TOWARD THE RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING TRANSNATIONAL PARENT-CHILD CONTACT

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Currently there is no broadly applicable international legal instrument that protects ongoing contact between noncustodial parents and their children across national borders. Although the Hague Convention on the Civil Aspects of International Child Abduction provides strong protection for rights of custody, it grants relatively weak protection for rights of contact. This absence of protection for rights of contact both undermines the goal of preventing abduction and leaves unresolved the question of how to ensure the continuity of relationships between noncustodial parents and their children. In particular, parents and courts involved in relocation cases have no assurance that orders for visitation and other forms of parent-child contact will be fully recognized and enforced once the residence parent and child have relocated. In this Note, Marguerite C. Walter argues that a protocol providing for the recognition and enforcement of contact decisions by states adhering to the Abduction Convention would provide a relatively simple and immediate solution to the problem. Such a protocol would provide for the automatic recognition and enforcement of contact decisions when certain criteria are met. The most important of those criteria would be that the order emanate from the authorities of the child's habitual residence no earlier than six months to one year prior to the recognition request, and that all parties have been given the opportunity to be heard in the original proceeding. In addition, the protocol should provide for interjudicial communication, a strictly construed emergency exception to mandatory recognition and enforcement, and specific sanctions for failure to recognize and enforce a contact decision meeting the criteria set forth.

INTRODUCTION

Experts in international law agree that one of the more problematic gaps in the current framework of international agreements relating to children and families is the absence of a means of ensuring parent-child contact[1] across national borders.[2] In the last twenty-five

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[1] I use the terms "contact" or "access" instead of "visitation" both because they have become the standard terms in international instruments, and because they have a broader

years, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Abduction Convention) has successfully addressed many aspects of one of the most basic problems relating to the movement of children across national borders, namely their removal or retention—usually by a parent—in violation of valid custody rights.[3] The Abduction Convention does not, however, provide an enforceable right of access or contact, a gap which has led to concern that the Convention's goal of preventing and redressing abduction will not be fully realized until there is a means of enforcing transnational parent-child contact.[4]

Grammes v. Grammes,[5] a recent case involving abduction and contact across the American-Canadian border, illustrates the problem created by the lack of an international instrument for enforcement of contact decisions. In that case, the child, who had been living with both parents in Pennsylvania, was initially abducted by his mother to Canada.[6] The father only saw his child again one year later, after a Canadian court ordered contact to occur at the father's home, though the decision rejected his return request under the Abduction

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meaning, including communication by telephone, e-mail, or video, as well as visits. These other forms of contact have begun to assume more importance in decisions relating to what traditionally has been called visitation in the United States. *See* Sarah Gottfried, *Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases*, 36 FAM. L.Q. 475, 476–77 (2002).

[2] *See, e.g.*, Peter E. McEleavy, *International Contact—Where Does the Future Lie?*, INT'L FAM. L., Apr. 2001, at 55, 55; Peter McEleavy, *International Contact*, 30 FAM. L. 571 (2000); Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L L.J. 308, 311–12 (1997).

[3] For the text of the Convention, see Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Abduction Convention]. The Convention entered into force in the United States on July 1, 1988 and was implemented through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (1995). It is currently in force in seventy-five countries. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, STATUS TABLE 28, *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last updated Aug. 20, 2004). It is now in force between the United States and fifty-three other countries. *See* U.S. DEPT. OF STATE, HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, *at* http://travel.state.gov/family/adoption_hague_list.html (listing countries in which Abduction Convention is in force with respect to United States) (last visited Oct. 15, 2004).

[4] *See, e.g.*, Linda Silberman, *Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 48–50 (2003); *see also* McEleavy, *International Contact—Where Does the Future Lie?*, *supra* note 2, at 55 (suggesting that framework for protecting parent-child contact would significantly reduce return requests under Abduction Convention because many such requests are motivated by desire to protect contact rather than to gain custody).

[5] Grammes v. Grammes, No. Civ.A. 02-7664, 2003 WL 22518715 (E.D. Pa. Oct. 6, 2003).

[6] *Id.* at *1.

Convention.[7] When the father discovered that the mother intended to relocate further away in Canada, he retained the child in the United States at the end of a visit, abducting him for a second time in order to ensure that his contact with his son would not be cut off yet again.[8] An American court hearing the mother's subsequent return request rejected the Canadian court's reasoning in the prior abduction decision and refused to return the child to Canada.[9]

The *Grammes* case illustrates how a parent's fear that contact will not be adequately protected may lead to abduction. The father in *Grammes* was apparently motivated by this fear: Given the history of the case, if the child were to visit his mother in Canada in the future, he might be abducted once again. At the same time, excessive restrictions on the ability of a custodial parent to relocate, though designed to protect the right of contact, actually may motivate relocating parents to bypass the court system and abduct the child.[10] But contact is not just a right of parents; it is also a right of children, who are entitled to have meaningful relationships with both parents, regardless of the status of their parents' relationship with one another.[11] With increasing numbers of children affected by the global mobility of their parents,[12] there is a pressing need for a mechanism capable of ensuring the maintenance of parent-child relationships across borders. If there were a stronger international framework for enforcing contact decisions, the child in *Grammes*, for example, might have been spared the emotional trauma of multiple, unexpected relocations, each of

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[7] *Id.* at *2–*3. The parents had initially exercised joint custody as ordered by a Pennsylvania court, but the mother refused to allow the child to cross the border to spend the court-ordered time with his father. *Id.* at *1–*2.

[8] *Id.* at *3.

[9] *Id.* at *8. The American court found that the child's habitual residence was the United States, which did not change when he moved to Canada with his mother. The Canadian court had found that the child's habitual residence was Canada, presumably because the father initially acquiesced in the removal. *Id.* at *2.

[10] *See* WILLIAM DUNCAN, HAGUE CONVENTION ON PRIVATE INT'L LAW, TRANSFRONTIER ACCESS/CONTACT AND THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 9 (2002) [hereinafter DUNCAN REPORT], http://hcch.net/doc/pd_05e.doc (last visited Feb. 29, 2004); *see also* Steward, *supra* note 2, at 317. Duncan, the Deputy Secretary of the Hague Conference on Private International Law, drew up the report for the consideration of the Special Commission meeting held in September and October 2002 to discuss both the overall functioning of the Abduction Convention and specific problems relating to it, including the issue of contact.

[11] *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 9, 28 I.L.M. 1448 (recognizing right of children to maintain contact with both parents).

[12] *See, e.g.*, Lucy S. McGough, *Starting over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291, 292 (2003) ("Relocation continues to be the subject of commentary and law reform around the globe as lawmakers are confronted by an increasingly mobile generation of divorced parents.").

which was accompanied by the sudden disruption of his relationship with one of his parents.

In this Note, I suggest that an effective means of addressing the problem of international parent-child contact would be to draft an agreement on the recognition and enforcement of decisions on contact, which could function as an addendum or protocol to the Abduction Convention. In Part I, I outline the basic framework of the Abduction Convention. In Part II, I use an American case to illustrate the difficulties courts face when attempting to protect the right of international parent-child contact because of the absence of a broadly applicable international instrument on contact. In Part III, I discuss the growing efforts to develop international mechanisms for dealing with parent-child contact. In Part IV, I outline my proposal for a protocol on contact and explain how it would fit in with both the Abduction Convention and the relatively new Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention), which was opened for signature on October 19, 1996.[13]

I

THE ABDUCTION CONVENTION

The Hague Convention on the Civil Aspects of International Child Abduction is the primary international instrument for enforcing residence and contact rights transnationally. As its title suggests, its primary emphasis is on abduction, i.e., ensuring that custody rights are respected, rather than on contact.[14] For this reason, none of its provisions calls for the enforcement of contact orders.[15] This omission

[13] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *opened for signature* Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter Child Protection Convention]. The Child Protection Convention provides a framework for protecting the interests of children in international situations in which there may be a conflict of laws or jurisdiction. *See id.*, pmbl. at 1396. The United States has not yet signed the Convention, which is currently in force in nine countries. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, STATUS TABLE 34, *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70 (last updated June 16, 2004).

[14] According to the official explanatory report on the Convention, the Abduction Convention is "above all a convention which seeks to prevent the international removal of children." ELISA PÉREZ-VERA, HAGUE CONFERENCE ON PRIVATE INT'L LAW, EXPLANATORY REPORT 23, http://hcch.e-vision.nl/upload/expl28.pdf (last visited June 29, 2004). Thorough regulation of contact would "undoubtedly go beyond the scope of the Convention's objectives." *Id.* at 53.

[15] Under Article 21, states are obligated to "promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject," but no more. Abduction Convention, *supra* note 3, art. 21, 1343 U.N.T.S. at 102.

undermines the Convention's goal of deterring abduction, since parents might abduct their children rather than face termination of contact, as in the *Grammes* case.[16] Stronger protection for contact decisions would strengthen the overall functioning of the Abduction Convention and provide for greater stability in transnational parent-child relationships.

A. The Basic Structure of the Convention

The purpose of the Abduction Convention is a simple one: to eliminate the incentives for parents to abduct their children by requiring that children who are wrongfully removed or retained be returned to their country of habitual residence so that courts there may determine outstanding custody and access issues.[17] The Abduction Convention provides for the establishment of a Central Authority, frequently a designated office within the national government, in each State Party.[18] The Central Authority is responsible for the administration of the Abduction Convention, and for communicating and cooperating with the Central Authorities of other states during return proceedings.[19]

The key concept of the Abduction Convention is that of the child's "habitual residence," the courts of which jurisdiction are deemed best situated to determine the child's best interests.[20] The interpretation of the term habitual residence has given rise to litigation in the courts of various countries, but it is generally understood to mean the place where the child was living before her removal or retention and where one or both of her parents intended to establish a domicile.[21] Removal or retention of a child is wrongful when it is

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[16] *See supra* notes 5–12 and accompanying text.

[17] Article 1 of the Abduction Convention states its objectives as follows: (a) "to secure the prompt return of children wrongfully removed to or retained in any Contracting States;" 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." Abduction Convention, *supra* note 3, art. 1, 1343 U.N.T.S. at 98; *see also* PÉREZ-VERA, *supra* note 14, at 16–18 (outlining primary purposes of Convention, most important of which are deterrence of abduction and prompt return of children).

[18] *See* Abduction Convention, *supra* note 3, art. 6, 1343 U.N.T.S. at 99 ("A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities."). Those duties include aiding in locating a child, preventing harm to that child, and assisting in securing the return of the child. *Id.* art. 7, 1343 U.N.T.S. at 99. The Central Authority for the United States is the Office of Children's Issues at the State Department.

[19] *Id.* arts. 6–7, 1343 U.N.T.S. at 99.

[20] *See* Peter Nygh, *The New Hague Child Protection Convention*, 11 INT'L J. L. POL'Y & FAM. 344, 345 (1997).

[21] For an overview of the concept of habitual residence in the Abduction Convention, including references to cases construing the concept, see PAUL R. BEAUMONT & PETER E.

done in contravention of custody rights that were being exercised at the time of the removal or retention.[22] The Convention thus declines to address the merits of the custody disputes underlying international abductions.[23] It is the Abduction Convention's simplicity, along with its purposeful avoidance of the difficult underlying issue of the best interests of the child, that is largely responsible for its success in attracting a large number of States Parties and in achieving a high level of returns of abducted children.[24]

B. The Place of Parent-Child Contact in the Convention

Although one of the Abduction Convention's stated purposes is to protect what it calls access rights, it has in fact provided weak protection for transnational parent-child contact. While Article 21 of the Convention recognizes a right to access and requires States Parties to facilitate respect of access rights, it provides no enforcement mechanism for those rights.[25] Because of this omission, courts in the United

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MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 88–113 (1999). For references to case law arising under the Convention, see http://www.incadat.com, a database containing summaries and analysis of significant cases from many jurisdictions, as well as links to full opinions. The database is maintained by the Permanent Bureau of the Hague Conference on Private International Law, which oversees the general functioning of the Abduction Convention. *Id.*

22 *See* Abduction Convention, *supra* note 3, art. 3, 1343 U.N.T.S. at 98–99.

23 As Beaumont and McEleavy put it, the Convention is meant to address the interests of children generally in avoiding the upheaval of abduction and the potential loss of a relationship with one parent, rather than to inquire into the best interests of a particular child; it is the authorities of the child's habitual residence who are responsible for the latter inquiry. *See* BEAUMONT & MCELEAVY, *supra* note 21, at 29–30.

24 *See* Adair Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. INT'L L. & POL. 1, 7–8 (2000) (observing that there are far more Contracting States to Abduction Convention than any other Hague Convention on family matters, and suggesting that success of Convention is due to its simplicity, including avoidance of best interests analysis and foreshadowing of trends in substantive family law).

25 Abduction Convention, *supra* note 3, art. 21, 1343 U.N.T.S. at 102. A parent may request the Central Authority of a Contracting State "to make arrangements for organizing or securing the effective exercise of rights of access . . . in the same way as an application for the return of a child." *Id.* It further provides that those Central Authorities are "bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights" and should make efforts to remove obstacles to the exercise of access rights. *Id.* However, Central Authorities are not required to act to enforce access rights; Article 21 provides only that they "may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights." *Id.*; *see also* NIGEL LOWE ET AL., INTERNATIONAL MOVEMENT OF CHILDREN: LAW PRACTICE AND PROCEDURE 575 (2004) ("Article 21 imposes no duties upon judicial authorities and, unlike Art[icle] 12, creates no rights in private law which a parent can directly enforce in respect of a child.").

States and some other countries have found that they lack jurisdiction to hear claims for breach of access rights under Article 21.[26]

Parents seeking to maintain contact with their children across national borders have nevertheless sought ways to use Article 21 to enforce access rights, and some courts have permitted them to do so in certain circumstances. These courts have held that when a prior court order has granted a right of access to one parent while also placing limitations on the residence parent's[27] right to remove the child from the court's jurisdiction—often called a *ne exeat* order—the contact parent (or, in some cases, the court) has an effective right of custody under the Convention and may request a return.[28] The logic behind this conclusion relies on the definition of a right of custody in Article 5, which includes the right to determine a child's residence.[29] The *ne*

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[26] *See* Teijeiro Fernandez v. Yeager, 121 F. Supp. 2d 1118 (W.D. Mich. 2000) (holding that court did not have jurisdiction to hear claim for breach of access rights under Article 21); *see also* Janzik v. Schand, No. 99 C 6515, 2000 WL 1745203 (N.D. Ill. Nov. 27, 2000) (same); Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998) (same). Australian courts, in contrast, have held that Article 21 may be used as a limited basis for jurisdiction. *See* Police Comm'r of S. Australia v. Castell (1997) 138 F.L.R. 437 (Fam. Ct. Austl.) (Full Ct.), *available at* www.incadat.com (finding jurisdiction under Article 21 for enforcement of rights of access already established by operation of law in foreign country, but rejecting argument that Article 21 and Australian implementing legislation empower Central Authorities to initiate proceedings to establish new order of contact); *see also* DUNCAN REPORT, *supra* note 10, at 20 & n.65 (noting United States, British, and Israeli decisions finding custody rights implied by *ne exeat* clause).

[27] I use the term "residence parent," rather than "custodial parent," to reflect the international trend away from viewing children as passive objects possessed, and contested, by their parents. For the same reason, I use the term "contact parent" to refer to the parent who is to have contact with the child, rather than referring to that parent as one with a right of visitation or access.

[28] A case often cited on this point is the Canadian decision in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 553 (Can.), which held that a Scottish court had custody rights under the Convention at the time of removal because it had the power to determine the child's residence in a pending residence dispute. *See also* C. v. C., 1 W.L.R. 654 (Eng. C.A. 1989) (holding by English Court of Appeal that power on part of any person or of court to restrict removal of child was equivalent to right of custody under Abduction Convention). American courts, however, are split on this issue. A leading case holding that *ne exeat* orders do not rise to the level of rights of custody is *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001). This decision has been followed by the Fourth and Ninth Circuits. *See* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 805 (2003) (overturning district court's finding that *ne exeat* order of Scottish court gave effective right of custody both to mother and to court in which final custody determination was pending); Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002) (holding that *ne exeat* clause combined with contact order does not rise to level of custody right under Abduction Convention). More recently, however, the Eleventh Circuit has declined to follow the majority in *Croll*, holding that a *ne exeat* order, along with the father's right to care for his child under Norwegian law, was a custody right requiring the return of the child under the Convention. *See* Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004).

[29] Abduction Convention, *supra* note 3, art. 5(a), 1343 U.N.T.S. at 99 ("For the purposes of this Convention . . . 'rights of custody' shall include rights relating to the care of

exeat order is seen as a measure of control over the child's residence and thus as a type of custody right. This approach has been endorsed by the Hague Conference and by Abduction Convention scholars,[30] but American courts remain split on the issue.[31]

Though not explicitly enforceable under the Abduction Convention, the right of contact is closely related to the primary focus of the Convention—ensuring the return of children who have been removed or retained in violation of a party's custody rights. For example, the Convention may facilitate international contact simply because return can be enforced under its terms. When a parent resides in a state which is not a signatory to the Convention, however, courts may be reluctant to send children overseas for visits.[32] At the same time, the Convention's comparatively weak protection of rights of contact actually may promote abduction, as parents resort to self-help to ensure a continuing relationship with their children.[33] These difficulties become especially clear in the context of relocation, in which the residence parent seeks to move overseas. Courts hearing such cases are faced with a situation in which their orders are not necessarily enforceable, since a foreign court generally has discretion as to whether to recognize or enforce orders emanating from other states. When courts have not explicitly limited a parent's right to relocate, they have devised their own mechanisms for the international protection of parent-child contact.[34]

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the person of the child and, in particular, the right to determine the child's place of residence . . . .").

[30] *See* DUNCAN REPORT, *supra* note 10, at 20 (reporting that "preponderance of the case law supports the view that the existence of a *ne exeat* order is capable of elevating 'rights of access' in effect to the status of 'rights of custody' ").

[31] *See* Silberman, *supra* note 4, at 46–47 (discussing U.S. cases); *see also supra* note 28.

[32] *See, e.g.*, Abouzahr v. Matera-Abouzahr, 824 A.2d 268, 281 (N.J. Super. Ct. App. Div. 2003) (considering, but ultimately rejecting, limiting visits to United States). Courts in France sometimes have limited visits in these circumstances. *See* Bruno Sturlese, *Autorité Parentale: Soustraction internationale de mineurs et droit conventionnel de l'entraide judiciaire civile*, 8 JURIS-CLASSEUR DE DROIT INTERNATIONAL, Fasc. 549, art. 5 (1994) (asserting that French courts have power to limit visits to French territory where there is risk of international abduction).

[33] *See supra* note 4 and accompanying text.

[34] See, for example, *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 35, 52–53 (Cal. Ct. App. 1998), permitting relocation from California to Australia, but conditioning permission on concessions from the relocating party, discussed *infra* at Part II.B.

II

THE LIMITS OF UNILATERAL ACTION IN AN UNCERTAIN INTERNATIONAL LEGAL FRAMEWORK: IN RE MARRIAGE OF CONDON AND SUBSEQUENT CASES

As mentioned above, the difficulties caused by the absence of an international framework for ensuring transnational parent-child contact appear most clearly when a residence parent chooses to relocate overseas.[35] Courts in the United States and elsewhere increasingly have heard requests to modify residence and contact orders to allow for the relocation of residence parents and their children, both nationally and internationally.[36] In general, these parents have benefited from recent legal trends recognizing the importance of the residence parent's autonomy, as well as the importance of stability in children's relationships with the residence parent.[37] But when the proposed relocation is an international one, courts are more reluctant to modify orders because they have no way of ensuring that their orders will be enforced. The approach taken by several California courts in recent years illustrates the disadvantages of unilateral court action,[38] which may restrict relocation through financial burdens placed on the relocating parent, and which may ultimately undermine the enforceability of contact judgments by too rigidly insisting on continuing jurisdiction over the parties.

A. The Legal Context of International Relocations

The legal context in which international relocations occur is characterized by uncertainty. As noted in the Introduction, there is currently no broadly applicable international instrument providing for the recognition and enforcement of contact orders when a parent and

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[35] *See supra* notes 5–12 and accompanying text (discussing *Grammes* case as an example of difficulties that arise in American courts when residence parent moves out of country).

[36] *See* McGough, *supra* note 12, at 292.

[37] *See* Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 32, 38 (2002) (noting importance of stability in child's relationship with residence parent, social-science research supporting parental relocation, and courts' increasing deference to relocation preferences of residence parent).

[38] By unilateral court action I mean measures taken by a court in one country to guarantee the enforceability of its decision in another country, including attempts to divest foreign courts of subsequent jurisdiction over the matter or the parties. *See, e.g.*, *Condon*, 73 Cal. Rptr. 2d at 52–53 (requiring enforceable concession of jurisdiction to U.S. court). Such action is unilateral in that it does not involve communication or cooperation with the judicial authorities of the second country or recourse to a relevant international agreement.

child relocate abroad.[39] Such orders may be recognized under national laws regarding the recognition of judgments. In the United States, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) calls for foreign orders concerning custody and visitation to be enforced on the same basis as orders issued by sister states.[40] Both the United Kingdom and Australia have passed laws permitting the registration of foreign orders concerning children, which also may

[39] There are some regional international instruments providing for such recognition, however. In Europe, the agreement generally referred to as the Luxembourg Convention provides that a parent may request the recognition and enforcement of a decision relating to contact. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20, 1980, art. 4, Europ. T.S. No. 105, at 213–14. In addition, the so-called Brussels II Regulation provides for recognition and enforcement of judgments concerning children. Council Regulation 1347/2000 of 29 May 2000, arts. 14, 21, 2000 O.J. (L 160) 19, 23–25 [hereinafter Brussels II Regulation]; *see also* Nigel Lowe, *New International Conventions Affecting the Law Relating to Children—A Cause for Concern?*, 2001 INT'L FAM. L. 171, 171–75 (describing background, scope, and application of Brussels II Regulation). The Council of Europe recently completed a Convention on Contact Concerning Children, which includes detailed provisions regarding the recognition and enforcement of contact orders. Convention on Contact Concerning Children, May 15, 2003, art. 14, Europ. T.S. No. 192, at 8 [hereinafter Contact Convention]. For further information on the Contact Convention, see LOWE ET AL., *supra* note 25, at 597–605, detailing the Convention's origin, objects, scope, and general principles, Lowe, *supra*, at 177–78, citing lack of success of other international conventions as reason for the creation of the Contact Convention and describing the Convention's scope and principles, and McEleavy, *International Contact—Where Does the Future Lie?*, *supra* note 2, at 56–57, evaluating the scope and effectiveness of the 2000 draft of the Convention.

[40] UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 105(b), 9(IA) U.L.A. 649, 662 (1999) [hereinafter UCCJEA] (requiring that child custody determinations made in foreign country be recognized). The UCCJEA is meant to replace the Uniform Child Custody Jurisdiction Act (UCCJA), 9(IA) U.L.A. 261 (1999) [hereinafter UCCJA], which by the early 1980s had been adopted, with some minor alterations, by all fifty states as well as the District of Columbia. *See* Thomas Foley, Note, *Extending Comity to Foreign Decrees in International Custody Disputes Between Parents in the United States and Islamic Nations*, 41 FAM. CT. REV. 257, 262 (2003) (reporting that UCCJA was in effect in all states by early 1980s). Both the UCCJA and the UCCJEA require that state custody decisions be given full faith and credit by other states. UCCJA § 13, 9(IA) U.L.A. at 559; UCCJEA § 313, 9(IA) U.L.A. at 700. The UCCJEA further provides that the same full faith and credit be extended to the custody decisions of foreign countries. *Id.* § 105(b), 9(IA) U.L.A. at 662. It defines custody proceedings broadly, including decisions regarding visitation. *Id.* § 102(4), 9(IA) U.L.A. at 658. The UCCJEA also clarifies a point of confusion in state practice under the UCCJA: The court issuing the custody order has continuing, exclusive jurisdiction over the matter and the parties until either none of the parties any longer has a significant connection to the state, or the child, parents and any person acting as a parent no longer live in the state. *Id.* § 202, 9(IA) U.L.A. at 674. The UCCJEA is currently in force in thirty-seven states and the District of Columbia, while the UCCJA remains in force in the other thirteen states. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, A FEW FACTS ABOUT THE . . . UNIFORM CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, *at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Feb. 6, 2004).

include recognition and enforcement.[41] In France, the recognition and enforcement of foreign judgments not covered by regional agreements on the recognition of judgments is governed by the doctrine of *exequatur*, according to which a French judge must recognize a foreign judgment meeting certain criteria, and is forbidden to inquire into the merits of the dispute.[42] But, with the exception of the Uniform Child Custody Jurisdiction Act (UCCJA) and UCCJEA, which affect only orders to be enforced in the United States (and not American orders to be enforced overseas), all of these mechanisms for recognition and enforcement contain an element of discretion: Courts are not required to recognize or enforce foreign orders concerning contact. Currently, there is no nonregional international agreement which requires such recognition or enforcement.[43]

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[41] For the United Kingdom, see the Child Abduction and Custody Act, 1985, c. 60, § 16 (Eng.), *reprinted in* 6 HALSBY'S STATUTES OF ENGLAND AND WALES 284, 290, 292 (4th ed. 1999), which provides for registration in England and Wales of orders on custody and access from the authorities of other States Parties to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children. *Id.* §§ 12, 16; *see also* LOWE ET AL., *supra* note 25, at 413–27 (discussing Act). Under Australian law, orders from any state may be registered pursuant to the Family Law Act 1975, § 68 (Austl.), *reprinted in* ACTS OF THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA PASSED DURING THE YEAR 1975, at 374, 406–07 (1978).

[42] The approach to *exequatur* continues to be governed by the decision of France's highest civil court, the Cour de cassation, in *Munzer c. dame Munzer*, Cass. 1e civ., Jan. 7, 1964, J.C.P. 1964, II, 13590, note M. Ancel, *reprinted in* BERTRAND ANCEL & YVES LEQUETTE, LES GRANDS ARRÊTS DE LA JURISPRUDENCE FRANÇAISE DE DROIT INTERNATIONAL PRIVÉ 367–69 (4th ed. 2001). The work of several leading French legal scholars offers useful explanations and analyses of the recognition and enforcement of foreign judgments in France. *See* DANIÈLE ALEXANDRE, LES POUVOIRS DU JUGE DE L'EXEQUATUR 339–75 (1970) (presenting detailed analysis of precise role and powers of judge hearing *exequatur* requests); BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 384–417 (3d ed. 2000) (outlining policies and procedures for recognition and enforcement of foreign judgments); Horatia Muir Watt, *Effets en France des décisions étrangères*, 10 JURIS-CLASSEUR DE DROIT INTERNATIONAL, Fasc. 584-5 (1990) (describing limits on power of French courts to review or modify foreign decisions).

[43] The Hague Conference has established a convention on the recognition and enforcement of civil judgments, but it does not include judgments in the area of family law, and it has only been ratified by four states. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 258. For the status of ratifications and accessions, see HAGUE CONFERENCE ON PRIVATE INT'L LAW, STATUS TABLE 16, *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=78 (last visited Feb. 29, 2004). The Hague Conference is also currently at work on a broader convention on jurisdiction and the recognition and enforceability of judgments. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, WORKS IN PROGRESS: JUDGMENTS, *at* http://www.hcch.net/e/workprog/jdgm.html (last visited Feb. 29, 2004). But this project, again, would not apply to matters of family law. The current proposal is limited to the recognition and enforcement of choice-of-court clauses. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, DRAFT ON EXCLUSIVE CHOICE OF COURT AGREEMENTS, WORKING

This lack of an international legal framework for ensuring transnational parent-child contact has meant that courts considering relocation requests have been torn between two important interests: recognizing the right of the residence parent to remake her life, and on the other hand, protecting the interests of both the left-behind parent and the child in the continuity of their relationship despite what may be a significant geographical distance. *In re Marriage of Condon*[44] is an instructive example of the limits on courts' ability to protect these interests effectively in international relocation cases.

B. Background to Condon*: The Right to Relocate in the National Context*

In re Marriage of Condon was decided in the context of a growing trend in American courts toward permitting the relocation of residence parents and their children, but the case contained the added twist of an international relocation. *Condon* involved an American father and Australian mother; the latter abducted the children from the United States to Australia when the marriage fell apart, and the father petitioned for their return under the Abduction Convention.[45] An Australian court then ordered that the children be returned.[46]

After the children were returned, the mother petitioned a California court to allow the children to continue to reside with her and to permit her to relocate with them to Australia.[47] Her request came shortly after a major shift in California law concerning relocation. In *In re Marriage of Burgess*,[48] the California Supreme Court recognized a presumptive right on the part of the residence parent to relocate, as long as that relocation would not endanger the child's rights or well-being.[49] This holding eliminated the requirement that a residence parent seeking to relocate either had to demonstrate that

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DOCUMENT 110 E (2004), *available at* http://hcch.e-vision.nl/upload/wop/jdgm_wd110_e.pdf.

[44] 73 Cal. Rptr. 2d 33 (Cal. Ct. App. 1998). The court's method of considering relocation requests has been applied in *In re Marriage of Lasich*, 121 Cal. Rptr. 2d 356, 363–64, 368–70 (Cal. Ct. App. 2002) and *In re Marriage of Abargil*, 131 Cal. Rptr. 2d 429 (Cal. Ct. App. 2003), both of which allowed relocation conditioned on the relocating parent posting a financial bond and conceding jurisdiction to the California courts. The appeals court also recently remanded a case where the lower court had not considered the mother's relocation proposal, based on the *Condon* scheme. *In re* Marriage of Sellahewa, No. D040143, 2003 WL 22229424, at *7, *9 (Cal. Ct. App. Sept. 29, 2003).

[45] *Condon*, 73 Cal. Rptr. 2d at 36.

[46] *See* Cooper v. Casey (1995) 123 F.L.R. 239, 240, 248 (Fam. Ct. Austl.) (Full Ct.) (refusing appeal of return order issued by lower court).

[47] *Id.* at 36–38.

[48] 913 P.2d 473 (Cal. 1996).

[49] *Id.* at 478.

the move was necessary or accept that the children would reside with the other parent.[50]

The *Burgess* decision is representative of an overall shift in the United States toward permitting relocation, although state practice remains split between recognizing a presumptive right to relocate and requiring a showing that the relocation is necessary for the children's welfare.[51] This trend is based both on a greater recognition of the autonomy of residence parents to remake their lives in the wake of a divorce or break-up,[52] as well as on social science research emphasizing the importance of continuity in a child's relationship with his or her primary caregiver.[53] Advocates of the new approach point out that in states without such a presumption, "[u]nless [residence parents] obtain the consent of their former spouses or lovers, they are routinely subjected to delays and litigational burdens—burdens greater than those imposed by the criminal law on those who wish to relocate but are subject to probation or parole supervision."[54] The imposition of such burdens has prompted objections that these restraints on the mobility of residence parents are unconstitutional infringements of the right to travel.[55]

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[50] *Id.* at 476 (holding that, in initial judicial custody determination, "a parent seeking to relocate does not bear a burden of establishing that the move is 'necessary' as a condition of custody").

[51] *See, e.g.*, Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 247 (1996) (describing state supreme court rulings granting relocation requests despite "a tide of restrictive lower court rulings" prohibiting relocation); Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 246 (1999) ("There is very little agreement among the various states regarding proper resolution of the relocation issue."). New York, which, like California, had required a showing of necessity before permitting relocation, also rejected that approach in 1996. *See* Tropea v. Tropea, 665 N.E.2d 145, 150 (N.Y. 1996) (rejecting test requiring relocating parent to prove exceptional circumstances, in favor of individualized consideration of "all the relevant facts and circumstances").

[52] *See* Bruch & Bowermaster, *supra* note 51, at 248 (recognizing that in many states, custodial parents are "unable to make reasonable plans for themselves and their families . . . without placing the custody of their children seriously at risk").

[53] *See* Kindregan, *supra* note 37, at 38 (observing that some studies suggest that most important element in well-being of child is stability of relationship to primary caregiver, while increased contact with nonresidence parent has not been shown to increase child's well-being); *see also* Richards, *supra* note 51, at 258–62 (discussing social science research by Dr. Judith Wallerstein on effects of divorce on children).

[54] Bruch & Bowermaster, *supra* note 51, at 248.

[55] *See, e.g.*, Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 3 (1995–96) (describing constitutional issues raised by relocation); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 630 (1985–86) (addressing problem of parent's right to travel within joint custody context); Tabitha Sample & Teresa Reiger, Comment, *Relocation Standards and Constitutional Considerations*, 15 J. AM. ACAD. MATRIMONIAL LAW. 229, 230 (1998) (citing constitutional considerations in relocation

Most of the decisions adopting a presumption in favor of relocation have involved a domestic relocation. In contrast, *Condon* involved an international relocation of significant distance. The *Condon* court nevertheless followed *Burgess* but sought additional safeguards, specific to the international context, for ensuring continuity in the relationship between the father and his children.[56]

C. *Protecting Continuity in the Parent-Child Relationship*

The *Condon* court felt compelled to find a way to ensure that its contact orders would be respected even after the mother had relocated, in order to protect the father's relationship with his children.[57] It proposed a series of measures designed to maintain the continuity in the relationship between the father and children after the relocation. First, it linked support payments to the degree of contact the father would have with the children, ordering that both spousal support and child support, set at one level if the mother remained in Los Angeles, be reduced if she moved to Australia.[58] The difference was

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standards). The seriousness of the issue is illustrated by a decision in which a court attempted to force a residence parent to relocate in order to be closer to a nonresidence parent, who himself had relocated. *See In re* Marriage of Hawwa, No. AO93979, 2001 WL 1334327, at *1 (Cal. Ct. App. Oct. 30, 2001) (reversing lower court's order facilitating child's contact with father by holding that mother could either lose custody or relocate from Pennsylvania to father's new home in northern California). Courts in the United Kingdom and Australia also have begun to deal with the issue of international relocation. For the United Kingdom, see *Payne v. Payne*, 2001 Fam. 473, 477 (Eng. C.A. 2001), and LOWE ET AL., *supra* note 25, at 98–99, discussing *Payne*. Several recent Australian cases involve detailed discussion of the varying interests at stake in relocation. *See* U v. U (2002) 211 CLR 238 (Austl.) (denying international relocation request); AMS v. AIF (1999) 199 CLR 160 (Austl.) (rejecting requirement that residence parent show compelling reasons for relocation); Lisa Young, B and B: *Family Law Reform Act 1995 (Cth)—Relocating the Rights Debate*, 21 MELB. U. L. REV. 722, 722–23 (1997) (discussing human rights implications of conflicting court holdings on relocation requests).

[56] The appeals court made it clear that it had reservations about extending the *Burgess* rule to the international context, stressing its view that the *Condon* case "tests the very outer limits" of the *Burgess* presumption in favor of relocation. *In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 35 (Cal. Ct. App. 1998). The court emphasized that *Burgess* involved a proposed move of forty miles, while *Condon* involved a move of some 8000 miles. *Id.* Despite its discomfort with applying *Burgess* to this situation, the court concluded that it "should not interfere at this late date with the trial court's carefully constructed order allowing this relocation," but added that it would remand for further measures to guarantee the enforceability of the U.S. decision. *Id.* Such measures, of course, were unnecessary in the domestic context faced by the court in *Burgess*, since the UCCJA and UCCJEA provide for the enforcement of sister-state judgments regarding custody and contact. *See supra* note 40.

[57] *See Condon*, 73 Cal. Rptr. 2d at 43 (noting that intercontinental relocations are tantamount to termination of nonmoving parent's contact rights, and holding that courts should consider best interests of child in evaluating relocation requests).

[58] *Condon*, 73 Cal. Rptr. 2d at 38. In addition to providing for lower child support payments if the mother remained in Los Angeles, however, the court also ruled that if the

to be paid into a "travel-trust fund" to cover the costs of visits between the father and children.[59] The appeals court that reviewed the *Condon* decision required, in addition, that the mother post a significant bond, which, along with all or some of the support payments, would be forfeited if she were to disregard the court order.[60]

To some extent these financial arrangements were practical: Maintaining contact between the children and their father at such a great distance would require significant financial resources. There is also a certain logic to the reduction in child-support payments, since providing a means for the children to retain significant contact with their father was, like the support payments, ultimately in their interest. On the other hand, those reductions in support were likely to have an impact on the quality of life of both the mother and the children because the level of the support payments was presumably based on their material needs. Reducing the payments in order to safeguard contact thus imposed a burden on both the mother and the children. This raises questions about the desirability of such arrangements, as does the posting of a bond that further burdened the mother financially.[61]

Such financial constraints function as an incentive for the residence parent to respect the court's orders even after she has left its jurisdiction.[62] At the same time, however, a punitive element underlies the connection *Condon* draws between contact and finances. This

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mother remained, the father's support payments to her eventually would be reduced to zero, somewhat undermining the intention to create an incentive for her to stay. *Id.* at 38 n.6. Courts in some states routinely tie support payments to the nonresidence parent's access to the children, while others do not. *See* Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 619, 621–29 (1989) (describing varying state policies as to conditioning support payments on contact); Greg Geisman, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. REV. 568, 569, 603–07 (1993) (advocating statutory reform to treat child support and visitation as complementary activities); Carolyn Eaton Taylor, Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059 (1984) (criticizing conditioning of child support on contact).

[59] *Condon*, 73 Cal. Rptr. 2d at 38.

[60] *Id.* at 52–53. The appeals court remanded the case to the lower court for a determination of the precise amount of the bond and of what portion of the support payments would be forfeitable. *Id.* The requirement of such bonds in international contact cases has been approved by the Council of Europe. *See* Contact Convention, *supra* note 39, art. 10, Europ. T.S. No. 192, at 6.

[61] The financial safeguards required by *Condon* and subsequent cases seem to be requirements only families of substantial means would be able to meet. For those without such means, relocation would appear not to be an option at all.

[62] It is not unusual for courts in the United Kingdom to require the posting of a bond, as well as the issuance of a mirror order abroad, before permitting a child to leave the jurisdiction. *See* LOWE ET AL., *supra* note 25, at 147–52.

approach risks treating the relocating parent as if she has committed a civil infraction, or even a crime, when all she has done is seek residence and contact arrangements that accommodate her need to relocate.

The punitive element of the *Condon* arrangements comes through even more clearly in *In re Marriage of Lasich*,[63] a decision adopting the *Condon* court's approach. In *Lasich*, the court placed the majority of the financial burden for maintaining contact on the mother, who sought to relocate to Barcelona with the children.[64] She was required to pay all the father's transportation costs between California and Barcelona and to deposit all child-support payments in a trust account to finance the expenses the father incurred while visiting with his children in Spain.[65] She also had to provide the father and children with computers and Internet software to enable them to maintain contact electronically.[66] The court further ordered the mother to post a $100,000 bond, which would be forfeited if she sought to modify the order in any other country.[67]

In addition, the *Lasich* court sought to subject the mother to criminal sanctions for kidnapping if she requested a modification of the contact order from another court or otherwise failed to respect its contact provisions.[68] Yet the court acknowledged that the mother's conduct up to that point indicated that she would respect its orders.[69] Indeed, unlike the mother in *Condon*, the mother in *Lasich* had voluntarily submitted to the court's jurisdiction with regard to her proposed relocation to Spain and had never abducted her children.[70] Yet the *Lasich* court, following the logic of *Condon*, ultimately treated her as if the relocation request itself were a prelude to criminal behavior.

Thus, although the *Condon* approach recognizes a residence parent's presumptive right to relocate, it can result in the imposition

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63 *In re* Marriage of Lasich, 121 Cal. Rptr. 2d 356 (Cal. Ct. App. 2002).

64 *Id.* at 358.

65 *Id.* at 363. Apparently the court never intended for the child-support payments to be used for the children's material needs, but rather intended for them to support the father's visits to Spain. This arrangement suggests that the very notion of child support here was entirely subordinated to the court's desire to ensure the mother's compliance with its orders. This treatment of child support demonstrates the court's efforts to fashion a solution to an international problem using legal tools created for a very different set of problems, and illustrates why an international instrument providing for the enforceability of contact orders is needed.

66 *Id.*

67 *Id.* at 364.

68 *Id.* (requiring mother to recognize application of International Parental Kidnapping Act, 18 U.S.C. § 1204 (2000), and to waive extradition for arrest on international kidnapping charges in event she violated any aspect of California contact order).

69 *Id.*

70 *Id.*

of excessively coercive measures. Because these measures are meant to encourage the residence parent to respect the court's order, they impose burdens that are likely to render the cost of relocation prohibitive for many, if not most, residence parents. This approach to relocation may have the paradoxical effect of inducing parents who would like to relocate to bypass the court system altogether and to abduct their children.[71]

D. The Role of the Court: Perpetual Jurisdiction over Children Residing Abroad?

The *Condon* plan also demonstrates a profound distrust of the willingness or ability of foreign courts to consider properly the importance of contact between left-behind parents and their children. In addition to imposing constraints on the mother, the *Condon* court sought to ensure its continued jurisdiction over the mother and children, even after they moved to Australia. Such continuing jurisdiction is a feature of the UCCJA and UCCJEA and has been crucial to eliminating competition among jurisdictions which may all have some connection to the parties.[72] It is also considered essential to eliminating competing decisions regarding transnational parent-child contact.[73] However, because the *Condon* arrangement contains no mechanism for eventual transfer of jurisdiction to the court of the children's new residence, it inappropriately seeks to vest permanent jurisdiction over children and families living abroad in a single court. This inability to adapt to children's changing situation is the natural consequence of courts acting unilaterally, rather than within the framework of an

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[71] *See* DUNCAN REPORT, *supra* note 10, at 9 ("If no respect is given abroad to contact orders made in the context of relocation orders, this may affect the willingness of judges to permit relocation, where such permission is required; and, if judges are unwilling to allow relocation, this may precipitate abductions by primary carers.").

[72] This aspect of the court's approach reflects the importance of limiting jurisdiction when parties are potentially subject to jurisdiction in more than one state or country. Thus, where more than one court would have jurisdiction over a case concerning international parent-child contact, a successful agreement on contact would limit jurisdiction to courts with a specific relationship to the parties and eliminate other potentially valid bases for jurisdiction, such as the mere presence (as opposed to residence) of the child in the jurisdiction. This was a crucial element of the reforms embodied in the UCCJEA, which provides for the exclusive continuing jurisdiction of the court that issued the original residence or contact order. *See* UCCJEA, *supra* note 40, § 202, 9(IA) U.L.A. at 673; *see also* Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267, 281–82 (1998).

[73] *See* DUNCAN REPORT, *supra* note 10, at 24–25 (emphasizing need for limited jurisdiction to avoid repeat litigation regarding international parent-child contact).

international agreement or, alternatively, in cooperation with authorities in the other state.[74]

First, to ensure some level of enforcement of its order, the *Condon* court asked the mother to register the order in Australia before it would permit the relocation.[75] Australia has a statute providing for the registration of foreign orders concerning children; once an order has been registered, it is entitled to full recognition and enforcement in Australia.[76] The *Condon* court acknowledged the applicability of the Australian statute but was dissatisfied because registration did not provide "absolute protection" to its order.[77] It objected to the fact that the registration law permits the modification of an overseas child order after one year has passed.[78] It seems, however, that the *Condon* court underestimated the protection granted to a registered overseas residence and contact order under Australian law, because an Australian court would, in fact, have little discretion to modify a registered order.[79] The *Condon* court's reluctance to rely on Australian law suggests that an international agreement providing greater certainty in the recognition of contact orders might have enabled the court to place greater faith in its sister courts.

To avoid the possibility that an Australian court might modify its order, the *Condon* court sought permanent jurisdiction over the matter and the parties, requesting that the parties "address the issue [of] whether the California court's order . . . was enforceable *in perpetuity* under Australian law, international treaties or agreements."[80] It concluded that "[a]n unenforceable order is no order at all and a custody order which is guaranteed enforceability for only one year of the remaining ten to twelve years of minority represents an

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[74] Such cooperation, while desirable, is not the norm, although there are efforts to establish an explicit framework for direct judicial communication in matters relating to the Abduction Convention. *See* PHILIPPE LORTIE, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRACTICAL MECHANISMS FOR FACILITATING DIRECT INTERNATIONAL JUDICIAL COMMUNICATIONS IN THE CONTEXT OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2002), http://www.hcch.net/doc/2002_pd6e.doc (last visited Feb. 28, 2004).

[75] *See In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 50 (Cal. Ct. App. 1998).

[76] *See* Family Law Act 1975, § 68(2) (Austl.), *reprinted in* ACTS OF THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA PASSED DURING THE YEAR 1975, at 374, 406–07 (1978); *Condon*, 73 Cal. Rptr. 2d at 50.

[77] *See Condon*, 73 Cal. Rptr. 2d at 50.

[78] *Id.* at 51.

[79] *See* Dir.-Gen., Dep't of Families, Youth and Cmty. Care v. Reissner (1999) 157 F.L.R. 443, 460 (Fam. Ct. Austl.) (implying that Australian court would have had less discretion to modify American contact order had that order been registered under Australian law).

[80] *Condon*, 73 Cal. Rptr. 2d at 51 n.27 (emphasis added).

abuse of discretion by the issuing court."[81] It therefore remanded the case to the lower court with the expectation that the lower court would require the mother to concede the continuing jurisdiction of the California court and seek Australian recognition and enforcement of this concession.[82] Should she attempt to modify the California order in the courts of Australia "or any other nation," the mother would forfeit the bond and all or some of the support payments.[83]

The problem with this approach is its insistence on permanent jurisdiction in California, even after the children had become habitual residents of another country.[84] Most experts considering the interests of children in the transnational context believe that the courts of a child's habitual residence are in the best position to assess the child's needs and interests.[85] For this reason, both the Abduction Convention and the Child Protection Convention limit jurisdiction to determine issues such as residence and contact to the courts of the child's habitual residence.[86]

In contrast, the *Condon* court felt obliged to retain permanent jurisdiction over the mother and children in order to ensure the enforcement of its contact orders and the protection of the children's relationship with their father. But the *Condon* approach, which depends on the prior recognition of its contact orders by foreign courts, contains the seed of its own failure. Few courts in the United States or elsewhere would consent to permanent derogation of their jurisdiction to decide issues concerning the best interests of children living in their geographical area. Like American courts, foreign courts

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[81] *Id.* at 52.

[82] *Id.* at 52–53.

[83] *Id.* at 53. The appeals court in *Lasich* issued a similar jurisdictional order, requiring the mother in that case to register its custody order in Spain under the Abduction Convention on an annual basis and provide proof of such registration before the children could move to Spain. *In re* Marriage of Lasich, 121 Cal. Rptr. 2d 356, 363–64 (Cal. Ct. App. 2002). It further ordered the mother to file an annual declaration in the Spanish courts that the children's ordered ten-week minimum visits in the United States each year made them habitual residents of California. *Id.* at 364. This aspect of the order was meant to ensure that, should the mother retain the children in Spain and refuse to send them to the United States for their scheduled visits, the father would have a basis for filing a return request under the Abduction Convention. *See supra* Part I (describing role of habitual residence in Abduction Convention).

[84] Note that the UCCJEA provides for just such continuing jurisdiction when the parent still relocates within the United States. *See* UCCJEA, *supra* note 40, § 202, 9(IA) U.L.A. at 673. However, the greater geographical distances, as well as cultural and linguistic differences, could make such continuing jurisdiction less practicable when children acquire a habitual residence overseas.

[85] *See* Nygh, *supra* note 20, at 345.

[86] *See* Abduction Convention, *supra* note 3, 1343 U.N.T.S. 89; Child Protection Convention, *supra* note 13, art. 5, 35 I.L.M. at 1397 (providing that authorities of child's habitual residence have jurisdiction over measures relating to child's well-being).

have specific mechanisms and doctrines for recognizing and enforcing foreign orders,[87] but they ultimately have discretion to decline to recognize orders that violate public policy. An order providing for the permanent jurisdiction of foreign courts over persons residing in a court's jurisdiction presents a high risk of violating public policy.[88]

Thus, uncertainty over enforcement motivated the *Condon* court to craft a decision that both burdened the family and sought to permanently disempower foreign courts from hearing matters concerning persons in their jurisdiction. One way to alleviate some of this uncertainty and its consequences would be an international agreement providing for the recognition and enforcement of contact orders. This type of agreement would assure a court that its order would be legally enforceable overseas for a specified period of time, even if permanent jurisdiction in the original court was not an option. International legal scholars have suggested four possibilities: (1) an additional protocol to the Abduction Convention,[89] (2) the promotion of the 1996 Child Protection Convention,[90] (3) the promotion of a guide to good practice in contact cases arising under the Abduction Convention,[91] and (4) the development of frameworks for international judicial cooperation in abduction cases as a means of promoting uniform interpretation of Article 21 of the Abduction Convention.[92] Each of these proposals is discussed in detail in Part III.

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[87] *See supra* notes 41–42 and accompanying text.

[88] In France, for example, state public-policy interests in the area of family law have been significantly attenuated, favoring instead greater individual autonomy in family arrangements. *See* MARIE CAROLINE VINCENT-LEGOUX, L'ORDRE PUBLIC: ÉTUDE DE DROIT COMPARÉ INTERNE 514 (2001). The exception is where the welfare of children is concerned; this is still an area of strong state interest where the public policy exception may come into play. Consequently, a French court may refuse recognition or enforcement of a foreign order violating public policy in this area. *See id.* Of course, it is the *Condon* appeals court's own deeply held view that California courts ought to determine the welfare of the children that underlies its determination to retain jurisdiction over the matter.

[89] *See* Silberman, *supra* note 4, at 48–50.

[90] *See, e.g.*, LOWE ET AL., *supra* note 25, at 561 (suggesting that Child Protection Convention could resolve access issues left unaddressed by Abduction Convention).

[91] *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT AND CONCLUSIONS OF THE SPECIAL COMMISSION CONCERNING THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 35 (2003) [hereinafter REPORT AND CONCLUSIONS], http://www.hcch.net/doc/abd2002_rpt_e.pdf.

[92] *Id.* at 35–36 (reporting Commission's conclusion that Hague Conference should encourage such cooperation, particularly in common law jurisdictions where competing interpretations of Article 21 were most problematic).

III
THE VIEW OF THE HAGUE CONFERENCE ON TRANSFRONTIER PARENT-CHILD CONTACT: FOUR POSSIBILITIES

Experts in international law have recognized the problems created by the gap in the Abduction Convention and by decisions such as *Condon*. The Hague Conference on Private International Law, which drafted the Abduction Convention and generally oversees its implementation,[93] has recognized the urgent need for an international instrument protecting transnational parent-child contact.[94] In the fall of 2002, it held a Special Commission to consider possible approaches to protecting transnational parent-child contact and thereby to facilitate the optimum functioning of the Abduction Convention.

The Special Commission considered four possible solutions to the problems surrounding transnational contact: (1) the drafting of an additional protocol to the Abduction Convention, (2) the promotion of the 1996 Child Protection Convention, (3) the dissemination of a guide to good practice in contact cases arising in relation to the Abduction Convention, and (4) the development of a formal framework for cooperation among the judicial authorities of different jurisdictions in abduction cases.[95] Each of the proposals is examined in turn.

A. An Additional Protocol to the Abduction Convention

Some scholars have called for a comprehensive protocol to address many of the outstanding issues in the implementation of the Abduction Convention.[96] They have proposed a protocol that addresses not only the enforcement of parent-child contact,[97] but also, among other issues: (1) the definition of custody rights with regard to *ne exeat* clauses; (2) the empowerment of courts hearing return requests under the Abduction Convention to issue interim orders for access pending a final decision on return; and (3) the creation of sanc-

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[93] *See* Abduction Convention, *supra* note 3, arts. 37–45, 1342 U.N.T.S. at 104–05.

[94] *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS OF THE FOURTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 12 (2001) (calling lack of protection for contact/access "serious matter requiring urgent attention"), http://hcch.e-vision.nl/upload/concl28sc4_e.pdf; *see also* DUNCAN REPORT, *supra* note 10, at 7 (reporting conclusions of Special Commission of 2001 that lack of protection for parent-child contact required "urgent attention") (emphasis omitted).

[95] *See* REPORT AND CONCLUSIONS, *supra* note 91, at 34–36.

[96] *See* Silberman, *supra* note 4, at 48–50.

[97] *Id.* at 49.

tions for the lack of enforcement of return orders, a particular problem in civil law countries where there is no contempt remedy.[98]

The Special Commission rejected this solution, preferring to consider the need for a protocol in the future if the other steps it endorsed failed to lead to "significant improvements in practice."[99] It did not indicate precisely which improvements it would find significant, or over what time period it anticipated that such improvements might reasonably be expected to develop. The Commission's reluctance to endorse a protocol reflects its concern that the process of drafting one might seriously undermine the Abduction Convention, since it would represent an opportunity for the wholesale renegotiation of the Convention.[100] Instead, the Special Commission opted to promote ratification of the Child Protection Convention.[101] This convention covers a broad range of issues relating to the protection of children in the context of international jurisdictional conflicts, including contact.[102]

B. The Child Protection Convention

The Child Protection Convention seeks to provide a unified instrument for dealing with international conflicts of laws regarding children, including providing for the recognition and enforcement of orders meant to protect children.[103] The broad scope of the Child Protection Convention distinguishes it from the Abduction

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[98] *Id.* at 45–50, 56.

[99] REPORT AND CONCLUSIONS, *supra* note 91, at 34 (internal quotation marks omitted).

[100] *See id.* (reporting that "[a]ll contributors agreed that the use of a Protocol should be seen as a last resort, recognising the dangers of having too many competing instruments"); *see also* DUNCAN REPORT, *supra* note 10, at 49 ("It is also possible that some States Parties may wish to seize the rare opportunity afforded by negotiations on a Protocol, to raise, in addition to issues surrounding contact/access, other Articles within the 1980 Convention which in their view require to be amended or supplemented.").

[101] *See* REPORT AND CONCLUSIONS, *supra* note 91, at 35 ("Those States which have already agreed in principle to ratify or accede to the 1996 Convention are urged to proceed . . . with all due speed. Other States are strongly encouraged to consider the advantages of ratification or accession and implementation."). The Child Protection Convention provides for the protection of rights of access in Article 3. *See* Child Protection Convention, *supra* note 13, art. 3(b), 35 I.L.M. at 1396. In contrast to a protocol added to the Abduction Convention, the Child Protection Convention is an independent agreement covering a broad range of issues relating to children; it does not focus on abduction and contact. *See id.* art. 3, 35 I.L.M. at 1396–97 (listing range of issues to which Convention applies).

[102] *See* Child Protection Convention, *supra* note 13, art. 3, 35 I.L.M. at 1396–97.

[103] *See* Eric Clive, *The New Hague Convention on Children*, 3 JURID. REV. 169, 170 (1998) (noting that Child Protection Convention is most comprehensive of agreements relating to conflict of laws with regard to protection of children). The Convention also extends to determining which state has jurisdiction to make orders concerning the protection of a particular child, as well as which law that state should apply and which law applies

Convention, which is essentially limited to enforcing the return of abducted children. The Child Protection Convention was, however, drafted so as to harmonize with the Abduction Convention.[104] In particular, like the Abduction Convention, it designates the authorities of a child's habitual residence as the decisionmakers most competent to determine issues relating to the child.[105] Some of the protections it seeks to regulate include the attribution (including the termination or restriction) of parental authority,[106] rights of custody and access, and measures designed to protect the person or the property of the child.[107] The Child Protection Convention thus extends to a vast array of matters pertaining to children, even though it does not apply to many others, such as rights of succession or maintenance obligations.[108]

Article 23 of the Child Protection Convention provides for the recognition of child-protection orders, including contact orders, by operation of law—that is, without the parent or other interested party having to undertake any proceedings requesting recognition.[109] The drafters of the Convention sought to provide the maximum scope for

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to parental responsibility more generally. *See* Child Protection Convention, *supra* note 13, art. 1(1), 35 I.L.M. at 1396.

[104] *See, e.g.*, Anne-Marie Hutchinson & Margaret H. Bennett, *The Hague Child Protection Convention 1996*, FAM. L., Jan. 1998, at 35, 36 (reporting that Article 7 of Protection Convention was "specifically drafted to bring it wholly into line (in terms of definitions) with the Child Abduction Convention," in large part by basing jurisdiction on habitual residence).

[105] *See, e.g., id.* at 35; *see also* Clive, *supra* note 103, at 172–74; Nygh, *supra* note 20, at 345. An additional reason for basing jurisdiction on habitual residence was the reluctance of common law states to accept jurisdiction based on nationality, which had been the approach of the Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, which the 1996 Convention is meant to replace. *See* Nygh, *supra* note 20, at 344–45. As of 1996, the 1961 Convention had been ratified by only eleven states, all of them civil law countries. *Id.* at 345.

[106] This term is defined in Article 1(2) as "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child." Child Protection Convention, *supra* note 13, art. 1(2), 35 I.L.M. at 1396.

[107] *See id.* art. 3, 35 I.L.M. at 1396–97.

[108] *See id.* art. 4, 35 I.L.M. at 1397 (listing matters to which Convention does not apply).

[109] *See id.* art. 23, 35 I.L.M. at 1399 ("The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States."). Recognition by operation of law means that a parent will not have to initiate any proceeding to obtain recognition of the order, unless he or she also seeks enforcement of the order. *See* PAUL LAGARDE, HAGUE CONFERENCE ON PRIVATE INT'L LAW, EXPLANATORY REPORT 585 (1996), *available at* http://hcch.e-vision.nl/upload/expl34.pdf. Enforcement, on the other hand, does not come about by operation of law. Instead, the interested party may request a declaration of enforceability or registration for the purposes of enforcement according to the procedures laid down by the state in which the measure is to be enforced. *See* Child Protection Convention, *supra* note 13, art. 26, 35 I.L.M. at 1400.

such recognition. Thus, while proof of the order ordinarily would be required in the form of a document from the authority that made it, faxes verifying orders taken over the phone in urgent situations would also suffice.[110] Such recognition may be refused in limited situations, such as cases in which the authority that issued the order did not have jurisdiction based on the child's habitual residence, the child's views were not heard, or any person with a claim to parental responsibility was not heard in the original proceedings.[111]

In addition, the Child Protection Convention provides for preventive action for either recognition or nonrecognition of orders.[112] Thus, the left-behind parent in a relocation case such as *Condon* could request a declaration of recognition of a contact order before the child actually relocated.[113] While such orders still could be modified by the authorities of the state of the child's new habitual residence after relocation, the point of departure for a court deciding whether such modification is necessary would be an enforceable order and its specific regime of contact between the child and the left-behind parent.[114] As noted by William Duncan, Deputy Secretary General of the Hague Conference on Private International Law, "There is no reason why the court in which modification is sought should not apply the same safeguards against abuse as it would to a purely domestic case in which one parent is seeking to modify the terms of an existing enforceable order."[115] Because the order would be enforceable, and recognized as such not only by the courts of the requested state but by both States Parties to the Convention, these provisions should provide

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110 LAGARDE, *supra* note 109, at 585.

111 *See* Child Protection Convention, *supra* note 13, art. 23(2), 35 I.L.M. at 1399.

112 *See id.* art. 24, 35 I.L.M. at 1400 ("Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State."). A party might request nonrecognition of an order taken in contravention of basic due process requirements under the Convention, such as the right of all parties to be heard. *See id.* art. 23, 35 I.L.M. at 1399–1400 (listing grounds for nonrecognition of orders).

113 *See* William Duncan, *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau*, 33 N.Y.U. J. INT'L L. & POL. 103, 117 (2000).

114 *See id.* at 118. In some respects this framework resembles Australia's scheme for the registration of foreign orders. *See supra* notes 76–79 and accompanying text. Unlike the Australian law, however, the Child Protection Convention represents an agreement among states—and not a mere internal legal provision—that modification will occur only in limited, agreed-upon circumstances. States therefore have leverage to pressure other Contracting States to ensure that their authorities respect the provisions regarding modification, further reducing judicial discretion and creating an international remedy on the state level for violations of the Convention.

115 Duncan, *supra* note 113, at 118.

greater reassurance to a court hearing a relocation case.[116] In addition, Article 35 of the Child Protection Convention permits a left-behind parent to obtain in his home state a preliminary finding of his fitness to have contact with the child, a finding which the court of the child's habitual residence would be required to consider before making a decision regarding contact.[117]

Nevertheless, there are some aspects of the Child Protection Convention that have been criticized and that may make some states reluctant to ratify it. Some scholars have expressed concern that it is a relatively complicated convention and may be difficult for national courts functioning within the context of a range of different legal and cultural traditions to apply.[118] Of even greater concern are some of the jurisdictional aspects of the Convention. In particular, Article 5(2) provides that when a child's habitual residence changes, the authorities of the child's new residence automatically gain jurisdiction over matters pertaining to the child.[119] This provision is limited by Article 7, which explicitly provides that when a child has been wrongfully removed or retained, the courts of her prior habitual residence retain jurisdiction until two conditions have been met. First, the child must have acquired a habitual residence in another state. Second, a person with a right of custody must have either acquiesced in the relocation or else have failed to file a request for the child's return within one year of the removal or retention, provided that the person with the right of custody was aware of the child's whereabouts.[120]

Despite this limitation, designed to prevent wrongful retention or removal, there has been some concern, particularly in the United States, that the Child Protection Convention could undermine the Abduction Convention by reestablishing a motivation for wrongful removal or retention: If a parent can gain access to a new jurisdiction by changing the child's residence—and thereby to a different order relating to custody and access—then she may arrange to do just that.[121] At the same time, a foreign court hearing a return order

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116 *See supra* note 114.

117 Child Protection Convention, *supra* note 13, art. 35(2), 35 I.L.M. at 1401; Duncan, *supra* note 113, at 118.

118 *See* Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239, 269 (2000) (referring to Convention's rules as "intricate and complicated," and noting magnifying effect of such complication in Convention to be applied by national courts in many different countries).

119 *See* Child Protection Convention, *supra* note 13, art. 5(2), 35 I.L.M. at 1397.

120 *Id.* art. 7(1), 35 I.L.M. at 1397.

121 *See* Silberman, *supra* note 118, at 250–54; *see also* Nygh, *supra* note 20, at 348.

might refuse return if doing so would give it instant jurisdiction to decide custody.[122]

Doubts about the Child Protection Convention's effect on the Abduction Convention, in addition to its complexity, may explain why only six countries have ratified it to date, and only three have acceded to it.[123] The member states of the European Union signed the Convention in 2003, but none has yet ratified it.[124] Even if the Child Protection Convention is ultimately the best tool for protecting transnational parent-child contact, it likely will take some time before its global impact is felt.[125] Moreover, there are doubts as to the effectiveness of the Child Protection Convention with respect to the recognition and enforcement of judgments. Article 23, which provides grounds for the nonrecognition of foreign judgments, permits nonrecognition where the judgment "is manifestly contrary to [the] public policy of the requested State, taking into account the best interests of the child."[126] This reference to the best interests of the child risks inviting the requested court to review the fact-finding and conclusions of the foreign court and to issue a new judgment in lieu of recognizing the foreign order.[127] Similarly, the enforcement provision of the Child

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[122] *See* Nygh, *supra* note 20, at 348. Professor Nygh noted that delegates from Australia, for instance, found this objection difficult to accept, since their courts rarely refuse return and do so only when there are compelling reasons for refusal. *Id.*

[123] Those countries that have ratified the Child Protection Convention are Australia, the Czech Republic, Latvia, Monaco, Morocco, and the Slovak Republic. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, STATUS TABLE 34, *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70 (last modified June 16, 2004). Estonia, Ecuador, and Lithuania have acceded to the Convention. *Id.*

[124] *See id.* (recording signature date of European Union States as April 1, 2003). Although there are indications that ratification throughout the European Union is forthcoming, where parent-child contact is concerned, its effectiveness in Europe adds little to existing regional European agreements on contact. The real importance of the Child Protection Convention lies in its potential for extraregional application. Of course, its effectiveness in Europe and Australia will go a long way toward encouraging other countries to ratify or accede to it.

[125] *See* McEleavy, *International Contact—Where Does the Future Lie?*, *supra* note 2, at 58 (noting that Child Protection Convention is aimed at "a diverse range of countries with different political and cultural outlooks, which have to individually take steps for [its] ratification"). European commentators also are concerned that the United States will refuse to sign it, which would significantly undermine its likelihood for achieving global effectiveness:

> EU-wide ratification would provide an important boost for the 1996 Convention and would, for example, put pressure on the United States to ratify. Were this to happen . . . then it [can] be anticipated that at least as many States will implement the 1996 Convention as have currently become parties to the 1980 Hague Abduction Convention.

LOWE ET AL., *supra* note 25, at 562.

[126] Child Protection Convention, *supra* note 13, art. 23(2)(d), 35 I.L.M. at 1399.

[127] *See* LOWE ET AL., *supra* note 25, at 552–53. The authors point out that the word "manifestly" should be interpreted as the primary limiting factor on such reexamination of

Protection Convention conditions enforcement on the best interests of the child under the internal law of the requested state, which could seriously undermine the effectiveness of the enforcement provision.[128]

In this regard, it is noteworthy that signatories to the Child Protection Convention from the European Union have opted to follow the recognition and enforcement rules provided under European Community law.[129] Given the uncertainties regarding the effectiveness of the recognition and enforcement provisions of the Convention, as well as the likelihood that it will take a significant period of time before the Convention achieves widespread effectiveness, it is not clear that promotion of the Child Protection Convention will provide a reliable framework for ensuring transnational parent-child contact in the near future.

C. *The Third and Fourth Possible Solutions: The Guide to Good Practice and Judicial Cooperation*

In addition to promoting rapid ratification of the Child Protection Convention, the Special Commission recommended that the Permanent Bureau of the Hague Conference on Private International

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the underlying decision, but that there is no way yet to predict how courts will interpret the provision. *Id.* at 552–53.

128 Child Protection Convention, *supra* note 13, art. 28, 35 I.L.M. at 1400; *see also* LOWE ET AL., *supra* note 25, at 553.

129 Each of the European Union States signed the Convention subject to the following provision:

> Articles 23, 26 and 52 of the Convention allow Contracting Parties a degree of flexibility in order to apply a simple and rapid regime for the recognition and enforcement of judgments. The Community rules provide for a system of recognition and enforcement which is at least as favourable as the rules laid down in the Convention. Accordingly, a judgment given in a Court of a Member State of the European Union, in respect of a matter relating to the Convention, shall be recognised and enforced . . . by application of the relevant internal rules of Community law.

COMM. OF THE EUR. CMTYS., PROPOSAL FOR A COUNCIL DECISION AUTHORISING THE MEMBER STATES TO RATIFY, OR ACCEDE TO, IN THE INTEREST OF THE EUROPEAN COMMUNITY THE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN (THE 1996 HAGUE CONVENTION), Annex (2003), *available at* www.europarl.eu.int/meetdocs/committees/juri/20031001/030348en.pdf (presenting text of declaration to be made by all European Union States ratifying or acceding to 1996 Convention); *see also* HAGUE CONFERENCE ON PRIVATE INT'L LAW, STATUS TABLE 34 (listing European Union States that have ratified or acceded to 1996 Convention, and confirming that each has made required declaration concerning recognition and enforcement), *at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70 (last updated Aug. 23, 2004). The European Union rules for the recognition and enforcement of judgments concerning access and other matters of parental responsibility are outlined in Council Regulation (EC) 2201/2003. *See* Council Regulation (EC) 2201/2003 of 27 November 2003, 2003 O.J. (L 338) 1.

Law draft nonbinding recommendations and/or a guide to good practice in the area of transnational parent-child contact.[130] Since such a guide would be nonbinding, the Commission suggested that the Hague Conference also begin efforts toward "the formulation of general principles and considerations relevant to international access/contact,"[131] which would encourage states to enforce the provisions of the nonbinding guide. These principles would focus primarily on ensuring a more uniform interpretation of Article 21.[132] Neither the guide to good practice nor the general principles would be enforceable; instead, their success would rely on states' willingness to follow them as a matter of comity in order to promote the overall functioning of the Abduction Convention.[133] As discussed in the context of *Condon*, however, comity alone is not always enough to reassure courts and other state authorities that their orders will be respected.[134]

As this Part has demonstrated, the proposed solutions in fact do little to remedy the problems surrounding transnational parent-child contact. Whether because of perceived difficulties in the case of a comprehensive protocol, potential barriers to widespread ratification in the case of the Child Protection Convention, or the lack of enforceability in the case of the good practice guide and judicial principles, it is clear that the Special Commission's recommendations will not prevent more decisions like *Condon*.

IV
A More Immediate Solution: A Limited Protocol on the Recognition and Enforcement of Foreign Contact Orders

In this Part, I will demonstrate how a protocol limited to the recognition and enforcement of decisions on contact avoids the pitfalls of the proposals considered by the Special Commission. Because it would be limited to a single set of issues, such a protocol would avoid the wholesale renegotiation of the Abduction Convention feared by the Special Commission while nevertheless providing a practical framework for ensuring transnational parent-child contact. After dis-

130 Report and Conclusions, *supra* note 91, at 35. The first overall Guide to Good Practice in the implementation of the Abduction Convention was presented at the meeting of the Special Commission and was approved by the delegates. *See id.* at 15–31, 35.

131 *Id.* at 35 (internal quotation marks omitted); *see also id.* (suggesting that "progress could be made on the difficult question of enforcement through the formulation of nonbinding principles which draw attention to the special features of international cases").

132 Direct judicial communications would have the same goal. *Id.* at 35–36.

133 *See* Report and Conclusions, *supra* note 91, at 35 (noting that good practice guide would be nonbinding).

134 *See supra* notes 57–88 and accompanying text.

cussing the advantages of such a protocol, I will outline the main features such an agreement should contain in order to be effective.

A. *The Advantages of a Limited Protocol*

A limited protocol on the recognition and enforcement of contact orders would alleviate some of the uncertainties faced by the *Condon* court. By providing an explicit and uniform framework for the transnational effectiveness of contact orders, such an agreement would eliminate the need for potentially oppressive financial constraints or counterproductive attempts to retain permanent jurisdiction over children living abroad.

Unlike the Child Protection Convention, a recognition and enforcement protocol would provide a relatively immediate solution to the parent-child contact problem. Eight years have passed since the Child Protection Convention was signed, yet it is in effect in only a handful of countries.[135] It is likely to take another decade or more before the Convention is widely applicable. In addition, as noted above, ratification by the states of the European Union—which account for the vast majority of states that have signed the Convention—will not alter the current situation concerning the recognition or enforcement of contact decisions, since the European Union has elected to use its current internal rules on recognition and enforcement of contact decisions under the Convention.[136] In contrast, a limited protocol on recognition and enforcement could provide a real effect much more quickly and across a much broader geographical area.

The other solutions discussed by the Special Commission, while potentially more immediate than ratification of the Child Protection Convention, suffer from a serious flaw: They are not enforceable.[137] The Guide to Good Practice simply repeats the Abduction Convention's call for cooperation in matters of access.[138] Fostering direct judicial communications and the development of judicial principles under the Abduction Convention, while encouraging greater uniformity of interpretation of the Convention, would not provide any reliable framework for the recognition and enforcement of contact decisions. Courts would still find themselves obligated to issue contact orders to take effect overseas with no assurance that those orders

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135 *See supra* note 123.

136 *See supra* note 129 and accompanying text.

137 The enforceability of contact decisions is considered to be of crucial importance in safeguarding transnational parent-child contact, as William Duncan noted in his report to the Special Commission of 2002. *See* DUNCAN REPORT, *supra* note 10, at 31.

138 *See* Abduction Convention, *supra* note 3, art. 21, 1343 U.N.T.S. at 102.

would be respected. In contrast, a limited protocol on the recognition and enforcement of judgments would enable authorities issuing orders for transnational contact, like the court in *Condon*, to trust that their orders will be enforced by an international agreement with binding force. It thus would eliminate the need for problematic financial restrictions[139] and attempts to retain permanent jurisdiction over parties living abroad.[140]

In addition, a limited protocol on the recognition and enforcement of decisions on international parent-child contact might serve as a bridge toward more widespread ratification of the Child Protection Convention. By providing for greater certainty in the recognition of residence and contact orders, such a protocol might encourage the United States, for instance, to sign the Child Protection Convention by allaying some of its concerns over the Convention's effect on jurisdiction when a child changes residence. A recognition and enforcement protocol, by providing for the enforcement and recognition of contact orders—which often also include residence or custody orders—could counteract some of the jurisdictional uncertainties created by certain provisions in the Child Protection Convention.[141]

However, drafting such a protocol would not be without difficulties. For instance, the Hague Conference has encountered a number of obstacles to drafting a general convention on the recognition of foreign judgments.[142] But the much more limited scope of a protocol on contact decisions, along with the mandate of the Hague Conference to find specific solutions to the problem of transnational contact, indicates that such an agreement is nevertheless achievable. In addition, recent efforts by the Council of Europe and the European Parliament toward providing for the enforceability of contact decisions attest not only to the importance of the issue, but to the increasing willingness of authorities to enter into such agreements.[143] As the approach taken by European Union states indicates, a separate agreement on recognition and enforcement would in no way interfere with ratification of the Child Protection Convention, since the

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139 *See supra* Part II.C.

140 *See supra* notes 75–86 and accompanying text.

141 For a discussion of these concerns, see Silberman, *supra* note 118, at 250–54, describing the potential for jurisdictional provisions of the Child Protection Convention to encourage international child abduction.

142 *See supra* note 43.

143 *See* Contact Convention, *supra* note 39, Europ. T.S. No. 192; Brussels II Regulation, *supra* note 39, 2000 O.J. (L 160) 19; *see also* Lowe, *supra* note 39, at 171–75, 177–78 (discussing Brussels II Regulation and Contact Convention).

Convention allows States Parties to develop their own rules on recognition and enforcement.[144]

B. *The Contours of a Limited Protocol on Transnational Contact*

In order to prevent situations similar to those encountered in *Condon*, the structure of a limited protocol on the recognition and enforcement of contact decisions should provide both certainty and flexibility, an admittedly difficult balance to strike. The following are some features that would be most important to consider in drafting a successful recognition and enforcement agreement.

1) The habitual residence of the child should be the only recognized basis for courts to issue orders as to parent-child contact that merit recognition and enforcement under the agreement. Such a provision would correspond to the jurisdictional principles of both the Abduction Convention[145] and the Child Protection Convention.[146] By limiting recognition and enforcement to decisions issued by the authorities of the state of the child's habitual residence, the agreement would avoid forum-shopping via abduction, which would not be the case if the mere presence of the child in the jurisdiction of the court issuing the order were sufficient to trigger the recognition and enforcement agreement.[147]

2) The agreement should provide for a default rule of mandatory recognition of foreign contact orders for a specified period of time, up to between six months and one year after the order has been made.[148]

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144 *See supra* note 129 and accompanying text.

145 *See* Abduction Convention, *supra* note 3, art. 4, 1343 U.N.T.S. at 99 ("The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.").

146 Child Protection Convention, *supra* note 13, art. 5(1), 35 I.L.M. at 1397 ("The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.").

147 *Cf.* Silberman, *supra* note 118, at 251–54 (expressing concern that Convention's recognition of immediate acquisition of new habitual residence would increase incentives to abduct in order to obtain new forum).

148 *Cf.* Child Protection Convention, *supra* note 13, art. 23(1), 35 I.L.M. at 1399 (stating that orders shall be recognized by operation of law); *see also* UCCJEA, *supra* note 40, § 106, 9(IA) U.L.A. at 663 (mandating recognition and enforcement of decisions made in substantial conformity with Act). In contrast, the Council of Europe's new Convention on Contact Concerning Children only requires that States Parties establish their own internal mechanisms for the recognition and enforcement of orders from other States Parties. *See* Contact Convention, *supra* note 39, art. 14(1)(a), Europ. T.S. No. 192, at 8 ("States Parties shall provide . . . a system for the recognition and enforcement of orders made in other States Parties concerning contact and rights of custody."). However, a provision requiring mandatory recognition and enforcement would provide for greater certainty among States Parties to an international, rather than a regional, agreement that their courts' orders will be recognized. Unlike the members of the Council of Europe, States Parties to such an

A one-year period would correspond to the Abduction Convention's one-year limit on return requests, and to the period in which a child's habitual residence generally is considered to have changed, even if she was wrongfully removed or retained.[149] Though in some cases one year might be too long, given the changes which may take place in a child's life in that time period, it is important to prevent a child's relocation from giving the courts of her new residence the power to modify immediately the contact orders issued in the state of her prior residence. For this reason, the agreement should contain some default time period during which the orders are presumptively unmodifiable. Such a provision might mitigate some of the concerns about courts immediately acquiring jurisdiction when a child's habitual residence changes, at least where contact orders are concerned. Alternatively, a protocol on recognition and enforcement could, like the UCCJEA, provide for exclusive continuing jurisdiction in the original state, as long as one of the parties maintained a significant connection to the state (such as residence).[150] This provision would have satisfied the *Condon* court but would conflict with the Child Protection Convention's provision for a change in jurisdiction when the child's habitual residence changes.[151]

3) The agreement should provide for the prior judicial or administrative registration and recognition of contact orders. This will allow courts hearing relocation cases to issue residence and contact orders with the confidence that they will be respected for an appropriate period of time.[152]

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agreement might have significantly different approaches to recognition and enforcement of foreign judgments, which would undermine the goal of creating greater certainty in the effectiveness of contact orders with an international dimension.

[149] *See* Abduction Convention, *supra* note 3, art. 12, 1343 U.N.T.S. at 100 (mandating return only if less than one year has elapsed since child's abduction). Courts still have discretion to order returns after the one-year mark, however. *See* BEAUMONT & MCELEAVY, *supra* note 21, at 203–09 (discussing Article 12 requirement to return child after one year has elapsed unless it is demonstrated that child is settled in new environment).

[150] *See* UCCJEA, *supra* note 40, § 202, 9(IA) U.L.A. at 673–74.

[151] *See* Child Protection Convention, *supra* note 13, art. 5(2), 35 I.L.M. at 1397.

[152] This could take the form of registration, as provided for under Australian law, or of mirror orders, which are judicial decisions in the second jurisdiction embodying the orders issued by the first jurisdiction. Courts in the United Kingdom often request mirror orders when considering the relocation of children overseas. However, they have not yet determined on what jurisdictional basis they may themselves issue mirror orders when so requested, since normally they may only make orders concerning children already in their jurisdiction. *See* LOWE ET AL., *supra* note 25, at 35–36 (outlining case in which English court made mirror order, though it most likely did not have jurisdiction under Children Act); *cf.* Child Protection Convention, *supra* note 13, arts. 24 & 28, 35 I.L.M. at 1400 (allowing prior recognition of orders and providing for mandatory enforcement of such orders); Contact Convention, *supra* note 39, art. 14(2), Europ. T.S. No. 192, at 8 (directing

4) A decision rendered without an opportunity for all interested parties to be heard should be open to challenge.[153] If, for instance, a nonresidence parent were not heard in the original proceeding leading to the contact order, she could challenge its recognition and enforcement in another state and petition for its modification.[154] To facilitate the participation of all interested parties, the protocol could mandate notice when a judicial authority seeks jurisdiction to modify an order issued overseas.[155]

5) There should be, of course, limited exceptions to automatic recognition and enforcement. In an emergency situation, for example, the court of another State Party should have jurisdiction to alter the contact order or issue a new one, if doing so is urgently necessary to protect the well-being of the child.[156]

6) Equally important would be a provision for the cooperation of judicial and other authorities.[157] For example, a court hearing a relocation request could contact the authorities in the state to which the residence parent proposed to relocate in order to find out more about recognition and enforcement of foreign orders. A court hearing a

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States Parties to create procedures for prior recognition and declaration of enforceability of contact orders); UCCJEA, *supra* note 40, §§ 305–306, 9(IA) U.L.A. at 692–93 (creating system of registration of residence and contact orders for purposes of recognition and enforcement).

153 *Cf.* Child Protection Convention, *supra* note 13, art. 23(1)(b)–(c), 35 I.L.M. at 1399 (providing that orders may be refused recognition and enforcement if made without child or person claiming infringement of his or her parental responsibility having been heard); UCCJEA, *supra* note 40, § 305(d)(3), 9(IA) U.L.A. at 692 (providing that lack of notice and opportunity to be heard in child custody proceeding resulting in order is defense to recognition and enforcement). The Convention on Contact does not provide such a defense to enforcement. *See* Contact Convention, *supra* note 39, Europ. T.S. No. 192.

154 *Cf.* UCCJEA, *supra* note 40, §§ 106, 305(d)(3), 9(IA) U.L.A. at 663, 692. This principle could be expressed more generally in terms of the nonrecognition of orders not made in circumstances approximately similar to those in which such an order would be made in the state where recognition is sought.

155 *Cf. id.*, § 108(a), 9(IA) U.L.A. at 664 (requiring notice to persons outside state).

156 The UCCJA and UCCJEA provide for such emergency jurisdiction, although it is more explicit in the latter. *See id.*, § 204, 9(IA) U.L.A. at 676–77. Note, however, that practice under the UCCJA was confused as to jurisdiction, which is what led to the UCCJEA provisions explicitly granting exclusive continuing jurisdiction in the original state. *See* David H. Levy & Nanette A. McCarthy, *A Critique of the Proposed Uniform Child Custody Jurisdiction and Enforcement Act*, 15 J. AM. ACAD. MATRIMONIAL LAW. 149, 151 (1998) (pointing out that UCCJA "did not specify that emergency jurisdiction may only be exercised to protect a child on a *temporary* basis until the court with jurisdiction issues a permanent order"). In a protocol on recognition and enforcement of contact orders, such a limitation on emergency jurisdiction to modify an order might, again, conflict with the Child Protection Convention's flexibility regarding changes in jurisdiction.

157 The potential for direct judicial communication to manage international disputes concerning children recently has been recognized at several international meetings of judges, as well as by the Hague Conference on Private International Law. *See* LORTIE, *supra* note 74.

request for modification of an order could contact authorities in the issuing state for more information. Such communication might be facilitated through the appointment of a liaison judge, which some countries already have used in cases arising under the Abduction Convention.[158] The UCCJEA provides for similar communication, with the requirements that parties be permitted to argue the issues before the judge makes a final decision and that careful records be kept of all communication so that parties can adequately protect their interests.[159]

7) Finally, any recognition and enforcement agreement should provide for specific sanctions—in the form of a fine, for example—for persons who refuse to comply with foreign judgments that have been granted recognition and enforcement. While some national courts can use contempt of court to ensure compliance with their judgments, others do not, and many countries refuse to extradite their citizens for violation of foreign court orders.[160] An agreed-upon, state-controlled sanction, however, would avoid the potential for an excessively punitive approach, as seen in *Lasich*.[161]

A protocol on recognition and enforcement that included the above measures would, like the Abduction Convention, leave the balancing of competing interests of parents and children involved in transnational parent-child contact cases to national courts. Such determinations, which are complex and necessarily informed by cul-

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158 *Id.* at 8–10.

159 *See* UCCJEA, *supra* note 40, § 110(b), 9(IA) U.L.A. at 666. This section provides that parties may participate in the communication between courts, but if they cannot do so, they must have the opportunity to present facts and arguments before the court makes a decision. *Id.* Under § 110(d), parties also must be granted access to the record of such communications. 9(IA) U.L.A. at 667.

160 *See* Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 134–35 (2000) (stating that civil law countries "have no effective means of enforcing their own civil court orders"); Silberman, *supra* note 4, at 56 (noting that there is no contempt remedy in civil law countries); *see also* Jan Rewers McMillan, *Getting Them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. AM. ACAD. MATRIMONIAL LAW. 99, 105–07 (1997). It is probably for this reason that the Convention on Contact includes measures similar to those endorsed by the *Condon* and *Lasich* courts for holding individuals responsible for violations of foreign court orders. *See* Contact Convention, *supra* note 39, art. 10, Europ. T.S. No. 192, at 6 (listing safeguards for contact, including possibility of requiring one party to pay travel and accommodation expenses or to post security, as well as imposing fine on residence parent if he or she refuses to comply with contact order). Note also that in France some courts have required an *astreinte*—a fine for disobeying court orders, which is not the precise equivalent of the common law contempt remedy—to ensure the enforcement of contact orders. *See* Rennes, 6e ch., Mar. 18, 1982, D. 1983, p. 449, note Bénabent (Fr.).

161 *See supra* Part II.C.

tural values and national policies, could be addressed on an international level only by a very complex international agreement that would take years to implement. The Child Protection Convention, with its provisions regarding termination of parental rights and the applicable law in child-welfare cases, is a step in that direction. But in the meantime, a more limited agreement on recognition and enforcement fills the gap in authorities' ability to promote parent-child contact while the more generalized ratification of the Child Protection Convention is pending.

An agreement of this sort might not have fully satisfied the *Condon* court, which objected to the one-year limit on the enforceability of its orders under Australian law.[162] But the *Condon* court's anxiety seemed to be concerned primarily with the uncertainty of the degree of respect a foreign court would grant its orders.[163] A recognition protocol for contact orders such as that outlined above, linked to the Abduction Convention to ensure a child's return, could have reassured the *Condon* court that its orders would have been entitled to enforcement and that the father's participation in any subsequent modification would have been protected. If the order were wrongly modified or if it were modified without providing the father with notice or the opportunity to be heard, he could have turned to the Central Authority for the Abduction Convention for assistance.[164] Over the long term, as decisions enforcing foreign contact orders were issued in various states, courts would become more comfortable trusting their overseas colleagues to make appropriate contact decisions based on a fair hearing of all the parties.[165] The promotion of

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[162] *See supra* notes 77–78 and accompanying text.

[163] In its own words, nothing less than "absolute protection" for its order would have satisfied the *Condon* court. *See In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 50 (Cal. Ct. App. 1998). Under Australian law, however, the order would have enjoyed a significant degree of deference. *See supra* note 79 and accompanying text.

[164] As noted above, states which have ratified or acceded to the Abduction Convention designate Central Authorities to assist in problems arising under the Convention. In the United States, the Central Authority is the Office of Children's Issues at the United States Department of State, which regularly assists parents concerned with international child abduction. *See supra* notes 18–19 and accompanying text; *see also* U.S. DEP'T OF STATE, INTERNATIONAL CHILD ABDUCTION (providing information and resources concerning international child abduction), *at* http://travel.state.gov/family/abduction.html (last accessed July 1, 2004).

[165] A similar growth in trust has occurred in cases arising under the Abduction Convention, facilitated by international conferences of judges. Note, for example, that the Australian court in *Condon*, although clearly concerned as to how an American court would evaluate the mother's abuse allegations, nonetheless ordered the return of the children as mandated by the Convention. *See* Cooper v. Casey (1995) 123 F.L.R. 239, 248 (Fam. Ct. Austl.) (Full Ct.) (refusing appeal of return order issued by lower court). In a separate opinion, Justice Kay wrote, "[N]othing in the effect of the orders that we are

judicial communication and cooperation on contact issues hopefully would enable courts to feel more at ease overall and less likely to use *Condon*-like mechanisms when issuing contact orders with an international dimension.[166]

V
CONCLUSION

A limited agreement on recognition and enforcement of contact orders does not solve the difficult question of how to assess and balance the competing interests of parents and children involved in transfrontier relationships. But it might go a long way toward creating a stable international framework within which courts attempting to solve that question could act with the assurance that their decisions can be useful and effective, even across international borders. This, in turn, would help promote and protect the maintenance of relationships between parents and children who are separated by national borders.

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creating should in any way suggest to the Californian court that we in any way reject the evidence that is brought forward on behalf of the wife, some of which is most chilling in its detail." *Id.* He further expressed his confidence that the California court's prior orders had been made without hearing all the evidence and that in its future hearings it would take into account all such evidence. *Id.* By adding this note, Justice Kay implied what may have been a concern that the California court would not in fact take into account all the information relevant to the Australian mother's case; his decision to add this note ensured that his view of the evidence would be communicated to the California court reading the Australian court's decision. Without the framework of the Abduction Convention requiring faith in sister courts and promoting a uniform basis for abduction decisions, perhaps the Australian court would have been less willing to order the return of the children. A protocol on recognition and enforcement would, like the Abduction Convention, increase courts' willingness to trust one another's professionalism. In addition, if a protocol contained provisions for interjudicial communications, it could ease the kinds of anxieties about future proceedings overseas expressed by both the Californian and Australian courts.

166 As Philippe Lortie notes in his report on judicial communication in the context of the Abduction Convention, such communication would enable judges to "better understand how their colleagues work in other jurisdictions," which would lead to increased trust in the capacity and willingness of foreign courts to evaluate properly the rights and obligations of the parties, as well as the needs of the children involved. *See* LORTIE, *supra* note 74, at 7.