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COMMENT

THE DISPARITY IN TREATMENT OF INTERNATIONAL CUSTODY DISPUTES IN AMERICAN COURTS: A POST-SEPTEMBER 11TH ANALYSIS

Lexi Maxwell†

INTRODUCTION:

In recent years, as a result of the growing divorce rate in the United States and the increasingly progressive attitude of American judges in advocating shared custody, judicial activism in custody arrangements has begun to play an important role in the lives of many Americans. In addition, due to the increasing mobility of the global population, many custody disputes that enter the American judicial system transcend international boundaries. This results in complicated situations for United States district and state court judges who are tasked with issuing fair and equitable custody decrees on a regular basis while also being faced with the reality of the potential inequality in international custody awards based on a parent's home country.

Many nations, including the United States, have banded together in an attempt to encourage the resolution of custody disputes that cross international borders. The Hague Convention on the Civil Aspects of International Child Abduction¹ [hereinafter Hague Convention] is one such international effort, which attempts to reserve substantive custody decisions exclusively for the court that has jurisdiction in the habitual residence of a

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¹ Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980 T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter Hague Convention].

particular child.² The Hague Convention was ratified in 1980, and enacted into the United States body of law by Congress, in an attempt to de-complicate signatory nations' judicial procedure when faced with parents fighting for custody across international borders.³ The Convention was also designed to protect one parent when the other parent is seeking a custody decrees from his or her home country⁴. Under this agreement, the signatory nations mutually assist each other in ensuring that only one local court has jurisdiction over the substantive custody decisions of a child, even when the child's parents reside in two separate countries.⁵

Not all countries are signatories to the Hague Convention.⁶ International custody disputes can become more complicated and discretionary for a judge who is trying to act in the best interest of the child when the home state of the parent is not a signatory to the Hague Convention. In these cases, the judge must consider the realities that if a child is sent to a foreign non-Hague country, even for visitation⁷, the child is outside American jurisdiction and the American judicial system cannot protect the return of a child to his or her American parent in the event that the foreign parent chooses to disobey the American order. There is also a possibility that the foreign parent may obtain a conflicting custody decree from a foreign court.⁸ Because American courts are not bound by any particular convention, their decisions on whether a U.S. court has jurisdiction over a custody determination are remarkably different from those concerning Hague signatories, reflecting a trend that judges are less willing to give a child to a foreign court for a substantive custody determination, absent a compelling reason.⁹ These so called compelling reasons are not uniform among U.S. domestic jurisdictions because state courts handle

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See, e.g.,* Hosain v. Malik, 672 A.2d 988 (Ct. Sp. App. Md. 1996), (where the Court of Special Appeals of Maryland had to rule on whether or not to accept a custody order from Pakistan, which is not a Hague signatory).

⁸ *Id.*

⁹ *See, e.g.,* Al-Safran v. Al-Safran, No. 27823-5-II 2003, WL 21387188, at *5 (Wash. App. June 17, 2003) (where the Court of Appeals of Washington held that

substantive custody decisions. However, the state judicial trends have been to keep substantive custody determinations in the U.S. unless a court is confident that the case belongs in a foreign country and the foreign court will apply a standard comparable to the U.S. best interest standard in custody determinations.¹⁰

In recent years, domestic courts have effectively dealt with international custody disputes involving Hague countries, but have been hesitant to decline jurisdiction in custody cases involving non-Hague countries.¹¹ Since September 11th, some U.S. courts are wary of returning a child to a non-Hague country for a substantive custody determination, even if the country is the habitual residence of a child, which, under a Hague scenario, would require the U.S. court to decline jurisdiction over the case.¹² However, courts have been comfortable in allowing visitation in non-Hague countries if a judge determines that a child will be ensured a safe return to the U.S.¹³ Regardless, U.S. courts treat parents residing in non-Hague countries differently from those who live in Hague countries because there is no standard protocol for these custody decrees.¹⁴ This is especially problematic because state courts are making substantive custody decisions in non-Hague matters, where federal courts are merely screening the appropriateness of jurisdiction for Hague-signatories before state courts can assume jurisdiction.¹⁵

Part II of this paper will contain a general history of the Hague Convention. It will include a general history of the U.S. courts' treatment of custody disputes involving countries that

the mere fact that a parent was requesting visitation in a non-Hague nation, such as Kuwait, was enough to prevent visitation).

¹⁰ Contrast *id. with* Long v. Ardestani, 624 N.W.2d 405, 414 (Wis. Ct. App 2001) (where the Court of Appeals of Wisconsin held that a mother failed to show a compelling reason why her children should be prevented from visiting Iran, a non-Hague signatory nation, with their father).

¹¹ See *Hosain*, 672 A.2d 988; see also, Paz v. Mejia De Paz, 169 F. Supp. 2d 254, 259 (S.D.N.Y 2001) (holding that a child's habitual residence was New York which required that a custody dispute be resolved in New York rather than New Zealand).

¹² See *Al-Safran*, 2003 WL 21387188, at *5.

¹³ See *Long*, 624 N.W.2d at 414.

¹⁴ See Hague Convention, *supra* note 1, at art. 14-16 (which does not provide for federal review of international custody disputes concerning non-Hague signatories).

¹⁵ See *Al-Safran*, 2003 WL 21387188, at *5.

subscribe to the Hague Convention. Part III will provide an overview, with examples from various U.S. jurisdictions, of U.S. courts' treatments of custody disputes involving non-Hague signatories. It will also evaluate the adjudicative process absent any binding international law or convention. Part IV will state the conclusion that international custody disputes that do not fall under the Hague Convention could be more fairly adjudicated in American courts.

In conclusion, despite legitimate concerns, it is clear that U.S. courts must equalize and adopt more uniform treatment of custody disputes involving Hague and non-Hague countries. Some recent decisions, such as the New Jersey Supreme Court's approval of parental visitation in Lebanon (a non-Hague signatory)¹⁶, should be applied in all state jurisdictions. The primary focus of the judges should be on the best interest of the child and courts should work creatively with non-Hague situations to allow visitation if it is the just resolution to the custody dispute. This method of awarding custody in non-Hague countries, with safeguards for enforcement, is preferred over abuses of jurisdiction in which a child is forced to remain in the U.S. Clearly, many countries will not adopt the Hague Convention. Therefore, American courts continue to suggest through their holdings that in order to safeguard the rights of Americans, custody disputes must be adjudicated in the U.S. However, even in retaining jurisdiction, U.S. courts should not totally reject the idea of visitation in the non-Hague countries if safeguards for return are implemented.

PART II

The Hague Convention was adopted at the Hague on October 6, 1980 by 36 countries.¹⁷ The United States ratified the Convention on April 29, 1988.¹⁸ Congress enacted the International Child Abduction Remedies Act to implement the ratified Convention.¹⁹ The Hague Convention came to fruition in order

¹⁶ See generally *Abouzahr v. Matera-Abouzahr*, 824 A. 2d 268 (N.J. 2003).

¹⁷ Hague Convention, *supra* note 1.

¹⁸ Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act*, 125 A.L.R Fed. 217 (1995).

¹⁹ Hague Convention, *supra* note 1, at art. 1.

to address a variety of important international policy concerns. Chapter I, Article 1 of the Convention states that:

the objects of the present Convention are – a. To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b. To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.²⁰

In order to accomplish this goal, Article 2 reads that “[c]ontracting states shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention.”²¹ In order to assess where a child’s rightful custody should be decided, under Article 4, the Convention holds that “the convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.”²² In order to implement the removal to the proper state, each signatory must, under Article 6, appoint a central authority in charge of this matter.²³ Section b of Article 6 further outlines that the process of discerning habitual residence includes a consideration of a child’s social background.²⁴

Under Article 13, the only situations in which a domestic court can opt not to return a child to his or her place of habitual residence are where it discerns the requesting parent was not actually exercising custody rights or where there is a grave risk in returning the child to that situation.²⁵ Thus, under Article 14 of the Hague Convention, domestic trial judges have no discretion in international custody disputes unless it is clear that the particular court should rightly have jurisdiction over the substantive matter of the case.²⁶ This policy of restraint in jump starting the judicial process in an international custody dispute until habitual residency is determined is crystalized in Article 16:

²⁰ *Id.* at art. 1.

²¹ *Id.* at art. 2.

²² *Id.* at art. 4.

²³ Hague Convention, *supra* note 1, at art. 6.

²⁴ *Id.* at art. 7(d).

²⁵ *Id.* at art. 13.

²⁶ *Id.* at art. 14.

The judicial or administrative authorities of the contracting state to which the child has been removed or in which it has been retained shall not decide on the merits of rights or custody until it has been determined that the child is not to be returned under this convention or unless an application under this convention is not lodged within a reasonable time following receipt of this notice.²⁷

This article clearly states that a custody trial on the merits is unlawful unless it has first been determined that a child should not be returned to the residence of the other parent. Thus, the Hague Convention is set up in a manner to easily facilitate the transfer of children between signatory countries during custody disputes. This Convention does not speak to substantive law, but rather it is a mechanism for selecting the proper jurisdiction to settle substantive custody issues.

On August 11th, 1988, President Ronald Reagan designated the United States Department of State as the central authority of the U.S., for purposes of enforcement of the Hague Convention.²⁸ Pursuant to Executive Order No. 12645, those filing a claim in the U.S. concerning an international custody dispute could apply to the central authority or initiate a proceeding in federal district or state court.²⁹ Since the enactment of this system, when a domestic U.S. court is faced with an international custody dispute, it is required to follow the simply laid out guidelines of where to send the dispute.³⁰ Substantive custody decisions are thereby reserved for American courts only where the United States has been the habitual residence of the child.³¹ In some instances, American courts have held that they lacked jurisdiction in international custody disputes involving Hague countries.³² Thus, American courts are able to screen out international custody disputes if a child is not a habitual resident of the United States.

²⁷ *Id.* at art. 16.

²⁸ Smith, *supra* note 18.

²⁹ *Id.*

³⁰ Hague Convention, *supra* note 1, at art. 3.

³¹ *Id.*

³² See, e.g., *Aldinger v. Selger*, 263 F. Supp. 2d 284 (D.P.R. 2003) (holding that a child's habitual residence was Germany, and, therefore, the US courts did not have jurisdiction over the matter).

For example, in *Wiggill v. Jakicki*,³³ the US District Court for the Southern District of West Virginia held that, under the Hague Convention, Federal Courts cannot enforce parental rights of access if there is no "wrongful removal" of a child.³⁴ Here, the mother states that the British father has the right of custody and that she is only seeking visitation during the summer months.³⁵ The court stated that "while federal courts undoubtedly have jurisdiction under the Convention and ICARA to act where children have been wrongfully removed from their country of habitual residence, that jurisdiction does not extend to access issues and alleged breaches of access rights."³⁶ Therefore, the international custody dispute concerning the parental right of access of a British parent was dismissed in Federal Court. The reasoning for lack of subject matter jurisdiction was because it failed to qualify for jurisdiction under the Hague Convention.³⁷

In addition, an extensive examination of recent U.S. court decisions concerning international custody disputes falling under the Hague Convention evidences the fact that courts have been able to apply this Convention with ease concerning jurisdictional issues³⁸ in that they do not make substantive custody decisions in instances where a child is not a habitual resident of the United States.³⁹ The most simple illustration of the Hague Convention protections is illustrated in *Aldinger v. Segler*.⁴⁰ In *Aldinger*, the U.S. District Court for the District of Puerto Rico made the determination that a child's habitual residence was Germany.⁴¹ This fact determined that the child should be returned there for a custody determination on the merits.⁴² In fact, the parties stipulated that the children's habitual place of residence was Germany.⁴³ Thus, the only issue to determine was whether Aldinger forfeited his custody rights

³³ *Wiggill v. Janicki*, 262 F. Supp. 2d 687 (S.D. W. Va. 2003)

³⁴ *Id.* at 688.

³⁵ *Id.* at 689.

³⁶ *Id.*

³⁷ *Wiggill*, 262 F. Supp. 2d at 690.

³⁸ *Aldinger*, 263 F. Supp. 2d at 290.

³⁹ *Id.*

⁴⁰ *Id.* at 284.

⁴¹ *Id.* at 287.

⁴² *Id.* at 289.

⁴³ *Id.*

in the marriage contract.⁴⁴ The court reasoned that its role "is limited to the procedural and jurisdictional issues addressed by the Convention, and a determination of the ultimate merits of any custody dispute between the parties is beyond that narrow procedural and jurisdictional landscape."⁴⁵ It would be up to a German court to make substantive custody decisions.⁴⁶ Thus, under the Hague Convention, when America is not a child's habitual residence, the clear role of a United States District Court judge in international custody disputes is limited to purely procedural issues pertaining to jurisdiction.

This simple analysis, where a U.S. district court is limited, under the Hague Convention, to procedural determinations, is also evident in *Antunez-Fernandes v. Connors-Fernandez*.⁴⁷ In *Antunez-Fernandes*, the U.S. District Court for the Northern District of Iowa reviewed a Hague Convention petition. Here, the plaintiff sought the return of children who were removed by the mother from France to the United States.⁴⁸ The court examined where the children habitually resided, and found their residence to be France.⁴⁹ Additionally, since there was no grave risk of harm to the children, the court held that the U.S. had no jurisdiction in the matter.⁵⁰ This case is a clear illustration of the effectiveness of the Hague Convention in resolving international custody disputes involving signatory nations. If an international custody issue arises, a U.S. district court would not look to decide the case on the merits unless it has first found that the U.S. is the child's habitual residence.⁵¹ As seen through the holding in *Croll v. Croll*⁵², a pre-September 11th decision, U.S. district courts have applied this rule consistently since the signing of the Hague Convention.⁵³ Here, the court held that since the child was a habitual resident of another

⁴⁴ *Aldinger*, 263 F. Supp. 2d at 287.

⁴⁵ *Id.* at 289.

⁴⁶ *Id.*

⁴⁷ *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800 (N.D. Iowa 2003).

⁴⁸ *Id.* at 806.

⁴⁹ *Id.* at 807.

⁵⁰ *Id.* at 810.

⁵¹ See *Aldinger*, 263 F. Supp. 2d at 284; see also *Antunez-Fernandez*, 259 F. Supp. 2d at 800.

⁵² *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

⁵³ *Id.* at 143-44.

Hague signatory country, Hong Kong, a U.S. district court was not authorized to rule regarding rights of access.⁵⁴

A slightly more complicated twist on this formula is exemplified in *Silverman v. Silverman*,⁵⁵ where the U.S. District Court for the District of Minnesota ruled in a custody dispute involving an Israeli father that an Israeli court had jurisdiction to decide the substantive custody issue.⁵⁶ Because Israel was the habitual residence of the children, as soon as the Israeli courts reached an order, the children had to be removed to that country as a Hague nation.⁵⁷ The court took this position even after a Minnesota court also decided the case on the merits and concluded that the children would be best off in the care of their mother in America.⁵⁸ This decision illustrates the fact that when presented with a situation where a child is a habitual resident of a foreign country, U.S. federal courts cannot allow a domestic custody decree to stand.⁵⁹ The court could legally hold that the child remain in the United States pending a custody determination in Israel, but could not rule as to any substantive custody issues⁶⁰.

McKenzie v. McKenzie is another case where the court held that, under the Hague Convention, U.S. courts can only decide jurisdiction in international custody disputes.⁶¹ In this case, the U.S. District Court for the Eastern District of New York held that, under the Hague Convention, a court may determine whether a child can be returned to another country, but cannot address the substantive issues of the custody dispute.⁶² In this case, the court defined the term "habitual residence" as more of a state of being rather than a specific period of time.⁶³ The court found that this child had spent nearly a year in the U.S., but was not convinced that the child's habitual residence had

⁵⁴ *Id.*

⁵⁵ *Silverman v. Silverman*, No. Civ. 00-2274 2003, WL 22076555 (D. Minn. Aug. 28, 2003).

⁵⁶ *Id.* at *3.

⁵⁷ *Id.*

⁵⁸ *Id.* at *2.

⁵⁹ *Id.* at *2-*3.

⁶⁰ *Id.* at *3.

⁶¹ *McKenzie v. McKenzie*, 168 F. Supp. 2d 47 (E.D.N.Y. 2001).

⁶² *Id.* at 49.

⁶³ *Id.* at 50-51.

shifted from Germany.⁶⁴ Therefore, the court abstained from ruling on the merits of the case.⁶⁵ In its decision, the court looked to the definition of habitual residence as seen in *Brooke v. Willis*,⁶⁶ stating that the place of habitual residence “is determined more by a state of being than by any specific period of time . . . [and] can be established after only one day as long as there is some evidence that the child has become ‘settled’ into the location in question.”⁶⁷ Therefore, as illustrated through the abovementioned cases, if a court concludes that a child has an affiliation that is stronger with one nation, but currently resides in another country, the court must still hold that more tightly connected country as the child’s habitual residence.⁶⁸ The country of habitual residence is then charged with substantive custody determinations associated with the child.⁶⁹

The interplay between the federal and state court systems is also laid out in Article 6 of the Hague Convention, which dictates that each state appoint a particular enforcement agency for the convention.⁷⁰ Federal courts have jurisdiction over Hague disputes; traditional substantive custody disputes, however, must be resolved in state court.⁷¹ Therefore, if a parent seeks a custody decree involving solely American parties in the U.S., he will pursue this goal through the state court system. However, in international custody disputes, a state court may not reach a substantive decision on the merits of the case if a parent raises a Hague Convention objection.⁷² Rather, a state court must defer its decision until a federal court resolves the objection.⁷³ This safeguard, which attempts to eliminate conflicting international custody orders, is implemented through the federal court system.⁷⁴

⁶⁴ *Id.* at 50.

⁶⁵ *Id.*

⁶⁶ *Brooke v. Willis*, 907 F. Supp. 57, 61 (S.D.N.Y. 1995).

⁶⁷ *McKenzie*, 168 F. Supp. 2d at 50 (quoting *Brook v. Willis*, 907 F. Supp. 57, 61 (S.D.N.Y. 1995)).

⁶⁸ *Id.*

⁶⁹ Hague Convention, *supra* note 1, at art. 6.

⁷⁰ *Id.*

⁷¹ 42 U.S.C.A § 11601(b)(4) (2003).

⁷² *See generally id.*

⁷³ *Id.*

⁷⁴ *Antunez-Fernandes*, 259 F. Supp. 2d at 808.

Holder v. Holder illustrates that, under the Hague Convention, there is a designated interaction between federal and state courts, which results in different substantive roles for each.⁷⁵ In this case, the U.S. Court of Appeals for the Ninth Circuit reviewed a decision by the U.S. District Court for the Western District of Washington to stay a Hague action for removal to Germany.⁷⁶ At the time of the Hague action, a California state court was ruling on the divorce proceedings on the merits.⁷⁷ The father was stationed with the U.S. Air Force in Germany.⁷⁸ After a trip to California, the mother refused to return to Germany with the children.⁷⁹ The Court of Appeals for the Ninth Circuit ruled that the district court abused its discretion in staying the Hague action.⁸⁰ Although the father filed in California state court, he did not waive his Hague rights solely because he failed to mention any Hague claims in his California claim.⁸¹ Under Section 11603 of the Hague Convention, there is a clear rule that federal courts adjudicating Hague Convention petitions should accord full faith and credit to judgments of state or federal courts that had completed proceedings on the merits.⁸² Accordingly, Federal courts should only examine whether it is appropriate that custody be decided in the US rather than ruling on the substance of the decision.⁸³ Under this reasoning, this court found that it is illogical to conclude that a Hague Convention claim would be barred in federal court because the Hague Convention was not raised in that state case.⁸⁴ Due to the Hague Convention, the federal court system was able to easily adjudicate the rights of parents during an international custody dispute.⁸⁵

In addition to challenges to local custody decrees in federal courts, state appellate courts have also reviewed and reversed

⁷⁵ *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002)

⁷⁶ *Id.* at 859.

⁷⁷ *Id.* at 861-2.

⁷⁸ *Id.* at 860.

⁷⁹ *Id.* at 860.

⁸⁰ *Holder*, 305 F.3d at 867.

⁸¹ *Id.* at 867.

⁸² *Id.* at 863.

⁸³ *Id.*

⁸⁴ *Id.* at 864.

⁸⁵ *Id.* at 873.

trial court custody decisions⁸⁶ when lower state courts do not have proper jurisdiction as a child's habitual residence.⁸⁷ In *In re Jude L. Vernor*,⁸⁸ the Court of Appeals of Texas held that the Texas trial court inappropriately assumed jurisdiction in deciding the custody issue on the merits.⁸⁹ The lower court had handed down a temporary order following a paternity and custody trial, requiring the mother to return the child to from Australia to Texas within 11 days.⁹⁰ The father then initiated an application for the return of the child under the Hague Convention in the family court of Melbourne, Australia.⁹¹ However, in that proceeding, the father failed to mention that the temporary order naming him as a joint managing conservator and restricting the child's residence to Texas had been dismissed years earlier.⁹² The court concluded that the child was living in Texas at the time of the child's removal to Australia, but the father had no custodial rights under Texas law.⁹³ Therefore, the appellate court held that the mother's removal of the child from Australia was not a violation under the Hague Convention.⁹⁴

In making its assessment that the trial court erred in concluding that the father properly evoked the Hague convention, the Court of Appeals used the following system of analysis:

[whether a parent:](1) had 'rights of custody' of the child at the time of the removal of the child and was exercising those rights; (2) the child was removed from the child's habitual residence; and (3) the removal breached the applicant's 'rights of custody'.⁹⁵

Here, a state appellate court, rather than a federal district court, had jurisdiction to rule that the child's habitual residence was, in fact, Texas.⁹⁶ Because the child was not wrongfully removed from Texas, as his father had no custodial rights under Texas law, the father was not entitled to an order of return from

⁸⁶ See *In re Jude L. Vernor*, 94 S.W.3d 201 (Tx. Ct. App. 2003).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 209.

⁹⁰ *In re Jude L. Vernor*, 94 S.W.3d at 206.

⁹¹ *Id.* at 204-05.

⁹² *Id.* at 204.

⁹³ *Id.* at 209.

⁹⁴ *Id.*

⁹⁵ *In re Jude L. Vernon*, 94 S.W.3d at 209.

⁹⁶ See *id.*

Australia.⁹⁷ This conclusion stands irrespective of any later assertion of custodial rights in a Texas state court.⁹⁸ Thus, the provisions of the Hague Convention, which attempt to prevent simultaneously competing custody orders, can be implemented by federal courts or through the appellate system of any particular state.⁹⁹

U.S. courts have been guided in their custody decisions by the exceptions provided for in the Hague Convention, which allow a non-habitual residence jurisdiction to retain jurisdiction over a substantive custody decision.¹⁰⁰ One such exception is an evocation concerning the enumerated exception in the convention of grave risk of harm to a child.¹⁰¹ Article 13(b) of the Hague Convention lifts the requirement that a custody dispute be determined in the country of habitual residence if a showing is made that the child would face a grave risk of harm if he or she was returned to that country for a substantive custody determination.¹⁰² It is clear, however, that some U.S. courts are cautious in their acceptances of this exception as a valid means of retaining substantive jurisdiction in custody disputes.¹⁰³ In *Raijmakers-Eghaghe v. Haro*,¹⁰⁴ the U.S. District Court for the Eastern District of Michigan was presented with the issue of whether a return to a custodial parent in the Netherlands presented a grave risk of harm to a child.¹⁰⁵ In this case, the mother, a Dutch citizen living in the Netherlands, had legal custody of her two children pursuant to an Arizona divorce decree.¹⁰⁶ Thus, the initial custody determination was made by an American state court, which granted primary custody to the mother in the Netherlands. When the children were in the US

⁹⁷ In re Jude L. Vernon, 94 S.W. 3d at 211.

⁹⁸ *Id.*

⁹⁹ See also *Paz*, 169 F. Supp. 2d at 259 (S.D.N.Y. 2001) (concerning a father's filing of a Hague request that child be returned to his custody in New Zealand from New York, with federal district judge holding that child's habitual residence was now New York, and, therefore, the custody dispute should be resolved in New York rather than New Zealand).

¹⁰⁰ Hague Convention, *supra* note 1, at art. 13.

¹⁰¹ *Id.* at art. 13(b).

¹⁰² *Id.*

¹⁰³ See *Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953 (E.D. Mich. 2001).

¹⁰⁴ See *id.* at 954.

¹⁰⁵ *Id.* at 957.

¹⁰⁶ *Id.* at 954.

for scheduled visitation, one allegedly refused to re-board the plane.¹⁰⁷ Because the child feared returning home where he was constantly left home alone by his stepfather, his father decided to retain the children.¹⁰⁸ The mother subsequently filed this action to bring her children back to the Netherlands.¹⁰⁹ The court held that this information was sufficient evidence of lack of grave harm to grant summary judgment in favor of the mother.¹¹⁰ The court applied the definition promulgated in *Friedrich*¹¹¹ for grave harm, stating that there was no genuine issue of material fact that a return to the Netherlands would be “‘tantamount to a zone of war, famine, or disease’ . . . or that the family was ‘incapable or unwilling to give that child adequate protection.’”¹¹² The court concluded that a grave risk did not exist, and, therefore had no reason to retain jurisdiction.¹¹³ Thus, the court failed to find an imminently harmful and dangerous situation for the children upon return to the Netherlands, determining that substantive custody disputes must be resolved in the Netherlands.¹¹⁴ Once again, the provisions of the Hague Convention guided the court in its decision to grant summary judgment in favor of the mother and required a return to the Netherlands for the children.

The above examples illustrate where the Hague Convention has dictated that US courts not have jurisdiction over certain international custody disputes. In addition to restricting the power of U.S. courts in hearing international custody disputes, the Hague Convention has also effectively conferred jurisdiction to U.S. state courts in making substantive custody decisions where a child *was* a habitual resident of the United States. Because the Hague Convention criteria were used in assessing the appropriateness of asserting jurisdiction, no international battles ensued concerning the validity of those domestic custody decisions. For example, in *Ron v. Levi*,¹¹⁵ the

¹⁰⁷ *Raigamakers-Eghaghe*, 131 F. Supp. 2d at 955.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 955-56.

¹¹¹ *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996).

¹¹² *Raigamakers-Eghaghe*, 131 F. Supp. 2d at 957.

¹¹³ *Id.* at 957.

¹¹⁴ *Id.*

¹¹⁵ *Ron v. Levi*, 279 A.D. 2d 365 (N.Y. App. Div. 2001).

Supreme Court, Appellate Division, of New York held that, since the father failed to prove that his children were not habitual residents of any country other than the US, they could not be taken to Israel for a substantive custody determination.¹¹⁶ The court held that the children were born in Israel and were Israeli citizens but had spent relatively equal amounts of time in the United States and Israel.¹¹⁷ Thus, because there was no plan for the children to return to Israel, the Supreme Court of New York's dismissal of the Hague Convention action was entirely appropriate, as New York was the clear habitual residence, and the case was rightfully adjudicated according to New York state law.¹¹⁸ Because both Israel and the U.S. were Hague signatories, once the U.S. asserted jurisdiction, the international battles for a custody forum were over.¹¹⁹

Under the Hague Convention, state courts, once they establish legal jurisdiction under the Hague criteria, may customize particular custody orders by, for example, safeguarding a child's return to the US even if visitation is awarded in another Hague country.¹²⁰ In *Charpie v. Charpie*,¹²¹ the Supreme Court, Appellate Division of New York, upheld a trial court custody order requiring a father to deposit funds in escrow when he traveled with his children to Switzerland.¹²² Because New York was the children's habitual residence, its courts had sole and exclusive jurisdiction over this action and were able to insist on and enforce safeguards to protect the children.¹²³ In light of September 11th and the father's continuing threats to remove his children permanently to Switzerland, and because the father failed to persuade the New York court that spending a year in Switzerland was in the children's best interest, the court found

¹¹⁶ *Id.* at 862.

¹¹⁷ *Id.* at 366-67.

¹¹⁸ See also *Escaf v. Rodriguez*, 52 Fed. Appx. 207 (4th Cir. 2002)(holding that because Colombia was the habitual residence of the child, he had been wrongfully retained in the United States); See also *Paz*, 169 F. Supp. 2d at 258-59 (holding that a child's living in New Zealand was only meant to be temporary and therefore his custody dispute should be adjudicated in the U.S.).

¹¹⁹ *Paz*, 169 F. Supp. 2d at 958-59.

¹²⁰ See *Charpie v. Charpie*, 752 N.Y.S.2d 291 (N.Y. App. Div. 2002).

¹²¹ *Id.*

¹²² *Id.* at 293.

¹²³ *Id.*

it appropriate to allow visitation with collateral.¹²⁴ Since the New York court had substantive jurisdiction, as it was the habitual residence of the children, the New York state courts had the authority to insert this provision concerning international travel into the custody decree.

Since September 11th, state courts have also asserted jurisdiction in situations where a U.S. court has personal jurisdiction over only one party, the child is a habitual resident of the U.S., and the case arises with another Hague signatory.¹²⁵ In *Spindler v. Mayol*,¹²⁶ the District Court of Appeals of Florida decided a case in which a husband had removed his child from Florida to Brazil.¹²⁷ Despite the fact that process was not served on the father in compliance with Florida law or under the Hague Convention, the state court affirmed most of the divorce and custody judgment.¹²⁸ It reasoned that Florida was the home state of the child, the paramount criteria for substantive decision-making under the Hague Convention, and was, therefore, allowed to make custody decisions in the matter under the Hague Convention.¹²⁹ Because the Hague Convention specifically discusses custody disputes that fall across international borders, the Florida courts were not paralyzed in their ability to resolve the matter for the child who was found to be a habitual resident of Florida. This custody dispute was handled without controversy in Florida, under Hague, irrespective of the fact that the father tried to shield himself in Brazil.

PART III

The Hague System of establishing a child's habitual residence and conferring exclusive jurisdiction for substantive custody decisions only in that jurisdiction works well for international custody disputes that fall within the Hague convention. However, U.S. courts are left in the dark in terms of statutory guidance when dealing with disputes involving an American parent and a parent seeking custody or visitation in a

¹²⁴ *Id.*

¹²⁵ *Spindler v. Mayol*, 849 So.2d 1102 (Fla. Dist. Ct. App. 2003).

¹²⁶ *Id.*

¹²⁷ *Id.* at 1103.

¹²⁸ *Id.* at 1104-05.

¹²⁹ *Id.*

non-Hague signatory nation or where that parent has also availed himself or herself of that nation's court system simultaneously with the American parent's filing for custody in an American court.¹³⁰ One primary reason for the troubles facing U.S. judges is a judge's necessary practical consideration that even if a U.S. court asserts substantive jurisdiction in a custody dispute with a non-Hague resident, its holding could become worthless if a child is removed to that other country, as the U.S. would have no enforcement mechanism over its decree.¹³¹

Since September 11th, American judges have become increasingly wary of declining the right to adjudicate substantive custody decisions that involve a party who is a resident of a non-Hague country. This judicial skepticism has also grown regarding visitation in non-Hague countries as the number of "anti-American" non-Hague signatory nations and judicial bodies have grown and those which already existed have become increasingly stronger in anti-American sentiment.¹³² Because there is no determinative treaty between the U.S. and Islamic nations, American state judges have the authority, which they seem to be using, to rule in a non-uniform way relating to treatment of custody decrees issued by Islamic countries.¹³³ U.S. courts have established a pattern, since the enactment of the Hague Convention, of finding ways to keep custody disputes that do not fall under the Hague protection in US courts. This pattern has strengthened since September 11th and it has resulted in a policy of reluctance to extend comity to these non-Hague countries.¹³⁴

For example, a Maryland Court of Special Appeals 1996 case, *Hosain v. Malik*,¹³⁵ illustrates the tradition of American

¹³⁰ Treatment of non-Hague signatories in international custody disputes is not accounted for under the Hague Convention. Thus, the only guidance comes from the International Parental Kidnapping Crime Act of 1993, when a child is abducted from the U.S. to a non-Hague country. See 18 U.S.C. § 1204.

¹³¹ Hague Convention, *supra* note 1.

¹³² See, e.g., *Ahmed v. Naviwala*, 762 N.Y.S. 2d 125 (N.Y. App. Div. 2003).

¹³³ Thomas Foley, *Extending Comity to Foreign Decrees in International Custody Disputes between Parents in the United States and Islamic Nations*, 41 FAM. CT. REV. 257, 257 (2003).

¹³⁴ *Id.*

¹³⁵ *Hosain*, 671 A.2d 988; see also, June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791, 810 (Fall 1998).

courts only allowing disputes to be settled in non-Hague countries if those nations follow American standards.¹³⁶ The Court of Special Appeals of Maryland ruled that since the Pakistan court applied the best interest of the child test in its custody decision, the Pakistani orders were not contrary to American law or public policy and were entitled to comity.¹³⁷ This pre-September 11th decision illustrates the fact that an American court has the ability to remove substantive custody disputes to non-Hague countries if it feels that the standards of the other nations are not contrary to American law and policy.¹³⁸

An analysis of recent U.S. courts' treatment in custody decrees of parents from non-Hague countries shows a trend concerning international custody disputes. This pattern points towards courts not denying visitation to those countries merely because travel to a non-Hague country is involved. For example, in 2001, the Court of Appeals of Wisconsin held in *Long v. Ardestani* that it was in the children's best interest to travel with their father to Iran.¹³⁹ The court found that the mother had a burden to prove that taking the children to a non-Hague country was not in the best interest of the children under those particular circumstances.¹⁴⁰ This conclusion was reached despite the fact that, not only is Iran not a Hague signatory, but it is also a country that bases its law on the Koran, under which a mother is only entitled to custody of small children.¹⁴¹ The mother had a legitimate fear that if these children were brought to Iran, they would not return.¹⁴² However, under the particular circumstances of this case, the court concluded that it was not proper to infer that the father did not intend to return to the U.S. with his children.¹⁴³ In fact, the court refused to adopt a rule of law that states that travel to non-Hague countries should be prohibited because of enforcement concerns.¹⁴⁴

¹³⁶ *Hosain*, 671 A.2d at 991.

¹³⁷ *Id.* at 990.

¹³⁸ *Id.* at 1010-11.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 414.

¹⁴¹ *Id.* at 408.

¹⁴² *Id.*

¹⁴³ *Long*, 624 N.W. 2d at 417.

¹⁴⁴ *Id.* at 418.

Rather, each case should be considered as to whether a risk is formed in traveling to a non-Hague country.¹⁴⁵

Since September 11th, courts have attempted to find other mechanisms to secure rights for American parents in international custody disputes involving non-Hague nations.¹⁴⁶ In stark contrast to the *Long* decision, in 2003, the Court of Appeals of Washington, in *Al-Safran v. Al-Safran*,¹⁴⁷ held in that the mere fact that a parent was requesting visitation in a non-Hague nation, such as Kuwait, was enough to prevent this visitation from occurring.¹⁴⁸ The court holds that there is no proper enforcement mechanism for children outside of the Hague Convention and, therefore, visitation may not occur.¹⁴⁹ In contrast *Long*, decided prior to September 11th, this court holds that it does not matter whether the non-Hague parent has exhibited any behavior that would suggest that the child would not be returned.¹⁵⁰ Therefore, some courts have become extremely wary of allowing a child to travel to one of these non-Hague countries because the court fears that if the child is not returned to the U.S., the American legal system will not be able to aid in the child's return and American parents will be without a legal remedy in the non-Hague country.¹⁵¹ In addition, if a child is removed to one of these countries, the risk is run that a parent might seek a different custody decree from the non-Hague nation that is not required to abide by the US orders.¹⁵²

Another one of these mechanisms is a consistent finding by courts that the best interest of a child cannot involve travel to a non-Hague country like Saudi Arabia. In *Ahmed v. Naviwala*, the Supreme Court, Appellate division of New York, made this ruling after a wrongful removal.¹⁵³ The ruling came despite a previous agreement by the parents, the desires of the children, and the recommendation of the guardian that custody should be

¹⁴⁵ *Id.* at 417.

¹⁴⁶ *Id.* at 417 (with the court holding it believed that the father had a great enough interest to return the children to the United States).

¹⁴⁷ *Al-Safran v. Al-Safran*, No. 27823-5-II 2003, WL 21387188 (Wash. Ct. App. June 17, 2003).

¹⁴⁸ *Id.* at *5.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Al-Safran*, 2003 WL 21387188, at *5.

¹⁵² *Id.*

¹⁵³ *Ahmed v. Naviwala*, 762 N.Y.S. 2d 125, 128 (2003).

split.¹⁵⁴ In addition, the mother, as sole custodian, was awarded full control of the children's passports.¹⁵⁵ This happened after the father took the children to Saudi Arabia and immediately sought a Saudi custody decree, which he received.¹⁵⁶ The court justified its decision based on the fact that Saudi Arabia was not a Hague signatory, and therefore, the father could go to this country and get his own custody decree and U.S. courts would have no authority to remedy the situation once the children were removed.¹⁵⁷ Because there was a willful interference with this parent's custodial rights, there is a sufficient change in circumstances as to deem the old order was inconsistent with the best interest of the children and terminate visitation to the non-Hague country.¹⁵⁸

The International Parental Kidnapping Crime Act of 1993, which was passed by Congress to create a remedy for the situation of wrongful removal, can be used by a court as an alternative to outright denial of visitation.¹⁵⁹ Many parents charged under this act have attempted, even before September 11th, to present the affirmative defense that they were acting under a foreign custody decree or according to religious convictions that would not be respected in U.S. courts.¹⁶⁰ However, even before September 11th, U.S. courts were extremely cautious in acknowledging this as a valid defense.¹⁶¹ Since September 11th, courts have increasingly made use of this act to close the enforcement gap with non-Hague convention signatories.¹⁶² For example, in *U.S. v. Fazal*,¹⁶³ the U.S. District Court for the District of Massachusetts held that the affirmative defense based on an Indian custody decree of a father charged with kidnapping under the IPKCA, did not warrant a dismissal of the

¹⁵⁴ *Id.* at 128.

¹⁵⁵ *Id.* at 129.

¹⁵⁶ *Ahmed*, 762 N.Y.S.2d at 128.

¹⁵⁷ *Id.* at 128.

¹⁵⁸ *Id.*

¹⁵⁹ International Child Abduction Remedies Act § 2, 42 U.S.C.A §11601 (1988).

¹⁶⁰ See *United States v. Amer*, 110 F.3d 873, 878 (2d Cir. 1997) (holding that defendant could not remove children to Egypt for a custody determination for religious reasons, when mother had full legal custody and children were habitual residents of the U.S.).

¹⁶¹ See *id.*

¹⁶² See *U.S. v. Fazal*, 203 F. Supp. 2d 33 (D. Mass. 2002).

¹⁶³ *Id.* at 35.

charges.¹⁶⁴ This court ruled that the Act was a rational tool for fulfilling “enforcement gap closing” function.¹⁶⁵ Therefore, equal protection rights of Indian citizens were not violated by his indictment under the act, where India was not a Hague signatory.¹⁶⁶ Irrespective of this protection, courts remain wary of allowing a parent to leave the country with a child because they continue to fear that a parent might not return from a non-Hague nation. Thus, U.S. courts would be left powerless in any enforcement of a U.S. custody decree.

Under the Hague Convention, U.S. federal courts have the clear authority to determine the merits of an abduction claim even if they lack the authority to determine an underlying custody claim.¹⁶⁷ In *Anderson v. Acree*,¹⁶⁸ the district court for the Southern District of Ohio ruled on whether a mother had lawfully removed her daughter from New Zealand, where the father had custody rights.¹⁶⁹ The court also decided whether the father could return the child to New Zealand for further custody proceedings, as the child’s place of habitual residence.¹⁷⁰ The court argued that it could not rule on the substantive issue of which parent should be awarded custody.¹⁷¹

In spite of this declaration, the court found that sufficient evidence was presented that the child now had greater ties to her new environment in Ohio with her mother. The court also concluded that the harm associated with uprooting the child outweighed any Hague convention considerations.¹⁷² The court held, however, that its ruling was not a custody determination, but rather a decision that the substantive custody decision should be made in the U.S.¹⁷³ Thus, even in some instances where U.S. courts are dealing with Hague signatory nations, they are wary of returning them to the hands of a foreign court if the children have established strong ties to the United States.

¹⁶⁴ *Id.* at 34.

¹⁶⁵ *Id.*

¹⁶⁶ *Fazal*, 203 F. Supp. 2d at 34-35.

¹⁶⁷ International Child Abduction Remedies Act § 2, *supra* note 159.

¹⁶⁸ *Anderson v. Acree*, 250 F. Supp. 2d 876 (S.D. Ohio 2002).

¹⁶⁹ *Id.* at 878.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 879-80.

¹⁷² *Anderson*, 250 F. Supp. 2d at 883.

¹⁷³ *Id.*

In such instances, a federal court will grant jurisdiction to a state court in the underlying custody dispute.¹⁷⁴ However, in Hague cases, it is more likely that, despite the fact that a custody dispute is adjudicated in U.S. court, individual judges are comfortable in allowing a child to travel to the Hague nation as part of a custody arrangement.¹⁷⁵

Some recent U.S. State court decisions reflect a positive trend towards equalizing the treatment of Hague and non-Hague citizens in U.S. custody disputes.¹⁷⁶ In *Abouzahr v. Matera-Abouzahr*,¹⁷⁷ the New Jersey Appellate Division rejected the attitude of sister courts regarding non-Hague nations. In *Abouzahr*, the intermediate appellate court emphasized that there is no absolute prohibition against awarding visitation in a non-Hague country.¹⁷⁸ In addition, it correctly noted that the best interest of a child is not served by a geographical restraint on visitation especially if a judge finds no reason to believe that the father would abduct his daughter or refuse to return her.¹⁷⁹ In fact, the court admits that it would be difficult for the mother to enforce a New Jersey custody decree in Lebanon.¹⁸⁰ Additionally, it points out that all countries in the Middle East, with the exception of Israel, are not Hague signatories.¹⁸¹ Therefore, there is no remedy with any of these nations after an unlawful abduction.¹⁸² However, the judge also considered the fact that the father had to travel a lot for business and would be forced to come into contact with a Hague country at some point, so it would not be in his best interest to violate the order.¹⁸³

Thus, even though the court was wary of allowing visitation to take place in Lebanon, a non-Hague country, it allowed for visitation assuming fulfillment of an advance notice require-

¹⁷⁴ *Id.* at 884.

¹⁷⁵ *See, e.g., Charpie*, 300 A.D. 2d 143 (where a New York court was hesitant about a father's intention to return his children from Switzerland to the U.S., but allowed visitation if he complied with certain precautionary measures).

¹⁷⁶ *See, e.g., Abouzahr*, 824 A.2d 268.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 281.

¹⁷⁹ *Id.* at 277.

¹⁸⁰ *Id.* at 275.

¹⁸¹ *Abouzahr*, 824 A.2d at 279.

¹⁸² *Id.* at 279.

¹⁸³ *Id.* at 278.

ment concerning visitation.¹⁸⁴ Citing *Long*, the court stated that it would not deny visitation to Lebanon merely because Lebanon was not a Hague signatory.¹⁸⁵ Although this comes from the appellate division and not the highest New Jersey court, it is still an active attempt to reverse the post-September 11th trend of totally eliminating parental access in non-Hague nations.¹⁸⁶ In the end, the New Jersey court seems to apply the most fair non-Hague rule, stating:

We decline to adopt a bright-line rule prohibiting out-of-country visitation by a parent whose country has not adopted the Hague Convention or executed an extradition treaty with the United States. Such a rule would unnecessarily penalize a law-abiding parent and could conflict with a child's best interest by depriving the child of an opportunity to share his or her family heritage with a parent. Moreover, it would mistakenly change the focus from the parent to whether his or her native country's laws, policies, religion or values conflict with our own. Such an inflexible rule would border on xenophobia, a long word with a long and sinister past.¹⁸⁷

Therefore, despite the mother's fear, the court saw no legitimate reason to deny a child access rights to her father, provided that four weeks notice be given to determine whether the region was safe for the child's travel.¹⁸⁸

Recently, American courts have become increasingly dependent on the best interest standard in determining all custody disputes. This policy is seemingly geared toward reassuring American parents with children involved in custody disputes with non-Hague signatories that an American court will not put a custody dispute in the hands of a non-Hague country that will not have fair custody hearings that rely on the best interest standard. Therefore, U.S. Courts have, through their acceptance of jurisdiction even in situations where it is not clear that America is a child's home state, implicitly found it to be their duty to hear these disputes in order to protect the rights of the party who is a U.S. Citizen and protect the Ameri-

¹⁸⁴ *Id.* at 281.

¹⁸⁵ *Id.*

¹⁸⁶ *Abouzahr*, 824 A.2d at 281.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 282.

can best interest standard, which clearly values different criteria than Islamic nations that refuse to recognize this standard.

Because American judges fear that custody arrangements with visitation to non-Hague countries are less easily enforceable, they are extremely liberal in actively restricting a child's contact with these foreign nations.¹⁸⁹ These restrictions seem to arrive even if, the child would likely be seen as a habitual resident of the foreign country and U.S. courts would abstain from jurisdiction¹⁹⁰ with non-Hague disputes when a child is arguably a habitual resident of the U.S., instead of deferring to the foreign, non-Hague nation, domestic courts bend over backwards to find a reason why these cases should be determined under the American legal system.¹⁹¹ This policy allows the court to apply the American best interest of the child standard that is generally not used in custody determinations by non-Hague, particularly Muslim, courts.¹⁹²

As a result, American judges have been making substantive custody decisions in disputes regarding non-Hague countries, while they merely make jurisdictional determinations for custody disputes involving Hague nations.¹⁹³ Overall, this approach creates inconsistent judicial policy.¹⁹⁴ U.S. courts face many legitimate fears concerning their inability to protect American interests in disputes involving non-Hague countries. However, these courts should strive to retain jurisdiction over any international custody dispute only where it is clear that American courts have a reasonable and legitimate claim to jurisdiction.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See, e.g., Long*, 624 N.W.2d at 408.

¹⁹² *See id.*

¹⁹³ *See, e.g., the court's treatment of the custody dispute in Long*, 624 N.W.2d 405, where it was anxious about returning a child to a country that did not follow a 'best interest of the child standard' and which could choose to ignore an American custody decree, versus the court's treatment of the custody dispute in *Wiggill*, 262 F. Supp. 687, in which the court merely abstained from US jurisdiction in substantive issues and ordered the case be returned for a decision on the merits to Germany.

¹⁹⁴ *See, e.g., id.*

PART IV/CONCLUSION:

Under the Hague Convention, U.S. courts have a clear guide in making decisions concerning international custody disputes. Some critics argue that policy underlying the Hague Convention creates judicial decisions that result in purely jurisdictional rulings rather than consideration of the best interest of the child.¹⁹⁵ However, regardless of this criticism, it is clear that the Hague Convention provides strict guidance for U.S. courts in their ability to make uniform decisions concerning international custody disputes. In addition, the Hague Convention is successful at safeguarding against parents attempting to forum shop in different Hague countries for favorable custody decrees.

Despite the success of uniform decisions under the Hague Convention, the reality remains that roughly three-fourths of the world's countries are not Hague signatories.¹⁹⁶ Some recent U.S. court decisions, such as the New Jersey Supreme Court's holding that allowed visitation in Lebanon, reflect a judicial trend towards equalizing the treatment of Hague and non-Hague citizens in custody disputes involving an American parent.¹⁹⁷ Even if American courts are wary of declining jurisdiction in favor of non-Hague countries applying their laws, this approach of fair custody dispute resolution should be applied across U.S. jurisdictions, with judicial energy spent seeking safeguards for enforcement rather than in denying international visitation where it is warranted.

Since September 11th, American judges might have correctly discerned that the only way to safeguard the rights of American citizens involved in international non-Hague custody disputes, is to adjudicate these cases in American courts. Regardless of whether or not this attitude is correct, American courts should follow New Jersey's lead. Even in deciding the merits of a custody dispute with a non-Hague signatory such as Lebanon, a court should not have the freedom, just because these nations are non-Hague signatories, to outright reject visitation in non-Hague countries.¹⁹⁸ This policy of outright rejection

¹⁹⁵ Starr, *supra* note 135.

¹⁹⁶ *Id.* at 793.

¹⁹⁷ *Abouzahr*, 824 A.2d 268.

¹⁹⁸ *See id.*

tion clearly does not reflect the American value and standard of considering what is in the best interest of the child in determining how a child should spend time with each of her parents. Rather, American judges must be creative in their decision-making concerning visitation to non-Hague signatories so the true best interest of each child can be achieved through the American judicial process.