countries, *see also* David Pearl, *A Textbook on Muslim Personal Law* (1987, 2nd ed.), at pp. 92–97; Norman Anderson, 'Islamic Family Law' in (1983) 4 *International Encyclopedia of Comparative Law* § III-162, at p. 76 (ages at which maternal custody ends ranging from two to puberty for boys and from seven to the date of marriage for girls; varying orders of preference for custody if the mother is unavailable or unqualified). Under Art. 162 of the JLPS, which provides for maternal custody until puberty for both boys and girls, the Shari'a court in Jordan normally awards custody to the mother until a child reaches 15. At that age, a son may choose to stay with his mother (although she then forfeits child support for him), but a daughter must go to her father. Interview with Ahmed Attoun, Judge of the Shari'a Court of first instance, in Amman (11 June 1997). If the mother is unavailable or unqualified to care for her children (for reasons such as insanity, poor morals, neglect or marriage to a man who is not a close family member), and custody is exercised by another female relative, custody will transfer to the father when a son reaches nine or a daughter 11. *See* JLPS Art. 161. The order in which care of young children is awarded when they are not in their mother's care is first to the maternal grandmother, then to the paternal grandmother, then to other female relatives (the child's full and half sisters, nieces and aunts) according to strict order that scholars report differently. *Compare* Welchman, *West Bank, supra* this note, with Jamal J. Nasir, *The Status of Women Under Islamic Law* (1994, 2nd ed.) at pp. 131–32 and Ahmed Attoun interview, *supra* this note. If none of these women is available and qualified, custody will be awarded to the father. Ahmed Attoun interview, *supra* this note. If the father, when entitled to custody, is unavailable or unqualified, custody will go to his male relatives following strict order; if no one from the father's side is available or qualified, the court may pick any suitable person. Ibid. The precise ages at which custody rights shift differ, depending upon the country and controlling legislation. A current legislative proposal from the Jordanian National Committee for Women would extend maternal custody until the age of 18. Interview with Tajhred Hikmat, Assistant Attorney General of Jordan, in Amman (10 June 1997). *See* Charles M. Sennott, 'Child's Death has Iranian Women Questioning Law', *Wisconsin State Journal*, 20 December 1997, at p. 8A.

[25] Such allegations were also made by a mother whose abduction of her children to Jordan was being addressed by the US embassy in June 1997.

cases often recount charges of spousal or child abuse.[26] If the children's return is sought in a case like this, the abductor may have a strong incentive to resist.

Here I fear that courts have been less than creative in applying the Convention. Because the difficulties of domestic violence were not clearly in view at the time the Convention was drafted, it contains no specific language addressed to the problem. Difficulties have arisen due to sometimes cavalier judicial decisions in cases of proven spousal abuse.[27] It would, for example, be possible to fashion a defence from Convention language that seeks to avoid grave harm to a child of either a psychological nature or as a result of an intolerable situation. Rather than do so, courts have generally accepted assurances that danger to the child will be averted following its return during the ensuing custody litigation.[28] In reality, of course, court orders are often woefully inadequate to actually protect the victims of violence, and several Convention countries are understandably reluctant to impose return orders in this context. Initial efforts to address the problem were undertaken

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[26] For a report of the literature concerning domestic violence and child abduction, *see* Eva J. Klain, *Parental Kidnapping, Domestic Violence and Child Abuse: Changing Legal Responses to Related Violence* (American Prosecutors Research Institute's National Center for Prosecution of Child Abuse, Parental Kidnapping Project, March 1995). Professors Hegar and Greif report that 20 per cent of abducting mothers said they were fleeing domestic violence, while only six per cent of abducting fathers made similar claims. Hegar and Greif, 'Abduction of Children by Their Parents: A Survey of the Problem' in (1991) 36 *Soc. Work* 421. They also report that approximately 75 per cent of abducting fathers and 25 per cent of abducting mothers had histories of violent behaviour. While these figures indicate a substantial number of cases involving both domestic violence and child abduction, the data are drawn from a large but non-representative sample and are, accordingly, only suggestive.

[27] *See*, e.g., *Murray v. Director of Family Services*, 16 Fam. LR 982, Full Court, Fam. Ct. Australia, Sydney, FLC 92–416 (19 and 23 August and 1 September 1993), LEXIS, Aust Library, Ausmax File, in which children were returned to New Zealand in the company of their mother, a victim of admitted abuse. The woman had alleged that her husband had threatened her life, possessed assorted weapons and belonged to a gang ('the Mongrel Mob') whose members he would enlist to 'perform acts of violence against her' if she returned. She also testified that she would not feel safe living with family members and would have to stay in a women's refuge in New Zealand with the children if they were returned. The Australian trial and appellate courts rejected her arguments that living under these conditions would constitute a grave risk of psychological harm to the children or place them in an intolerable situation. They expressed instead what might well have proven to be a naive belief that authorities could effectively protect her and the children from these threats.

[28] These assurances may be given to the court considering the return petition, in which case they are known as 'undertakings', or they may take the form of consensual orders in the country to which return is sought, in which case they are known as 'safe harbour orders'. Both techniques may be used in a given case.

in the March 1997 Special Commission meeting,[29] but a more structured response is needed.

C. Future

The easiest matter to predict about the Convention's future concerns its geographic reach. Surely we will see a continuing increase in Member States around the globe. Less clear is which states these will be and how current members will respond to future accessions. Several factors are at work.

We are already witnessing what may prove to be an increase in membership by countries that are insufficiently prepared to carry out their Convention obligations.[30] I refer in particular to countries that ratify or accede without even designating the Central Authority mandated by Article 6.[31] But this is not the only problem. Last year social scientists from the US who studied Central Authority operations reported, for example, that three countries could not be reached at the facsimile numbers their governments had provided to the Permanent Bureau.[32] An additional country responded to their inquiry with refreshing candor – a request for a copy of the Convention.[33]

I suspect that this trend may be an unintended consequence of accessions that are prompted by the UN Convention on the Rights of the Child. The UN Convention, in contrast to the Hague Convention, seeks States Parties without regard to whether they will immediately honour its substantive requirements. Indeed, countries are

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[29] At that meeting the Australian delegation made constructive suggestions to address the real dangers parents and children may face in these cases. *See* Special Commission, *supra* note 16, Working Document No. 3, submitted by the Delegation of Australia (distributed 17 March 1997). These proposals were, however, that Central Authorities voluntarily undertake to place returning parents or children in touch with social service providers and did not, accordingly, place countries under any obligation to assist them. Nor did they address the possibility, clearly authorized by the Convention, of refusing to return children in appropriate cases.

[30] When Dr. Girdner, for example, aided by Adair Dyer, sought information for her recent Survey of Central Authorities, three countries could neither be reached at the facsimile numbers provided by the Permanent Bureau nor, so far as could be told, through subsequent contacts provided by embassy officials. Girdner and Chiancone, *supra* note 11 at p. 3.

[31] A recent example is provided by South Africa, which deposited its instrument of accession on 8 July 1997, but did not identify a Central Authority. *See* Hague Conference on Private International Law, Circular No. 3(97) (13 August 1997).

[32] Girdner and Chiancone, *supra* note 11 at p. 3; telephone interview with Linda Girdner, Principal Investigator and Project Director, American Bar Assiation Center on Children and the Law (4 September 1997).

[33] Girdner interview, *supra* note 32.

expected to implement these UN treaty obligations only gradually, and a monitoring committee is set in place to review their progress.[34] Accession to the Hague Child Abduction Convention, for example, satisfies Article 11 of the UN Convention, which calls for Member States to enter international agreements to combat child abduction. If a country can accede to the Hague Convention without taking immediate steps to implement it, however, no good and much harm may result.

Although, given the ambitious agenda of the Convention on the Rights of the Child, the UN model of present commitment to future progress is fully understandable, it does not serve the aims of the Child Abduction Convention, which requires immediate governmental and judicial actions on behalf of abducted children. Unless parties to the Hague Convention refuse to accept accessions until countries have taken internal steps to permit its immediate implementation, I fear that the world of good that has been accomplished so far may be undercut by a sea of symbolic statements. If this shift from present performance to future aspiration occurs, the Child Abduction Convention and its deterrent effect will lose the vigour that has been so essential to its success.

There is another reason for restraint in evaluating whether to accept accessions. Many troubling abduction cases involve countries in which religious laws or courts affect the merits of child custody disputes. My recent research in Israel (a State Party) and Jordan (a non-party) has highlighted several matters that may affect the likelihood that the Convention can play a direct role in this context. There are two major areas of concern.

I. Return petitions

The first is whether a country with religious laws will honour the Convention's obligation to return a child to the place of its habitual residence, if that would be contrary to religious doctrine. Even if such doctrines would not interfere with the Convention's operation, there would be a greater than average risk of unacceptable decisions. In the religious courts of Israel and Jordan, for example, most judges, although learned in their religion, have little secular education, and almost none have a university education or training in secular law.[35] Thus, their methods of

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[34] UN Convention, *supra* note 19, Arts. 44–46.

[35] *See* Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (1994), at pp. 279–287; interview with Zaki Kamal, Advocate and former Director of the Druze Religious Courts, in Haifa (30 May 1997); interview with Amal Khoury, Advocate and *pro bono* attorney for Na'amat (Movement of Working Women and Volunteers) and Fr. Dr. George Khoury, psychologist, lecturer and former judge of the Greek Catholic religious court, in Nazareth (30 May 1997); interview with Asma Khader, Jordanian Advocate and activist and General Director, Al-Haq (West Bank affiliate of the International Commission of Jurists), in Amman (10 June 1997). Shetreet reports that a 1987 Knesset hearing revealed that 'the large majority of Dayanim [rabbis serving as religious court judges] had not completed their high school studies and did not have matriculation certificates'. Shetreet, *supra* this note at p. 281. Judges in the Muslim courts (*qadis*) are subject to even less strict

analysis and recourse to legal texts and sources could not be expected to resemble those of the civil courts that have thus far dealt with Convention cases.[36]

In what was greeted as a useful model for other countries with religious courts, when Israel ratified the Convention in 1991,[37] its implementing legislation placed jurisdiction over return requests in the country's civil courts of general jurisdiction. Its drafters' reasoning was that the Convention operates much as a venue provision, and Israel's civil courts were accustomed to providing international judicial assistance. This scheme also distanced Hague petitions from religious court judges, who might be more inclined to go beyond Convention issues to the merits of the underlying dispute. Thus far Israeli case law demonstrates rigorous implementation of the Convention, and its civil court approach does indeed provide an example worth imitating.[38]

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qualifications than *dayanim*, there being no clear requirement for a completed religious education or competency as measured by an examination. Ibid., at p. 286. Shetreet concludes, 'In addition to [concern about these lesser requirements], the criticism of the Dayanim is valid for the appointment of Qadis as well: there is a need for a general academic education and a legal education in secular law'. Ibid., at pp. 286–287.

[36] To a limited degree, this may be changing in Israel, where the country's Islamic jurists (*qadis*) have recently expressed their interest in participating with civil judges in Israeli judicial education programmes. Interview with Aharon Barak, President of the Supreme Court of Israel, in Jerusalem (28 May 1997); interview with Ahmad H. Natour, President of the High Shari'a Court of Appeal, in Jerusalem (1 June 1997).

[37] As a member of the Hague Conference at the time the Convention was promulgated by its Fourteenth Session, Israel (unlike other countries with religiously based law) had a right to ratify the Convention rather than go through the accession process. *See* Convention, *supra* note 1, Arts. 37–38; Status Report, *supra* note 17. It did so when it concluded that the Convention was operating well in other countries and would operate overall to the benefit of Israel's population, as more children were then being abducted from Israel to Convention countries than vice versa. Interview with Professor Pinhas Shifman, The Hebrew University of Jerusalem, in Jerusalem (11 March 1997); interview with Dr Dov Frimer, Advocate and Adjunct Lecturer, The Hebrew University of Jerusalem, in Jerusalem (6 June 1997).

[38] *See*, e.g., *Tourna v. Meshullam*, File 1648/92, Israel Supreme Ct. (15 April 1992), discussed in Stephen Goldstein, 'Returning Abducted Children' in (1992) 26 *Israel L. Rev.* 567; *Cohen v. Cohen*, Tel Aviv Dist. Ct. (25 May 1992); *Foxman v. Foxman McAnulty*, No. MA 2898/92, Tel Aviv Dist. Ct. (19 November 1992); *Issak v. Issak*, Personal Status No. 5382/92, Tel Aviv Dist. Ct. (3 March 1993); *Leibowitz v. Leibowitz*, No. Civ. App. 473/93, Israel Supreme Ct. (21 June 1993); *Lowenstein v. Lowenstein*, Personal Status No. 2173/94, Tel Aviv Dist. Ct. (26 June 1994); *Gabbai v. Gabbai*, Civ. App. No. 7206/93, Israel Supreme Ct. (21 March 1994); *Gunzberg v. Grinwald*, Israel Supreme Ct. (14 August 1995); but *see Barbee v. Barbee*, Israel Supreme Ct. (4 September 1994), described in Asher Felix Landau, Law Report, *The Jerusalem Post*, 26 September 1994. Recent Israeli reforms, however, place return petitions in a newly created civil Family Court within the Magistrate's Court, removing appeals as a matter of right to the Supreme Court. *See* Family Courts Law, 1995; Yaacov S. Zemach, *The Judiciary of Israel* (1993), at pp. 45–49; Stephen Goldstein, 'Regional Report: Common Law Countries' in *Reports, The Role of the Supreme Courts at the National and International*

II. Decisions on the merits after return

Quite aside from the handling of return petitions, however, is the matter of how courts of these countries will deal with children who have been returned from abroad under the Convention. In Israel, for example, many of these cases are heard in religious courts,[39] and in other countries either religious courts[40] or civil courts

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Level, International Colloquium, International Association of Procedural Law, Thessaloniki B195, B202 (21–25 May 1997). Only time will tell whether the Convention will suffer from this reform. Interview with Philip Marcus, Judge of the Jerusalem Family Court, in Jerusalem (11 May 1997); telephone interview with Edwin Freedman, Advocate with offices in Givatayim (16 May 1997); Frimer interview, *supra* note 37. It is possible that the Supreme Court will retain an active role in Convention cases by exercising its original jurisdiction in its capacity as High Court of Justice. Barak interview, *supra* note 36; *see also* Ariel Rosen-Zvi, 'Israel: Protection of Family Members and Strengthening the Partnership between Spouses' in (1992–93) 31 *J. Fam. L.* 367, at pp. 377–380 (child abduction cases in the High Court of Justice). *See* generally Zemach, *supra* this note at pp. 69–80, and Goldstein, *supra* this note at pp. B200–202, on the role of the High Court of Justice.

[39] The allocation of authority among the civil, Christian, Druze, rabbinical (Jewish), and Shari'a (Islamic) courts is discussed by Shetreet, *supra* note 35 at pp. 105–108. For rabbinical courts, the concept of 'connection' (ancillary) jurisdiction covers matters associated with a divorce that is filed there before the ancillary matter is brought before a civil court. In practice, a well-advised party who feels his or her chances are better in a religious court will commence divorce proceedings in that court at once, while the abductor is abroad and unlikely to file a preemptive civil custody action in Israel. So long as the divorce action and its connection with the custody matter are *bona fide*, service either while the defendant is only temporarily absent or upon the abductor's return to Israel (perhaps in the company of a child whose return has been ordered under the Convention) will give the religious court exclusive competence. *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, s. 1, 7 LSI 139 (granting jurisdiction only if both parties are 'in Israel'); Ariel Rosen-Zvi, 'Forum Shopping Between Religious and Secular Courts and Its Impact on the Legal System' in (1989) 9 *Tel Aviv Univ. Studies L.* 347, at pp. 350, 352, 359, 360, 364–384; interview with Ze'ev Falk, Professor of Law Emeritus, The Hebrew University of Jerusalem and then-Rector, Seminary of Judaic Studies, Jewish Theological Seminary of America, Jerusalem Branch, in Jerusalem (13 January 1997); Frimer interview, *supra* note 37. Cf. Menashe Shava, 'The Nature and Scope of Jewish Law in Israel as Applied in the Civil Courts as Compared with its Application in the Rabbinical Courts' in (1985) 5 *Jewish L. Annual* 3, at pp. 6–7 (arguing that even those matters controlled by religious law in both court systems may reach different outcomes due to differences in judicial education and outlook as well as differing procedural rules). No such race to the courthouse occurs for Muslims; jurisdiction over custody matters lies exclusively with the Shari'a courts. Shetreet, *supra* note 35 at p. 107. For a discussion of the Druze religious courts and religious law, *see* Aharon Layish, 'Islam as a Source of Law in the Druze Religious Courts' in (1979) 14 *Israel L. Rev.* 13, at pp. 18–25 For a discussion of the West Bank and Gaza Strip, *see* Welchman, *West Bank*, *supra* note 24. *See generally* Asher Maoz, 'Enforcement of Religious Courts' Judgments Under Israeli Law' in (1991) 33 *J. Church & State* 73.

[40] *See*, e.g., Jordanian Constitution of 1952, ch. 6 (The Judiciary), http://iconnect.com: 80/jordan/const/chap6.html (English translation by Dr Hanna Naddy); Welchman, 'The Development of Islamic Family Law in the Legal System of Jordan', *supra* note 24 at pp. 869–870.

applying religious law[41] would have jurisdiction. This gives rise to concern, as gender inequalities are particularly acute in systems in which judges are all men and in which custody doctrines may be rigidly age- and gender-based.[42]

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[41] *See*, e.g., Egyptian Decree Law No. 25 of the Year 1929 as amended by Law No. 100 of the Year 1985 Concerning Certain Personal Status Provisions, Art. 20, Egyptian Wakaeh, Issue 27, at 2 (25 March 1929); OJ, Issue 27 (adjunct) (4 July 1985); OJ, Issue 33 (15 August 1985) (articulating a civil custody law modeled after Islamic law). *See generally* Adrien Katherine Wing, 'Custom, Religion, and Rights: The Future Legal Status of Palestinian Women' in (1994) 35 *Harvard Int'l LJ* 149, at p. 171 (setting forth the history of Egyptian family law reform); Welchman, 'The Development of Islamic Family Law in the Legal System of Jordan', *supra* note 24 at p. 871 (recounting the abolition of Egypt's religious courts in 1956); Nadav Safran, 'The Abolition of the Shari'a Courts in Egypt' in (1958) 48 *Muslim World* at pp. 20–28, 125–135.

[42] Frances Raday, 'Women in Law in Israel: A Study of the Relationship Between Professional Integration and Feminism' in (1996) 12 *Georgia State L. Rev.* 525, at pp. 549–550:

> [In Israel] matters of personal status [have been delegated] to the jurisdiction of the courts of the various religious communities (Jewish, Moslem, and Christian). These courts are blatantly patriarchal institutions, and the relegation to them of questions of personal status causes an ongoing violation of women's right to equality in personal status law. The result ... has been the exclusion of women from the bench for divorce jurisdiction for all communities, because the religious courts are exclusively male....
>
> For many years, the Supreme Court has not intervened decisively to vindicate women's right to equality when petitions on issues of state and religion have been brought before it. The dilemma and ambivalence of the Supreme Court is clear....

An Israeli civil statute, for example, which in theory controls in both civil and religious courts, gives preference to maternal custody for children up to the age of six but imposes no gender preference thereafter as to either boys or girls. *See* Capacity and Guardianship Law, 1962, § 25, 16 LSI 106, at pp. 109–110; *but see* Pinhas Shifman, 'The Welfare of the Child and Religious Considerations' in (1993) 10 *Jewish L. Ann.* 159, at p. 161 ('[I]t is not clear whether the provisions ... apply to the religious courts.... [but the] case-law ... assumes that [they do]'). This statute contrasts both with Jewish religious law, which gives fathers custody of their sons at age six while retaining maternal custody for daughters until adulthood, and Hanafi Islamic law, which transfers custody of boys to their fathers at age seven and girls at age nine. *See* Eliav Shochetman, 'On the Nature of the Rules Governing Custody of Children in Jewish Law' in (1992) 10 *Jewish L. Ann.* 115; Anderson, *supra* note 24, at II-161, at p. 75. Shifman asserts that there are merely differing presumptions in the religious and civil courts and that both courts ultimately apply a welfare of the child (best interest) test, ibid., at pp. 166–167, and Abu-Gosh makes a similar assertion in the context of the Shari'a courts. *See* Subhi Abu-Gosh, 'The Shari'a Courts from the Perspective of Israeli Pluralism' in *Perspectives on Israeli Pluralism* (Kitty O. Cohen and Jane S. Gerber (eds.)) (1991), at p. 45 (eliding the distinction between the civil and religious custody rules). This may explain the frequent observation that religious courts simply apply their own views, ignoring the civil law. Brahyahu Lifshitz, 'Israeli Law and Jewish Law – Interaction and Independence' in (1990) 24 *Israel L. Rev.* 507; Eliav Shochetman, 'Israeli Law and Jewish Law – Interaction and Independence: A Commentary', ibid., 525, at p. 529 ('The situation ... is one of total or almost total non-recognition of the laws of the State of Israel on the part of the Rabbinical courts.'); Frances Raday, 'Israel – The Incorporation of Religious Patriarchy in a Modern State' in (1992) 4 *Int'l Rev. of Comparative Public Policy* 209. Although intervention

Much of the world has adopted a custody rule that calls for decisions according to the best interests of the child, and this is the system endorsed by the UN Convention on the Rights of the Child.[43] But a study of religious law highlights the ambiguity of the 'best interest' notion. It is likely, for example, that a judge (*dayan*) in an Israeli rabbinical court (an Orthodox rabbi) will give great weight to orthodox religious training and practice in child custody cases and will favour rearing a child in a traditional Jewish environment in Israel, even if the parents are not orthodox, have lived a secular life during their marriage and have spent much of their married life abroad.[44] Similarly, a judge (*qadi*) in an Islamic court will generally award a child's custody according to religious tradition, with rules that reflect the child's age, the custodial parent's gender and whether a parent has remarried.[45] In most of these courts, a custodial mother will have her residence restricted to the area in which the father resides.[46]

Each of these judges believes that his custody decisions advance the child's best interests. In both Israel and Jordan, for example, Islamic and Christian rules and customs require that teenage girls live with their fathers.[47] These are believed to

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by the Supreme Court in child custody cases is perhaps more frequent than in many other areas within the religious courts' jurisdiction, as Raday notes, the Israel Supreme Court often takes a hands-off attitude. *But see* Ariel Rosen-Zvi, 'Israel: Inter-Family Agreements and Parent-Child Relationships: Developments Within an Anachronistic System' in (1989–90) 28 *J. Fam. L.* 526, at pp. 540–541 (stating that the Supreme Court has frequently intervened in child custody matters, but expressing ambivalence about the adequacy of that intervention); Frances Raday, 'Equality of Women Under Israeli Law' in (1983) 27 *Jerusalem Quarterly* 81, at pp. 82–84.

[43] UN Convention, *supra* note 19, Arts. 3 and 9.

[44] Interview with Sharon Shenhav, Advocate and Director of the Overseas Department of Na'amat (Movement of Working Women and Volunteers), an organization with 53 legal offices throughout Israel, in Jerusalem (18 May 1997); Frimer interview, *supra* note 37; Rosen-Zvi, *supra* note 39 at p. 352. *See* Shetreet, *supra* note 35 at pp. 270–282 ('Today women stand before a bench totally composed of men, which often holds extremely conservative opinions').

[45] *See* Welchman, *West Bank*, *supra* note 24; Abu-Gosh, *supra* note 42.

[46] *See* Ze'ev W. Falk, 'Jewish Family Law' in (1983) 4 *International Encyclopedia of Comparative Law* § II-69, at pp. 32–34; Anderson, *supra* note 24, § II-162, at p. 76; Ronald Warburg, 'Child Custody: A Comparative Analysis' in (1979) 14 *Israel L. Rev.* 480, at pp. 493–494.

[47] Under the Law of Non-Muslim Religious Communities 1938, recognized religious communities in Jordan apply their own personal laws to child custody matters. *See also* The Jordan Civil Code Of Moslem Jurisprudence, § 17 (Hisham R. Hashem, translator and annotator 1990). Because the Latin (Roman) Catholic Church applies the local law of the diocese to child custody cases in its religious courts, however, the custody rules that control Shari'a cases also control cases in the Latin Catholic courts in Jordan, the West Bank and Israel. Interview with Fr. Dr. Jhaleb Bader, Judge of the Latin Catholic Church, in Amman (11 June 1997); interview with Monsignor Raouf Najjar, Apostolic Nuncio, in Amman (13 June 1997). *See generally* JLPS, *supra* note 24, Art. 165, addressing the same concern, and providing that a guardian who is a close male relative ('within the prohibited degrees of relationship') may take a virgin under the age of 40 under his protection if she is not to be

ensure the daughters' moral purity and, thereby, also to protect the family's honour, surely matters that might well be considered supportive of the child's best interests. If, however, girls (never boys) are sometimes murdered by male family members in these communities for actual or even suspected inappropriate behaviour,[48] how can

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trusted with herself; the woman forfeits her right to support if she objects without cause. Welchman, *West Bank*, *supra* note 24.

The Anglican Church, in contrast, has provided a contemporary 'best interest of the child' standard for custody cases in its religious courts in Jordan, Israel, Syria and Lebanon, while the Eastern Orthodox Church applies Byzantian or, in some circumstances, contemporary Greek law. Interview with Dr Hanna I. Naddy, Advocate and drafter of the regional Anglican child custody law, in Amman (12 June 1997).

[48] Honour crimes occur in both Muslim and Christian families in Jordan and Israel. Interview with Eman Na Jiaeh, Investigative Reporter and host of weekly television programme, Talk of the People, in Amman (10 June 1997). Jordanian newspapers report such murders approximately once a week. Interview with Sawsan Is'haq, Legal Adviser, Centre for Women in Palestinian Refugee Camps, in Amman (10 June 1997); interview with Anaam Asha, Social Worker, Ministry for Social Development, in Amman (10 June 1997). These crimes are frequently committed by boys below the age of 16, because a criminal conviction will not appear on their permanent records and incarceration periods are relatively brief compared to either adult prosecutions for murder in Jordan or prosecutions for honour crimes in Israel. Sawsan Is'haq and Anaam Asha interviews, *supra* this note. No prosecutions have been brought in Jordan on conspiracy or aiding and abetting charges against older male relatives. Interview with Tajhred Hikmat, Assistant Attorney-General of Jordan, in Amman (10 June 1997) (also expressing her belief that boys of 11 to 15 years of age commit these crimes on their own initiative). A recent lenient sentence and a reported remark by the Director of the Amman police, who said that a person who committed murder in an honour crime would be treated as a hero by the police, given coffee, calmed down and reassured that he had done what he had to do (Asma Khader interview, *supra* note 35), appear to have prompted this commentary:

> Violators being always the women, men are entitled to a multitude of relationships in the name of manhood, while women should be their passive objects.
>
> A son is taught to be the protector of his family's honour and to defend it with blood. If a sister has 'lost her way,' by, say, dating a man, killing her should be the right thing to do.
>
> And it is so easy; the courts (with real prosecutors) are very lenient when it comes to honour killing. Like a three-month sentence, by the criminal court, for the young man who killed his sister to cleanse his family's honour.
>
> Soon, such ridiculous sentences would be accompanied by congratulations to the perpetrators for being such 'good defenders of morality'.
>
> ....
>
> We must stop this madness. Let 'he, who never sinned ...'.

Randa Habib's Corner, 'Let He who Never Sinned...', *Jordan Times*, 10 June 1997, at p. 7. Even a child whose father has raped her may be in danger of murder at the hands of her male relatives for her loss of chastity. Asma Khader interview, *supra* note 35. Women who fear that they may become the object of an honour crime may seek protective custody. In June 1997, 28 such women were being held in prison in Jordan at their own request, with the longest continuing incarceration having then lasted 13 years. A father may, however, post a bond and obtain his daughter's release in such a case, even despite her objections. Sawsan Is'haq and Anaam Asha interviews, *supra* this note.

custody rules based on 'family honour' be understood to serve a female child's interests rather than those of the male members of her family?

Another aspect of the problem can be seen in Egypt, where I understand accession to the Convention is under consideration. There, a ministerial order barring government-certified doctors and health workers from performing female circumcision (known elsewhere as female genital mutilation) was the recent subject of intense public and legal controversy.[49] Female circumcision, whether or not legally proscribed, is not a problem of limited geographic dimensions, nor are its implications still theoretical so far as the Convention is concerned. Rather, it is also practised across most of sub-Sahara Africa, as well as in some communities within the Republic of South Africa.[50] The World Health Organization estimates

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[49] In reversing a lower court, the Supreme Administrative Court concluded that the Minister of Health had the power to bar the procedure because 'female circumcision is not a personal right according to the rules of Islamic Sharia [law]'. 'Egyptian Court Renews Ban on Female Circumcision', *The Sacramento Bee*, 29 December 1997, at p. A6, col. 1 (reporting decision of 28 December 1997). According to UN agencies, the term '[f]emale genital mutilation comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons'. World Health Organization, Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement 3 (1997) (hereafter WHO Joint Statement). The known practices have been grouped in Types I to IV, ranging from excision of the prepuce, with or without excision of part or all of the clitoris (Type I), through excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation) (Type III) to a lengthy list of unclassified acts, including pricking, piercing or incising of the clitoris, cutting of the vagina (gishiri cuts), and introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing it (Type IV). Female genital mutilation is usually performed by traditional practitioners with crude instruments and without anaesthetic, although qualified health personnel may perform the procedure in health care facilities for affluent families. Ibid., at pp. 3–4. According to these UN agencies, the most common form of female genital mutilation, accounting for up to 80 per cent of all cases, is 'excision of the clitoris and the labia minora' (Type II), with about 15 per cent of all procedures consisting of the most extreme form – infibulation. Ibid., at p. 5 (identifying southern Egypt as an area in which infibulation is practiced); *see also The Sacramento Bee, supra* this note (reporting an estimated total of 70–90 per cent of Egyptian women are circumcised). *See generally* WHO/EMRO Technical Publication No. 2, Traditional Practices Affecting the Health of Women and Children: Female Circumcision, Childhood Marriage, Nutritional Taboos, etc. (Report of a Seminar, Khartoum, 10–15 February 1979).

[50] WHO Joint Statement, *supra* note 49 at pp. 5–6: 'Most of the girls and women who have undergone genital mutilation live in 28 African countries, although some live in Asia. They are also increasingly found in Europe, Australia, Canada and the US, primarily among immigrants from Africa and southwestern Asia.'

Although the map accompanying this statement, ibid., at p. 6, does not appear to identify South Africa as containing areas in which the practice occurs, the official observer of the Republic of South Africa at the March 1997 Special Commission meeting reported that the practice occurs in some areas of her country. Statement of Barbara Hechter, Official Observer from South Africa to the Special Commission Meeting, *supra* note 16, to the author, in The Hague (19 March 1997). South Africa acceded to the Convention later that year. Status Report, *supra* note 17.

that 130 million women alive today have been subjected to some form of the procedure, and that 2 million new cases occur each year.[51]

In other words, the need for current Child Abduction Convention countries to grapple with these issues is upon us. South Africa deposited its instrument of accession in 1997, and accessions will soon come from many more countries with religious or cultural practices that pose human rights issues.

This constitutes a serious challenge to the future reach of the Convention. Member countries will need to pay close attention to the doctrines, the judges and the courts that will administer requests for return if an accession is accepted. Of equal importance, they must also examine who would decide the merits and what customs and legal standards would apply to children returned from abroad. If the Convention is not to become a vehicle of harm, contracting states must become vigilant indeed.

Here, too, the drafters provided appropriate means of response. First is the option for contracting states to refrain from accepting accessions.[52] Second is the possibility of refusing return petitions even if the Convention is in place should human rights be endangered.[53]

Although problems of this gravity may properly preclude acceptances, more finely tuned responses may also be contemplated. It is possible, for example, that Article 20 of the Convention will take on a new role. Virtually unused thus far, it provides a defence if the return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'.

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[51] WHO Joint Statement, *supra* note 49 at p. 5.

[52] This option was exercised by Austria, for example, when Hungary acceded to the Convention in 1986. It was not until 1990, after political borders between the two countries had opened and international travel opportunities for Hungarian citizens had increased, that Austria accepted the accession of its neighbour. *See* Status Report, *supra* note 17.

[53] Convention, *supra* note 1, Art. 20. It reads: 'The return of the child ... may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Rarely invoked, this article was the basis of a recent refusal by a Spanish court to return a two-and-a-half-year-old child to Israel. *See* Decision of the District Court of Barcelona, First Department (21 April 1997) (unofficial English translation provided by the Israeli Ministry of Justice). The child had been brought to Spain by its Spanish mother, apparently under a parental agreement for a temporary visit that was to have been completed prior to 22 January 1995. When the mother and child failed to return, an Israeli rabbinical court transferred custody of the child to its father on 27 June 1995 under a temporary order, because the court found the mother to be a 'rebellious wife (*moredet*)'. The Spanish Court understood the Israeli order to be based on a desire to punish the mother. Because it was based on the mother's status, without regard to the needs of the child, the Barcelona Court concluded that a return order would violate the child's human rights and fundamental freedoms under Spanish law to have custody determined according to its best interests. *See generally* Judith Romney Wegner, 'The Status of Women in Jewish and Islamic Marriage and Divorce Law' in (1982) 5 *Harvard Women's LJ* 1, at p. 23 (concerning the concept of 'obedience' under Jewish and Islamic law).

Entering into treaty obligations with a country that permits female genital mutilation, for example, would not necessarily raise human rights concerns if the children to be returned were girls who had already been circumcised or boys, for whom the practice is irrelevant. But asking the courts of a requested state to make human rights decisions about the legal system or practices of another Member State in what is intended to be a summary proceeding is a sensitive matter at best. First, it places upon an individual the onerous burden of raising and proving the violation, and second, it opens the possibility of trial court decisions that might embarrass the country's foreign relations.[54] Beyond these concerns, one is left to wonder where the boundaries would be drawn if, for example, one child were protected by the defence, but siblings were not directly implicated. Would they be separated, or would the human rights defence, perhaps in concert with other defences, permit a court to refuse to return all of the children? Indeed, what should occur if female genital mutilation is technically illegal, but practised in fact? Would a defence be available on the grounds of a grave danger of physical harm even if not on human rights grounds?

These questions are not easy, but I urge that they be addressed in the most serious fashion *before* accessions are accepted. Additionally, looking both at the interests of children in the largest sense and at the more parochial interests of the Child Abduction Convention, I urge considerable caution. From our experience with returns in the face of domestic violence or inadequate access to the legal system, we already know that the public (quite properly in my view) objects to return practices when they fail to protect the endangered or victimized.

Further globalization of the Child Abduction Convention must await fertile soil – the globalization of human rights in general and children's rights in particular. The bottom line must remain not how many countries belong to the Convention, but rather how effective the Convention is in bringing about good results for children and for those who care for them.

That such progress is indeed possible is suggested by my recent research in Jordan. A committee appointed by the King has prepared legislative proposals designed to advance Jordan's compliance with the UN Convention on the Rights of the Child.[55] These proposals, which will be considered in the next legislative session, address certain aspects of child custody law as well as current provisions that restrict

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[54] For an earlier example of this danger in a different context, *see Zschernig v. Miller* 389 US 429 (1968), *rehearing denied* 390 US 974 (1968). The US Supreme Court held that a state statute that barred the rights of heirs behind the Iron Curtain to property from local decedents was an impermissible local invasion of the country's foreign relations power. In other words, 'the ordering of the relationships between the Union (or its components) and foreign nations is a federal function'. Eugene F. Scoles and Peter Hay, Conflict of Laws (1992, 2nd ed.), § 3.36, p. 112, note 15.

[55] Tajhred Hikmat interview, *supra* note 48; interview with Dr Hamdi M. Murad, Assistant Director-General, Ministry of Islamic Affairs, in Amman (10 June 1997).

international travel by women and children.[56] A leading human rights and family law attorney, Asma Khader, has made more sweeping proposals, including the assignment of all custody cases to civil rather than religious courts.[57]

At the same time, members of the bar, judiciary and government expressed support for Jordanian participation in the Child Abduction Convention.[58] I understood this to be an expression of their desire to bring Jordan more fully into the global community on matters of common interest.

Indeed, although Jordan belongs to only one bilateral agreement concerning child custody, the government has been known to return children abducted to Jordan in the recent past, and representatives of other countries reported sound intergovernmental co-operation in addressing difficult international family law cases.[59] My conclusion is that Jordan is not yet at the point where domestic legislation and

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[56] Tajhred Hikmat interview, *supra* note 48; interview with Towjan Faissal, Member of Parliament, in Amman (12 June 1997).

[57] Her recommended reforms are: (1) that all personal status questions be governed by a uniform civil law; (2) that all cases involving personal status be heard in the civil courts unless the parties agree otherwise; (3) that child custody cases be decided according to the best interest of the child; and (4) that a child be permitted to take the nationality of either parent.

Should Jordan join the Child Abduction Convention, she also recommends that Convention cases be heard in the civil courts. Moreover, she supports gender equalization of the laws concerning the rights of parents to travel or relocate with their children and of the laws by which spouses of Jordanian citizens may obtain Jordanian citizenship. Asma Khader interview, *supra* note 35.

[58] E.g., interview with Abdalla Irteimeh, First Secretary, Ministry of Foreign Affairs, in Amman (12 June 1997); interview with Sa'di Krista, Advocate before the Shari'a courts, in Amman (12 June 1997) (expressing his concern, however, that courts of other nations might not honour their obligations to return children to Jordan).

[59] *See* 'Jordan Lets 2 New Jersey Children Leave', *The New York Times*, 18 August 1994, Late Edition – Final, at B1, col. 2 (reporting the *Abequa* case, in which six- and three-year-old siblings who had been abducted by their father after he killed their mother were returned to the care of the maternal grandmother and aunt). Because the father's Jordanian mother sought custody, but the children were returned before their case was heard by the Jordanian courts, the government has been criticized for alleged unlawful behaviour. News reports do not reveal whether the children, who were American citizens, also held Jordanian citizenship. If not, New Jersey law should have controlled the question of the children's guardianship according to the Jordanian Civil Code, and a New Jersey judgment that placed the children with their maternal relatives should have controlled. *See* Jordan Civil Code, *supra* note 47, § 17. Even under Jordanian law, if she is fit, the mother's mother is the next person in line to assume custody. *See supra* note 24. The Attorney General of Jordan refused a request from the father's relatives that he obtain an order preventing the children's departure from Jordan because he thought it in the children's best interests to be returned; he dealt with the case as a criminal, not a civil matter. Interview with Omar Abaza, then-President of the High Administrative Court, who was the country's Attorney General at the time of the *Abequa* case, in Amman (12 June 1997). The High Administrative Court would have had jurisdiction to review the Attorney General's decision, had it been asked to do so. Ibid. In this case that possibility was mooted by the children's departure.

judicial structures would support its membership in the Child Abduction Convention. But this could change with the implementation of reforms now being discussed there, most importantly, non-governmental proposals for a civil substantive law and civil court jurisdiction for child custody disputes.[60]

Discussing the recent Finnish experience, however, Matti Savolainen has noted the degree to which judicial resistance can impede a nation's legislative efforts to reform its child custody law.[61] How much more difficult this will be if reforms are contrary to a judge's religious convictions or to customs that have taken on the aura of religious obligations![62]

Full maturity for the Child Abduction Convention will come, however, only when these matters, too long ignored, are given their proper weight as Convention countries decide which new treaty obligations they will undertake. Only when an acceding country protects all members of the family will it be appropriate to extend the Child Abduction Convention to it. In the interim, more modest bilateral or even multilateral arrangements, whether formal or informal, may be appropriate to address issues within the context of existing constraints.[63] The Child Abduction

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[60] *See supra* notes 55–57 and accompanying text. Domestic legislation in any country, however, is susceptible to subsequent amendment, and this may be particularly likely if there is a backlash to major reforms, especially those that affect strong cultural practices. For that reason, acceptance of an accession that is based on dramatic domestic reforms might best be delayed a few years to ascertain whether the reforms have actually been accepted in practice. In some countries, of course, legal instability may be particularly likely because of other structural features of the government. In Jordan, for example, there have been shifts in basic rights through executive actions in recent years. Towjan Faissal interview, *supra* note 56; Asma Khader interview, *supra* note 35. Premature acceptances, should they occur, would likely be renounced only after high human costs had been incurred for a number of years. *See* Convention, *supra* note 1, Art. 44 (denunciation).

[61] Savolainen, *supra* note 12.

[62] *See generally*, e.g., interview with Feriel Saleh, Director, Society of Social Development Centers, in Amman (11 June, 1997) ('You need to change the customs before you change the law'); Alice Armstrong *et al.*, 'Uncovering Reality: Excavating Women's Rights in African Family Law' in (1993) 7 *Int'l JL & Fam.* 314; Thandabantu Nhlapo, 'Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate' in (1995) 9 *Int'l JL & Fam.* 208; 'Egyptian Court Renews Ban on Female Circumcision', *The Sacramento Bee*, 29 December 1997, at p. A6:

> Proponents of female circumcision, including some clerics, argue that the surgery is a requirement of Islam. But that is disputed by many Muslim scholars and the proponents have never provided strong evidence to support their claim.
>
> The Supreme Administrative Court [has now reversed a lower court ruling that held the ban exceeded the government's authority and has held instead] that the procedure is not one of Islam's dictates, and thus is subject to Egyptian [civil] law.

[63] There are indications, for example, that this approach currently works well in Jordan, where the King is intolerant of criminal action on Jordanian soil. Abdalla Irteimeh interview, *supra* note 58; Maloney interview, *supra* note 24; *supra* note 59 (discussing the *Abequa* case). And consider the discussion in the text of battered women who attempt to flee abuse in Convention countries. If that model were to replace the current one in Jordan, which

Convention must be permitted to retain its vigour through application in those areas where it has a fair chance of operating well. In that way it can also stand as an example of the international co-operation that awaits countries if they embrace our growing body of global child law.

contd.

currently restricts a woman's departure if her husband files a border stop, abused women might be granted custody but only on condition that they remain in Jordan to facilitate convenient access by their former spouses. If that were to occur, current exit prohibitions will be replaced by custody-inspired travel restrictions of the sort seen in many Convention countries. *See generally* Carol S. Bruch and Janet M. Bowermaster, 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present' in (1996) 30 *Fam. LQ* 245. For an abused woman and her children whose safety and family or cultural support live abroad, this would indeed be a tragic distinction without a difference and the flexibility of informal relations between governments would have been lost. Similar considerations may be relevant as to many potential treaty partners.