

## Putting the "Remedy" Back in the International Child Abduction Remedies Act - Enforcing Visitation Rights for the Left Behind Parent

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# PUTTING THE “REMEDY” BACK IN THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT—ENFORCING VISITATION RIGHTS FOR THE LEFT BEHIND PARENT

NICOLE CLARK<sup>†</sup>

## INTRODUCTION

A man and a woman from the United States met, got married, and started a family in England. They lived happily for some time, but later decided to separate. After a contentious divorce and a hard-fought custody battle, the mother received primary custody of their two young children, and the father received visitation every other weekend. He loved his children and lived for their weekends together. But one weekend, several years after the divorce, he was unable to get in contact with his wife. He called and sent messages to no avail; he went to her house only to find that she had moved out a week and a half before. Finally, after two weeks had passed, he received the call: She had taken the children to the United States, she wanted to move back home, and she did not want to see him—or to let the children see him—ever again.

The father was devastated and turned to the Hague Convention on the Civil Aspects of Child Abduction (“Hague Convention”), which operates through the International Child Abduction Remedies Act (“ICARA”) in the United States, for help in restoring his visits with his children. Unfortunately, his efforts proved unsuccessful. This Note explores why.<sup>1</sup>

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<sup>1</sup> Most left behind parents are fathers, not mothers. In 2008, the latest year for which statistics of international parental abductions are available, fifty-nine percent of parents taking children to the United States were mothers, and mothers constituted sixty-nine percent of taking parents worldwide. Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III—National Reports*, 6, (May 2011) available at <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf>. These percentages were

The Hague Convention “protect[s] children internationally from the harmful effects of their wrongful removal or retention and . . . establish[es] procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”<sup>2</sup> It was ratified in the United States on April 29, 1988, and on that day, President Reagan also signed ICARA into law.<sup>3</sup>

Both the Hague Convention and ICARA are meant to provide a method for seeking the return of a child or enforcing visitation rights for a child who has been abducted internationally by a parent or guardian. However, both have been widely criticized as falling short when it comes to visitation rights.<sup>4</sup> Unlike petitions under the more well-known aspects of the Hague Convention and ICARA, which provide for a child's repatriation to the country of last habitual residence, visitation petitions do not fare well in the United States. Federal district courts regularly deny visitation enforcement requests for lack of subject-matter jurisdiction, essentially leaving no recourse in the federal court system for noncustodial parents whose children are abducted by custodial parents and taken to the United States.<sup>5</sup> Further, prior to 2013, the only federal circuit court that had

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consistent with the two previous surveys conducted in 1999 and 2003. *Id.* Additionally, approximately seventy-two percent of taking parents were the child's primary caretaker. Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I—Global Report*, 6, (May 2011), available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.

<sup>2</sup> Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

<sup>3</sup> *Id.* The Hague Convention entered into force on December 1, 1983 was ratified by the United States on April 29, 1988 and was proclaimed by President Reagan on November 7, 1988. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2012) (current version at 22 U.S.C. §§ 9001–9011 (2012)).

<sup>4</sup> See *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860–61 & n.5 (E.D. Pa. 1998) (compiling journal articles that have criticized the failure to provide a remedy concerning visitation rights for parents); Priscilla Steward, *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, 331 (1997) (“Although Article 21 [of The Hague Convention] recognizes rights of [visitation], the Convention has no provisions that enforces [sic] such rights. Experts say that one of the Convention's biggest failures is its ineffectiveness at securing rights of [visitation].” (footnote omitted)).

<sup>5</sup> See, e.g., *Wiesel v. Wiesel-Tyrnauer*, 388 F. Supp. 2d 206, 212 (S.D.N.Y. 2005); *Wiggill v. Janicki*, 262 F. Supp. 2d 687, 690 (S.D. W. Va. 2003); *Bromley*, 30 F. Supp. 2d at 862.

considered a claim for enforcement of visitation rights was the United States Court of Appeals for the Fourth Circuit in *Cantor v. Cohen*.<sup>6</sup> The Fourth Circuit held, just as several district courts had, that it lacked jurisdiction to hear a claim for the enforcement of visitation rights under ICARA.<sup>7</sup> However, in February 2013, the United States Court of Appeals for the Second Circuit also had the opportunity to hear this issue in *Ozaltin v. Ozaltin*,<sup>8</sup> and it came to the opposite conclusion. In *Ozaltin*, the Second Circuit held that ICARA does create a federal right of action for the enforcement of visitation rights, thereby declaring that federal courts do have subject-matter jurisdiction over such claims.<sup>9</sup>

This Note argues that the Second Circuit's approach is more consistent with the aims of the Hague Convention and the needs of children than the Fourth Circuit's approach and that ICARA does confer jurisdiction upon federal courts to adjudicate claims for the enforcement of visitation rights under the Hague Convention. Part I discusses the background of the Hague Convention and ICARA and how visitation rights fit into each. Part II discusses the split between the Fourth Circuit and the Second Circuit regarding whether ICARA confers jurisdiction upon federal courts over claims for the enforcement of visitation rights. It further examines the issue by analyzing the holdings of a number of district courts that have held that they lacked subject-matter jurisdiction to consider claims for enforcement of visitation rights under ICARA. Part III argues that the Second Circuit was correct in holding that ICARA creates a federal right of action for the enforcement of visitation rights and that federal courts do in fact have subject-matter jurisdiction to hear such claims. Part IV suggests an amendment to the Hague Convention that would prevent future decisions in which federal courts dismiss visitation claims under ICARA for lack of jurisdiction.

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<sup>6</sup> 442 F.3d 196 (4th Cir. 2006).

<sup>7</sup> *Id.* at 197.

<sup>8</sup> 708 F.3d 355 (2d Cir. 2013).

<sup>9</sup> *Id.* at 371.

## I. BACKGROUND OF THE HAGUE CONVENTION AND ICARA

A. *The Hague Convention*

The Hague Conference on Private International Law ("Conference") is an intergovernmental organization comprised of seventy-seven members—seventy-six nations and the European Union.<sup>10</sup> The Conference was created in 1893 and earned permanency as an intergovernmental organization in 1955 through the enactment of its statute, which declared it a permanent character in the international community.<sup>11</sup> Since its inception, the Conference has met every four years to negotiate and adopt conventions and to discuss future work.<sup>12</sup> One such convention, concluded on October 25, 1980, was the Hague Convention.<sup>13</sup>

The Hague Convention addressed concerns with the growing incidence of international parental child abduction fueled by the ease of international travel, the increasing number of bicultural marriages, and the rising divorce rate.<sup>14</sup> This concern was due to the potentially serious consequences for children as well as the parents who have been left behind when an international child abduction occurs.<sup>15</sup> Not only is the child removed from contact with the parent who has been left behind, but the child is also

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<sup>10</sup> Overview, HAGUE CONFERENCE ON PRIVATE INT'L LAW, [http://www.hcch.net/index\\_en.php?act=text.display&tid=26](http://www.hcch.net/index_en.php?act=text.display&tid=26) (last visited Mar. 28, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Along with the seventy-seven members, nonmember States have increasingly become parties to Hague Conventions, resulting in more than 140 countries around the world being involved with the Hague Conference. *Id.*

<sup>13</sup> Hague Convention, *supra* note 2. The Hague Convention presently has ninety "Contracting States," sixty-four of which are members of the Conference and twenty-six of which are not members of the Conference. Hague Conference on Private International Law, *Status Table*, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 28, 2015) [hereinafter *Status Table*]. Contracting States are signatory states that have ratified the Hague Convention. See Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act* (42 U.S.C.A. §§ 11601 *et seq.*), 125 A.L.R. FED. 217 § 2 (1995).

<sup>14</sup> Outline: *Hague Child Abduction Convention*, HAGUE CONFERENCE ON PRIVATE INT'L LAW 1 (May 2014), <http://www.hcch.net/upload/outline28e.pdf>. Many such abductors are custodial mothers who wish to return to their home country after their marriage to a foreign citizen caused them to live abroad. See 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, 45 (2003).

<sup>15</sup> Outline: *Hague Child Abduction Convention*, *supra* note 14.

removed from a familiar environment and relocated to an environment in which the social structure, culture, and even language may be completely different.<sup>16</sup> These concerns are enunciated clearly in the enacting provision of the Hague Convention, which describes its purpose as “protect[ing] children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”<sup>17</sup>

The Hague Convention consists of forty-five articles, the objectives of which are “to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>18</sup> Article 5 explains that “‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence,”<sup>19</sup> while “‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”<sup>20</sup> Therefore, “rights of access” are essentially visitation rights for the noncustodial parent.<sup>21</sup> The Hague Convention also sets forth the remedies available for breaches of custody rights and for breaches of visitation rights.<sup>22</sup> In order to address such breaches, the Hague Convention requires that each “Contracting State” establish a “Central Authority,” which has “the broad mandate of assisting applicants to secure the return of their children or the effective exercise

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<sup>16</sup> *Id.*

<sup>17</sup> Hague Convention, *supra* note 2.

<sup>18</sup> *Id.* art. 1, 3 (“The removal or the retention of a child is considered wrongful where—it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and . . . at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.”).

<sup>19</sup> *Id.* art. 5.

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*; *see also* 42 U.S.C. § 11602 (2012) (current version at 22 U.S.C. § 9002 (2012)) (“[T]he term ‘rights of access’ means visitation rights.”). While the Hague Convention uses the term “access rights,” this Note uses the term “visitation rights,” as the two terms are synonymous and “visitation rights” is the more commonly used term.

<sup>22</sup> Hague Convention, *supra* note 2, art. 8.

[sic] of their visitation rights.”<sup>23</sup> According to the Hague Convention, the breach of custody rights requires the Central Authority to issue an order for the return of the child to the child's home country.<sup>24</sup>

The Hague Convention was signed by the United States on December 23, 1981, ratified by the President on April 29, 1988, and entered into force on July 1, 1988.<sup>25</sup> On the same day that he ratified the Hague Convention, President Reagan signed ICARA.<sup>26</sup>

### B. *The International Child Abduction Remedies Act*

The Hague Convention is, in form, a self-executing treaty, and therefore no implementing legislation was necessary to bring it into force.<sup>27</sup> The United States nonetheless implemented it through ICARA in order to “fit this unique treaty smoothly into our legal system with its federal and state court systems, potential venue questions, privacy legislation, and other features that distinguish the United States from many other countries.”<sup>28</sup> In its findings section, Congress emphasized its belief that international child abduction and retention is harmful to children, that the incidence of international child abduction is on the rise, and that custody should not be obtained by the wrongful removal or retention of the child.<sup>29</sup> Pursuant to these findings, ICARA provides a procedural mechanism that protects the rights

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<sup>23</sup> Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,511 (Mar. 26, 1986). A “Central Authority” is the local agency in the receiving state which is responsible for coordinating repatriation and visitation requests under the Hague Convention. The Central Authority for the United States is the Department of State, Office of Children's Issues. See Hague Conference on Private International Law, *Statistical Analysis Part II: National Reports United States*, at 1, [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2857&dtid=32](http://www.hcch.net/index_en.php?act=publications.details&pid=2857&dtid=32) (last visited Mar. 28, 2015).

<sup>24</sup> Hague Convention, *supra* note 2, art. 12.

<sup>25</sup> See *Status Table*, *supra* note 13.

<sup>26</sup> See *Ozaltin v. Ozaltin*, 708 F.3d 355, 378 n.4 (2d Cir. 2013).

<sup>27</sup> *Id.* at 359 n.5. While the Hague Convention has also been characterized as a non-self-executing treaty, further inquiry into this is unnecessary because ICARA, an implementing legislation, was enacted in the United States. See, e.g., *Cantor v. Cohen*, 442 F.3d 196, 210 (4th Cir. 2006) (Traxler, J., dissenting); Brooke L. Myers, Note, *Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court*, 40 LOY. L.A. L. REV. 1449, 1487 (2007).

<sup>28</sup> *Ozaltin*, 708 F.3d at 359 n.5.

<sup>29</sup> 42 U.S.C. § 11601 (2012) (current version at 22 U.S.C. § 9001 (2012)).

provided in the Hague Convention.<sup>30</sup> Through ICARA, Congress vested original jurisdiction over actions arising under the Hague Convention and ICARA concurrently in state courts and federal district courts.<sup>31</sup> ICARA provides:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of [visitation] to a child may do so by commencing a civil action . . . in any court which has jurisdiction of such action . . . .<sup>32</sup>

However, because ICARA itself does not provide any substantive rights,<sup>33</sup> federal courts must refer to the Hague Convention in order to determine what rights are protected. While the mechanisms for seeking the return of a child are clearly laid out in article 12 of the Hague Convention, the mechanisms for organizing exercise of visitation rights are not as clear.<sup>34</sup>

### C. Visitation Rights

#### 1. Under the Hague Convention

Admittedly, the Hague Convention protects visitation rights to a lesser extent than it does custody rights, and the remedies available for a breach of visitation rights do not include the return remedy that is provided for wrongful removals and retentions.<sup>35</sup> However, visitation rights are protected primarily in article 21, which provides that “[a]n application to make arrangements for organising [sic] or securing the effective exercise of rights of [visitation] may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.”<sup>36</sup> Once the Central

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<sup>30</sup> See Smith, *supra* note 13 (“ICARA . . . is merely a procedural mechanism allowing access to the remedies provided in the Convention.”).

<sup>31</sup> *Id.*

<sup>32</sup> 42 U.S.C. § 11603.

<sup>33</sup> See Smith, *supra* note 13.

<sup>34</sup> Compare Hague Convention, *supra* note 2, art. 12 (“Where a child has been wrongfully removed or retained . . . the authority concerned shall order the return of the child forthwith.”), with Hague Convention, *supra* note 2, art. 21 (“The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of [visitation] rights.”).

<sup>35</sup> Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,513 (Mar. 26, 1986).

<sup>36</sup> Hague Convention, *supra* note 2, art. 21.



Authority receives a visitation enforcement application, it "shall take steps to remove, as far as possible, all obstacles to the exercise of such rights."<sup>37</sup> Further, the Central Authority is to take all appropriate measures pursuant to article 7 to "promote the peaceful enjoyment of [visitation] rights and the fulfillment of any conditions to which the exercise of those rights is subject."<sup>38</sup> An aggrieved parent may also apply directly to the judicial authorities of the Contracting State for relief under other applicable laws, pursuant to article 29, which provides:

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or [visitation] rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.<sup>39</sup>

## 2. Under ICARA

ICARA, too, addresses visitation rights. In § 11603, ICARA provides that "[a]ny person seeking to initiate judicial proceedings under the Convention for . . . arrangements for organizing or securing the effective exercise of rights of [visitation] to a child may do so by commencing a civil action by

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<sup>37</sup> *Id.*

<sup>38</sup> Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,513 (Mar. 26, 1986). Article 7 of the Hague Convention lists the following responsibilities of the Central Authorities:

(a) [T]o discover the whereabouts of a child who has been wrongfully removed or retained; (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (d) to exchange, where desirable, information relating to the social background of the child; (e) to provide information of a general character as to the law of their State in connection with the application of the Convention; (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising [sic] or securing the effective exercise of rights of [visitation]; (g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Hague Convention, *supra* note 2, art. 7.

<sup>39</sup> Hague Convention, *supra* note 2, art. 29.

filing a petition . . . in any court which has jurisdiction of such action.”<sup>40</sup> The same section goes on to provide the relevant burden of proof in cases pertaining to visitation rights—petitioners must establish by a preponderance of the evidence that they have such rights.<sup>41</sup> ICARA does not create new substantive rights and the federal courts do not have the power to grant visitation rights to noncustodial parents where none previously existed. However, ICARA undoubtedly empowers federal courts to enforce visitation rights that noncustodial parents have already established in their country of residence. For this reason, as discussed more fully below, this Note asserts that ICARA provides federal courts with a mechanism for remedying breaches of visitation rights by conferring upon these courts the jurisdiction to do so.

## II. FEDERAL COURT SPLIT

This Part discusses the split of authority between the Fourth Circuit, which held that ICARA does not confer jurisdiction upon federal courts to adjudicate claims for enforcement of visitation,<sup>42</sup> and the Second Circuit, which held that ICARA does create a federal right of action to secure the effective exercise of visitation rights protected under the Hague Convention.<sup>43</sup> Beyond the Fourth Circuit holding alone, a number of district courts and commentators have also found that ICARA does not bestow upon federal courts subject-matter jurisdiction to consider claims regarding visitation rights.

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<sup>40</sup> 42 U.S.C. § 11603 (2012) (current version at 22 U.S.C. § 9003 (2012)).

<sup>41</sup> *Id.*

<sup>42</sup> *Cantor v. Cohen*, 442 F.3d 196, 197 (4th Cir. 2006).

<sup>43</sup> *Ozaltin v. Ozaltin*, 708 F.3d 355, 371 (2d Cir. 2013). The Second Circuit stated that, “[p]roperly framed, the Mother’s argument is not *jurisdictional* in nature but instead goes to whether § 11603(b) creates a federal right of action.” *Id.* at 371. Although it stated that the issue of whether a federal statute creates a claim for relief is not jurisdictional in nature, it went on to assert that “subject-matter jurisdiction is also supplied by 42 U.S.C. § 11603(a).” *Id.* at 371 n.23. Consistent with this assertion, the remainder of this Note refers to the claim for enforcement of visitation rights as a jurisdictional issue. Additionally, every other federal court that has adjudicated a case involving this specific issue has treated this as a jurisdictional issue. *See cases cited supra* notes 5–6 (providing additional support for discussing the issue in this manner).

## A. *No Federal Subject-Matter Jurisdiction*

### 1. The Fourth Circuit's Holding

In *Cantor v. Cohen*, decided in 2006, the United States Court of Appeals for the Fourth Circuit held that ICARA does not confer jurisdiction upon a federal court to hear claims for the enforcement of visitation rights.<sup>44</sup> Ms. Cantor and Mr. Cohen, who both lived in Israel, married and had four children.<sup>45</sup> The couple later divorced, and an Israeli Rabbinical Court issued a divorce decree providing Mr. Cohen, now living in Germany, with custody of two of the children and Ms. Cantor with custody of the other two.<sup>46</sup> The divorce decree also granted Ms. Cantor visitation with the children who were in her husband's care in Germany every two months and in Israel at least twice per year.<sup>47</sup> After this arrangement was ordered, the parents jointly decided that all of the children should live with Mr. Cohen in Germany.<sup>48</sup> Thereafter, Mr. Cohen moved to the United States, eventually residing in Silver Spring, Maryland, with all four children.<sup>49</sup> During this time, Ms. Cantor continued to live in Israel.<sup>50</sup>

Ms. Cantor filed a petition in the United States District Court for the District of Maryland on October 22, 2004, seeking the return of the children for whom she had custody orders and also seeking enforcement of her right of visitation with the other two children.<sup>51</sup> The district court denied the repatriation petition and found that it lacked subject-matter jurisdiction to hear Ms. Cantor's visitation claims under ICARA, therefore dismissing the claim.<sup>52</sup> The court based its ruling on the lack of an affirmative right to initiate judicial proceedings for visitation claims under the Hague Convention.<sup>53</sup> Ms. Cantor appealed to the Fourth

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<sup>44</sup> *Cantor*, 442 F.3d at 197.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 197–98. The court had issued two prior divorce decrees, both of which also dealt with the custody and visitation of the four children. *Id.* at 197.

<sup>47</sup> *Id.* at 198.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 200.

Circuit, arguing that the plain language of § 11603(b) of ICARA confers jurisdiction upon federal courts to hear claims seeking to enforce visitation rights.<sup>54</sup>

In refuting Ms. Cantor's argument that ICARA confers federal courts with jurisdiction over such claims, the Fourth Circuit looked first to the implementing language in § 11601 of ICARA, finding that "particular emphasis is drawn to Congressional concern regarding international abduction or wrongful retention of children."<sup>55</sup> The court found it instructive that the section does not mention visitation rights until the last subsection, "and then only mentions these rights in the context of the Convention."<sup>56</sup> Further, it emphasized Congress's declarations, which state that "[t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims."<sup>57</sup>

Based upon this finding, the Fourth Circuit turned to the Hague Convention itself and considered the language of article 21, which discusses visitation.<sup>58</sup> Article 21 states that "[a]n application to make arrangements for organising [sic] or securing the effective exercise of rights of [visitation] may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child."<sup>59</sup> The Fourth Circuit emphasized that article 21 of the Hague Convention does not provide for the presentation of a visitation claim to a judicial authority, in "sharp contrast" to article 12, which addresses wrongful removal or return claims and specifically refers to the initiation of judicial proceedings.<sup>60</sup>

The Fourth Circuit therefore found that § 11603 of ICARA must be read in conjunction with the Hague Convention.<sup>61</sup> In doing so, it declared that "under the Convention" there is "no

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<sup>54</sup> *Id.* at 199.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* The section referred to, § 11601(a)(4) of ICARA, explains that "[t]he Convention . . . establishes legal rights and procedures for the prompt return of the children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights." *Id.* (alterations in original) (emphasis omitted).

<sup>57</sup> *Id.* (alteration in original).

<sup>58</sup> *Id.* at 199–200.

<sup>59</sup> Hague Convention, *supra* note 2, art. 21.

<sup>60</sup> *Cantor*, 442 F.3d at 200.

<sup>61</sup> *Id.*

right to initiate judicial proceedings for [visitation] claims,” and that “federal courts are not authorized to exercise jurisdiction over . . . claims” seeking to enforce those visitation claims.<sup>62</sup> It found further support for its conclusion in the “long established precedent that federal courts are courts of limited jurisdiction and generally abstain from hearing child custody matters.”<sup>63</sup> With the exception of international child abduction and wrongful removal claims, the court held that other child custody matters are better handled by the state courts.<sup>64</sup>

The Fourth Circuit also examined the legislative history of ICARA, specifically looking to procedures to implement the Hague Convention.<sup>65</sup> The court emphasized the discussion surrounding concurrent original jurisdiction and highlighted a comment made by Senator Alan J. Dixon of Illinois, in which he stated that “none of the proponents of this bill, or my amendment, want to see the Federal courts to be involved in deciding the underlying custody disputes.”<sup>66</sup>

Finally, the Fourth Circuit offered one other common sense reason for its holding: While § 11603(e)(2) of ICARA and articles 12, 13, and 20 of the Hague Convention set forth several affirmative defenses that may be considered for a wrongful removal claim, there are no such provisions in either ICARA or the Hague Convention for visitation enforcement claims.<sup>67</sup> The court thus found it “difficult to believe that federal courts could entertain [visitation] claims, yet would be left powerless to consider any defenses which concern the safety or the best interests of a child.”<sup>68</sup>

Therefore, after taking all of these factors into account, the Fourth Circuit held that ICARA does not confer jurisdiction upon federal courts to hear claims for enforcement of visitation

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 202.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (quoting 134 CONG. REC. 6484 (1988) (statement of Sen. Alan J. Dixon)) (emphasis omitted).

<sup>67</sup> *Id.* at 204.

<sup>68</sup> *Id.*

rights.<sup>69</sup> Based upon this holding, the Fourth Circuit affirmed the district court's opinion and dismissed Ms. Cantor's claim seeking enforcement of her visitation rights.<sup>70</sup>

## 2. The District Courts and Commentators

Numerous district courts have also held that they lacked jurisdiction to hear claims under ICARA for noncustodial parents seeking to secure the enforcement of visitation rights.<sup>71</sup> These district court decisions invariably focused on interpreting the Hague Convention itself, and not ICARA, in deciding whether they had jurisdiction to hear these cases, despite the fact that in each case the petitioner asserted his claim under both the Hague Convention and ICARA.<sup>72</sup> The district court decisions have been uniform in their reasoning that article 21 of the Hague Convention, which addresses visitation rights, does not provide a judicial remedy for breaches of such rights, while article 12, which addresses custody rights, does provide judicial remedies for parents seeking the return of a child.<sup>73</sup> This difference, the courts hold, means that the Hague Convention was not intended to empower judicial authorities to enforce visitation claims.<sup>74</sup>

In *Bromley v. Bromley*,<sup>75</sup> a noncustodial father with a visitation order brought an action pursuant to the Hague Convention and ICARA seeking the enforcement of his visitation rights after the mother allegedly denied him his court-ordered visitation with the children.<sup>76</sup> The United States District Court for the Eastern District of Pennsylvania dismissed his claim, holding that it lacked jurisdiction over a claim for the

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<sup>69</sup> See *supra* pp. 1007–08.

<sup>70</sup> *Cantor*, 442 F.3d at 206. The Fourth Circuit was not unanimous in its decision however, as Judge Traxler wrote a dissenting opinion. *Id.* at 206–13 (Traxler, J., dissenting). Judge Traxler would have held that the district court did in fact have jurisdiction to consider the visitation claim, arguing that a straightforward reading of ICARA suggests that it “affords aggrieved parents a judicial forum for resolving claims that involve either custody rights or [visitation] rights.” *Id.* at 208. Judge Traxler's dissent went on to articulate essentially the same arguments as the Second Circuit later set forth in *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013). See discussion *infra* Part II.B.

<sup>71</sup> See cases cited *supra* note 5.

<sup>72</sup> See, e.g., *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998).

<sup>73</sup> See *infra* pp. 1010–11.

<sup>74</sup> *Id.*

<sup>75</sup> 30 F. Supp. 2d 857.

<sup>76</sup> *Id.* at 858–59.

enforcement of his visitation rights.<sup>77</sup> The district court compared article 12 of the Hague Convention, which “clearly provides authority for judicial authorities to order the return of a child ‘wrongfully’ removed,” with article 21, which is silent as to a remedy for visitation rights.<sup>78</sup> Based on this lack of judicial remedy, the district court held that it lacked subject-matter jurisdiction to hear the claim.<sup>79</sup>

Similarly, the father in *In re Adams ex rel. Naik v. Naik*<sup>80</sup> sought enforcement of his visitation rights.<sup>81</sup> Like the petitioner in *Bromley*, he brought his case under the Hague Convention and ICARA after his child’s mother brought his child to the United States without his knowledge.<sup>82</sup> The United States District Court for the Northern District of Illinois dismissed the father’s petition based upon the difference in wording between article 12 of the Hague Convention, which explicitly confers jurisdiction upon judicial authorities to effectuate the return of a child, and article 21 of the Hague Convention, which does not grant any such rights.<sup>83</sup>

*Wiggil v. Janicki*<sup>84</sup> was decided in the same fashion.<sup>85</sup> In this case, the father had custody of the child and the mother had summertime visitation rights.<sup>86</sup> The mother petitioned the court, under the Hague Convention and ICARA, to order the father to pay for the child’s passport in order to facilitate the exercise of her visitation rights.<sup>87</sup> In keeping with the decisions of other district courts, the United States District Court for the Southern District of West Virginia held that federal courts lack jurisdiction to enforce visitation rights under the Hague Convention and dismissed the petition.<sup>88</sup>

The few commentators who have written about the lack of remedies for breaches of visitation rights have similarly looked to the Hague Convention, rather than to ICARA, in determining

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<sup>77</sup> *Id.* at 858.

<sup>78</sup> *Id.* at 860.

<sup>79</sup> *Id.*

<sup>80</sup> 363 F. Supp. 2d 1025 (N.D. Ill. 2005).

<sup>81</sup> *Id.* at 1026–27.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1030.

<sup>84</sup> 262 F. Supp. 2d 687 (S.D. W. Va. 2003).

<sup>85</sup> *Id.* at 688–90.

<sup>86</sup> *Id.* at 687.

<sup>87</sup> *Id.* at 688.

<sup>88</sup> *Id.* at 689.

that federal district courts have no subject-matter jurisdiction to hear claims regarding a breach of these rights.<sup>89</sup> These commentators have focused on the weakness of article 21 of the Hague Convention, emphasizing that while it recognizes parents' visitation rights, it provides no procedures for enforcing such rights.<sup>90</sup> In doing so, these commentators have stressed the need for amendments to the Hague Convention and ICARA to provide for visitation enforcement. However, like the courts, these commentators have overlooked ICARA's independent authority—apart from the Hague Convention's provisions—to enforce visitation rights. It is this authority, provided solely by ICARA, on which the Second Circuit relied in enforcing visitation rights under the Hague Convention.

### *B. Recognizing Federal Jurisdiction*

On February 11, 2013, the Second Circuit became the first U.S. circuit court to hold that federal courts do have jurisdiction to consider a claim for visitation under ICARA with its ruling in *Ozaltin v. Ozaltin*.<sup>91</sup> Nurettin Ozaltin ("father") and Zeynep Ozaltin ("mother"), each of whom was a dual citizen of Turkey and the United States, were married and had two daughters together.<sup>92</sup> The children resided primarily in Turkey with both parents until the mother took the children to New York following a fight with the father.<sup>93</sup>

Approximately two weeks later, the father filed an application with the Turkish Ministry of Justice, in accordance with the Hague Convention, seeking an order that the mother

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<sup>89</sup> See *infra* note 87.

<sup>90</sup> See Steward, *supra* note 4, at 330–31 ("The Hague Abduction Convention attempts to protect and facilitate the [visitation] rights of non-custodial parents in Articles 7 and 21. . . . Although Article 21 recognizes rights of [visitation], the Convention has no provisions that enforces [sic] such rights."); see also Daniel M. Fraidstern, Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents with "Rights of Access" Get No Rights To Access Courts, 30 BROOK. J. INT'L L. 641, 662–63 (2005) ("Unfortunately, however, the remedies presented to a noncustodial parent [by the Hague Convention] are insufficient; they do not adequately serve the interests of justice, they may not be in the best interests of the child, and they do not serve the purpose of the treaty." (footnote omitted)); Silberman, *supra* note 14, at 48 ("The Convention's mechanisms for enforcement of [visitation] rights, which were always less than robust, have been further limited by various court interpretations.").

<sup>91</sup> 708 F.3d 355, 357–58 (2d Cir. 2013).

<sup>92</sup> *Id.* at 360.

<sup>93</sup> *Id.*



return the children to Turkey.<sup>94</sup> At that time, the mother initiated divorce proceedings in Turkey and the Turkish court granted the father alternate weekend visits in the United States.<sup>95</sup> The father exercised this right several times between May and August of 2011.<sup>96</sup> However, eventually the mother began attempting to limit his access by imposing conditions and other restrictions that the Turkish court had not.<sup>97</sup>

The father filed an action in the United States District Court for the Southern District of New York pursuant to 42 U.S.C. § 11603(b), seeking “(1) an order enforcing his visitation rights, pursuant to Article 21 of the Hague Convention; [and] (2) an order requiring the [m]other to return the children to Turkey, pursuant to Article 12 of the Hague Convention.”<sup>98</sup> Shortly thereafter, the district court issued an order requiring the mother to allow the father his visitation rights granted by the Turkish court “as long as [the children] stayed in the United States with their mother” and ordering the mother to show cause as to why the petition should not be granted in full.<sup>99</sup> After a two month trial, the district court issued an order requiring the mother to “(1) comply with the Turkish court’s visitation order, [and] (2) return the children to Turkey by July 15, 2012.”<sup>100</sup>

The mother did return the children to Turkey but continued to contest the district court’s order, including the order upholding the father’s visitation rights that had been granted in Turkey.<sup>101</sup> She appealed to the Second Circuit, arguing that federal courts lack subject-matter jurisdiction over claims seeking to enforce visitation rights.<sup>102</sup> She further argued that the only method to seek the enforcement of visitation rights is in a state court, or through the Department of State, acting in its role as the “Central Authority” for the United States under the Hague

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 361.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 362.

<sup>98</sup> *Id.* (footnote omitted).

<sup>99</sup> *Id.* at 357, 363.

<sup>100</sup> *Id.* at 364.

<sup>101</sup> *Id.* at 365.

<sup>102</sup> *Id.* The mother also appealed the order requiring her to return the children to Turkey, arguing, unsuccessfully, that she removed the children from Turkey with the consent of the Turkish court. *Id.* The remainder of the discussion of this case does not address the return order issue, but rather focuses on the visitation issue.

Convention.<sup>103</sup> The Second Circuit disagreed with the mother's argument, holding that ICARA does in fact create a federal right of action to enforce visitation rights and thereby asserting jurisdiction over the father's claim.<sup>104</sup>

The Second Circuit based its determination primarily on a plain reading of the statute. In a sharp departure from the line of cases discussed in Section A, the Second Circuit held that "[t]he statutory basis for a federal right of action to enforce [visitation] rights under the Hague Convention could hardly be clearer."<sup>105</sup> The Second Circuit first looked to the enacting legislation, which states that "[t]he courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the [Hague] Convention."<sup>106</sup> The enacting legislation continues:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of [visitation] to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.<sup>107</sup>

Further, the statute even provides for the burden of proof necessary in cases regarding visitation in § 11603(e)(1)(B): "A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence . . . in the case of an action for arrangements for organizing or securing the effective exercise of rights of [visitation], that the petitioner has such rights."<sup>108</sup> The Second Circuit read these sections of the statute together and concluded that ICARA "unambiguously creates a federal right of action to secure the effective exercise of [visitation] rights" protected under the Hague Convention.<sup>109</sup>

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<sup>103</sup> *Id.* at 371.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 372.

<sup>106</sup> *Id.* (alterations in original) (quoting 42 U.S.C. § 11603 (2012) (current version at 22 U.S.C. § 9003 (2012))).

<sup>107</sup> *Id.* (alteration in original) (quoting 42 U.S.C. § 11603).

<sup>108</sup> *Id.* (quoting 42 U.S.C. § 11603).

<sup>109</sup> *Id.*

The Second Circuit found further support for its conclusion that the courts must assume jurisdiction in the fact that the Central Authority “apparent[ly] lack[s] . . . any administrative apparatus for enforcing [visitation] rights.”<sup>110</sup> The Hague Convention provides:

[A] Central Authority . . . must offer *facilitative* services to the petitioner, such as taking appropriate measures to “discover the whereabouts of [the] child,” “bring about an amicable resolution of the issues,” and, as particularly relevant here, “initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child . . . .”<sup>111</sup>

The Second Circuit concluded that this “facilitative” role does not displace or inhibit the ability of a party to make a claim directly to a federal court under ICARA.<sup>112</sup>

Therefore, considering the statutory interpretation of ICARA along with the lack of administrative remedies available through the Hague Convention and ICARA, the Second Circuit held that federal law in the United States provides an avenue for noncustodial parents to seek judicial relief in a federal district court for the effective exercise of visitation rights.<sup>113</sup> For this reason, the district court’s ruling with respect to the visitation issue was affirmed.<sup>114</sup>

### III. ICARA DOES GIVE FEDERAL COURTS JURISDICTION TO ENFORCE VISITATION RIGHTS

#### A. *Plain Meaning of ICARA*

The Second Circuit’s approach in *Ozaltin*, which granted federal courts jurisdiction to consider such claims, is the better approach, as it promotes greater protection for the child and thus advances the purpose of the statute.<sup>115</sup> A plain reading of ICARA seems to confer jurisdiction upon federal courts to hear claims regarding visitation. Section 11603 of ICARA, which articulates judicial remedies, states that “[t]he courts of the States and the

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<sup>110</sup> *Id.* at 373.

<sup>111</sup> *Id.* (alteration in original).

<sup>112</sup> *Id.* at 374.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 371.

<sup>115</sup> *Id.* at 374.

United States district courts shall have concurrent original jurisdiction of actions arising under the Convention” and that “[a]ny person seeking to initiate judicial proceedings under the Convention for . . . arrangements for organizing or securing the effective exercise of rights of [visitation] to a child may do so by commencing a civil action . . . in any court which has jurisdiction.”<sup>116</sup> The Second Circuit held that this language “unambiguously” gave district courts original jurisdiction along with the courts of the States.<sup>117</sup>

The Fourth Circuit nonetheless precluded federal court jurisdiction on the ground that under the Convention, there are no rights to initiate judicial proceedings for claims regarding visitation.<sup>118</sup> However, there is no requirement that ICARA be read so restrictively. Section 11601(a) of ICARA, which sets forth the findings of Congress, notes that the Hague Convention “establishes legal rights and procedures for . . . securing the exercise of visitation rights.”<sup>119</sup> It is clear that Congress intended that actions to secure visitation rights arising under the Hague Convention be adjudicated in federal courts.<sup>120</sup>

Further, the Hague Convention itself has an objective to “ensure that rights of custody and of [visitation] under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>121</sup> Therefore, the Hague Convention recognizes visitation rights and seeks to protect such rights. Finally, while the Fourth Circuit held that the Hague Convention itself does not explicitly articulate rights to initiate judicial proceedings for claims regarding visitation, the court failed to recognize that the Hague Convention does advise that where a Contracting State provides a judicial forum, a noncustodial parent seeking to enforce visitation rights may initiate judicial proceedings directly.<sup>122</sup>

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<sup>116</sup> 42 U.S.C. § 11603(a)–(b) (2012) (current version at 22 U.S.C. § 9003 (2012)).

<sup>117</sup> *Ozaltin*, 708 F.3d at 372.

<sup>118</sup> *Cantor v. Cohen*, 442 F.3d 196, 200 (4th Cir. 2006).

<sup>119</sup> 42 U.S.C. § 11601(a)(4).

<sup>120</sup> *See id.*

<sup>121</sup> Hague Convention, *supra* note 2, art. 1.

<sup>122</sup> *Id.* art. 29 (“This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or [visitation] rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State . . .”).

### B. *Legislative History of ICARA*

Beyond the plain reading of ICARA, the relevant legislative history makes it clear that federal courts were intended to have subject-matter jurisdiction over enforcement of claims for visitation. In March of 1986, the Department of State made available the Letters of Transmittal and Submittal, English text of the Convention, and legal analysis concerning the enactment of ICARA.<sup>123</sup> In the legal analysis section, the Department of State stated:

In addition to or in lieu of invoking Article 21 to resolve visitation-related problems, under Articles 18, 29 and 34 an aggrieved parent whose [visitation] rights have been violated may bypass the [Central Authority] and the Convention and apply directly to the judicial authorities of a Contracting State for relief under other applicable laws.<sup>124</sup>

The Letter of Transmittal clarifies the function of articles 18, 19, and 34 of the Hague Convention, which is to allow a petitioner to apply directly to the judicial authorities rather than attempting to enforce visitation rights through the Central Authorities of a Contracting State.<sup>125</sup> Accordingly, this analysis provides further support for the argument that a person seeking to enforce visitation rights may apply directly to the federal courts under ICARA.<sup>126</sup>

Interestingly, the Fourth Circuit also purports to rely on legislative history in support of its contention that federal courts may not hear visitation claims, citing statements made by Senator Alan J. Dixon during the procedures to implement ICARA, in which he states, “[T]he [C]onvention and this act empower courts in the United States to determine only rights under the convention and not the merits of any underlying child custody claims.”<sup>127</sup> In quoting this passage, the court seems to suggest that preexisting visitation rights are not “rights under

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<sup>123</sup> See Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494 (Mar. 26, 1986).

<sup>124</sup> *Id.* at 10,514.

<sup>125</sup> *Id.*

<sup>126</sup> While this legislative history, along with the text of ICARA, allows a petitioner seeking enforcement of visitation rights to apply directly to state or federal courts, for policy reasons discussed more fully *infra*, federal district courts are the more appropriate avenue to obtain relief. See *infra* Part III.D.

<sup>127</sup> *Cantor v. Cohen*, 442 F.3d 196, 202 (4th Cir. 2006) (quoting 134 CONG. REC. 6484 (1988) (statement of Sen. Alan J. Dixon)) (emphasis omitted).

the convention” but “underlying child custody claims.”<sup>128</sup> The basis for this analysis, however, is not clear, as enforcing a preexisting right does not involve determining whether that right should be restricted in a particular case. The Hague Convention merely directs Contracting States to maintain the status quo—including the visitation status quo—until either the child is returned to the originating state or the petition under the Hague Convention is denied.<sup>129</sup> That is, when the noncustodial parent is seeking the enforcement of visitation rights under ICARA, the visitation has already been granted by a court of the other Contracting State. Therefore, the federal court need not consider the merits of the underlying custody claim but only enforce the rights that have already been granted, until the merits can be decided by a court empowered to do so.

### C. *Common Sense Approach*

Contrary to the Fourth Circuit’s rationale, the Second Circuit’s common sense approach to the interpretation of ICARA indicates that it does vest jurisdiction in federal courts to hear claims regarding visitation rights. The Central Authorities are only able to offer “facilitative services” for a parent seeking the enforcement of visitation rights.<sup>130</sup> Further, § 11603(e)(1)(B) of ICARA sets forth the burden of proof a petitioner must establish in order to bring an action for enforcement of visitation rights.<sup>131</sup> It seems unlikely, and is certainly not protective of the child, to suggest that the drafters of ICARA would establish such requirements if an aggrieved parent could do no more than seek the “facilitative services” of the Central Authorities following a breach of his or her visitation rights.

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<sup>128</sup> *Id.*

<sup>129</sup> See Hague Convention, *supra* note 2.

<sup>130</sup> 42 U.S.C. § 11603 (2012) (current version at 22 U.S.C. § 9003 (2012)).

<sup>131</sup> *Id.* (“A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence . . . in the case of an action for arrangements for organizing or securing the effective exercise of rights of [visitation], that the petitioner has such rights.”).

#### D. Policy Argument

International child abduction has immensely detrimental effects on not only the parent who has been left behind, but also, and most importantly, on the abducted child.<sup>132</sup> The abducted child is taken from a familiar environment and abruptly isolated from the family and friends the child once knew.<sup>133</sup> The child's relationship with the left behind parent is almost completely terminated, the child is forced to live in a new environment and culture with which the child must quickly become accustomed, and the child is kept in the exclusive control of the abducting parent, who may use this opportunity to further alienate the child from the left behind parent.<sup>134</sup> Research has indicated that a child who has been recovered from such abductions often may experience a wide range of emotional and psychological problems, including "anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt, and fearfulness."<sup>135</sup> Further, the relationship with the parent who has been left behind may be gravely damaged.<sup>136</sup> After being reunited, the child is often distrustful of the parent and questions why the parent did not try harder to find the child.<sup>137</sup>

Research shows that the removal of a child resulting in a breach of a parent's visitation rights is just as damaging to the child as a removal resulting in the breach of custody rights.<sup>138</sup> In accordance with this fact and the rationale that visitation is not only a right held by the noncustodial parent, but also held jointly by the child, a high value is placed a noncustodial parent's rights to visitation.<sup>139</sup> Therefore, when custodial parents breach that right, they not only violate the rights of noncustodial parents, but those of the child as well. Because ICARA is meant to protect

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<sup>132</sup> See U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 42 (2007) [hereinafter REPORT ON COMPLIANCE], available at [http://travel.state.gov/content/dam/childabduction/child\\_abduction\\_Compliance\\_Report.pdf](http://travel.state.gov/content/dam/childabduction/child_abduction_Compliance_Report.pdf).

<sup>133</sup> *Id.*

<sup>134</sup> See Steward, *supra* note 4, at 318.

<sup>135</sup> REPORT ON COMPLIANCE, *supra* note 128, at 42.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See Steward, *supra* note 4, at 329 & n.136 ("[D]epriving [a] child of [a] family environment is equally detrimental regardless of [the] type of legal title [the] parent possesses.").

<sup>139</sup> See Fraidstern, *supra* note 90, at 663–64 (quoting Pecorello v. Snodgrass, 142 A.D.2d 920, 921, 530 N.Y.S.2d 350, 351 (4th Dep't 1988)).

children from the harmful effects of child abduction, it must provide for more than “facilitative services” to remedy breaches of visitation rights, which are just as harmful to children as breaches of custody rights. It must also provide for enforcement of visitation rights, as they are rights under the Hague Convention and such rights are inextricably entwined with the well-being of the abducted child. The most efficient method of enforcing such rights, and the method authorized in the text of ICARA itself, is through adjudication in the federal court system.

The Fourth Circuit asserted that state courts are better suited to consider claims for the enforcement of visitation rights under ICARA because state courts have the specialized training and experience to deal with child custody matters.<sup>140</sup> However, as has already been established, the merits of the underlying custody issue are not a proper subject for federal court resolution, so it is unclear why that would be raised as an objection to enforcing visitation. When considering claims for the enforcement of visitation rights under ICARA, the court is not to examine any child custody issues. Rather, because a court in the home country will have already examined those issues and made an order for visitation, the court must do no more with regard to child custody issues than enforce the preexisting order, therefore, federal courts are better suited to deal with such claims. Courts adjudicating claims for the enforcement of visitation rights under ICARA are not required to consider any child custody issues but rather must consider issues regarding diverse citizens and the laws and treaties of the United States. Thus, because jurisdiction is expressly granted by the text of ICARA itself, federal courts do have jurisdiction over such visitation enforcement claims.

#### IV. SUGGESTIONS FOR AN AMENDMENT TO THE HAGUE CONVENTION

While a careful analysis of ICARA reveals that it does confer jurisdiction upon federal courts to adjudicate claims regarding the enforcement of visitation rights,<sup>141</sup> an amendment to the Hague Convention itself, clarifying the enforcement mechanism available, would be beneficial to avoid further decisions similar to

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<sup>140</sup> *Cantor v. Cohen*, 442 F.3d 196, 202 (4th Cir. 2006).

<sup>141</sup> *See supra* Part III.



those of the Fourth Circuit and the district courts. Further, such an amendment to the Hague Convention would ensure more consistent adjudication of visitation issues in all Contracting States.<sup>142</sup>

An amendment to article 21 of the Hague Convention, which instructs the Central Authority or judicial body to enforce visitation rights by requiring the custodial parent to bring the child to the noncustodial parent in accordance with the visitation order, would alleviate some of the confusion presented by the lack of parallelism between article 12 and article 21 of the Hague Convention. Further, the Fourth Circuit's holding that a lack of defenses available for access claims precludes federal courts from hearing such claims cannot be ignored.<sup>143</sup> Accordingly, an amendment allowing the defenses in article 13, which are available to a person opposing the return of a child,<sup>144</sup> to also be available to a person opposing the enforcement of visitation rights would give additional guidance to federal courts. This guidance would bring article 21 of the Hague Convention further in line with article 12 and could lessen the reluctance of federal courts to assert jurisdiction over these claims for which ICARA provides federal jurisdiction.

### CONCLUSION

The enactment of ICARA in the United States in 1988 was meant to "fit [the Hague Convention] smoothly into our legal system."<sup>145</sup> Regrettably, due to the overly narrow reading used by many courts, ICARA has largely failed in its purpose in connection with visitation rights. Fortunately for noncustodial parents whose children have been abducted and taken to the United States, the Second Circuit has interpreted ICARA in a more child-centered and holistic manner, recognizing federal jurisdiction for actions seeking the enforcement of visitation rights. While the Second Circuit's decision is a step in the right direction for the interpretation of ICARA, an amendment to the

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<sup>142</sup> See 42 U.S.C. § 11601 (2012) (current version at 22 U.S.C. § 9001 (2012)) ("In enacting this chapter the Congress recognizes . . . the need for uniform international interpretation of the Convention.").

<sup>143</sup> See *Cantor*, 442 F.3d at 204.

<sup>144</sup> See Hague Convention, *supra* note 2, art. 13.

<sup>145</sup> *Ozaltin v. Ozaltin*, 708 F.3d 355, 359 n.5 (2d Cir. 2013).

Hague Convention clarifying the remedies and defenses available when encountering a breach of access rights will help to prevent decisions in the future similar to that of the Fourth Circuit.