

**THE INTERNATIONAL CUSTODY BATTLE:  
CONFLICT OF LAW BETWEEN THE HAGUE  
ABDUCTION CONVENTION AND U.S.  
ASYLUM LAW**

*Nicole Su\**

I.	INTRODUCTION.....	434
II.	INCORPORATION OF FOREIGN RELATIONS LAW.....	436
	<i>A. The Domestic Side: Constitutional Framework.</i>	436
	<i>B. The International Side: Implementing Legislation of the Hague Abduction Convention.....</i>	440
	<i>C. General Conflict of Laws .....</i>	441
III.	INTERNATIONAL PROTECTION OF CHILDREN .....	442
	<i>A. The Purpose of the Hague Abduction Convention on the Civil Aspects of International Child Abduction .....</i>	442
	<i>B. The Purpose of U.S. Asylum Law .....</i>	447
IV.	THE CONFLICT OF INTERNATIONAL AND DOMESTIC LAW .....	450
	<i>A. Fifth Circuit Approach to the “Conflict of Law”</i>	450
	<i>B. Foreign Examples of the Resolution of “Conflict of Law” .....</i>	456
	<i>C. Shifting the U.S. Approach in the International “Custody Battle” .....</i>	458

---

\* J.D. Candidate, University of Houston Law Center, 2017. The author received a Bachelor of Arts in Political Science and Legal Studies from Northwestern University. This Comment received the Walter A. Wright Award for Outstanding Comment in International Law. The author would like to thank her parents and sister for their revisions, encouragement, and support. She is proud to be a part of the *HJIL* team and grateful for the entire editing staff.

## I.    INTRODUCTION

In 1809, Chief Justice Marshall extended judicial enforcement of international treaties in the United States when he declared:

Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.<sup>1</sup>

Over time, the Supreme Court has continued to evaluate the degree of enforcement of international agreements in domestic courts.<sup>2</sup> Justice Breyer has noted the increasingly international scope of the Supreme Court since he first joined the court in 1994.<sup>3</sup> Today, foreign laws and international agreements influence the daily lives of individual citizens of the United States, and Justice Breyer estimates that one-fifth of the current Supreme Court docket involves foreign law.<sup>4</sup> Therefore, it is inevitable that conflicts of law between international agreements and domestic law will arise, especially when federal district courts exercise their own discretion.<sup>5</sup> Courts accord additional weight to matters involving the well-being of children and the responsibility and burden of seeking the best interest of the child.<sup>6</sup>

---

1. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809).

2. David L. Sloss et al., *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 7, 14 (David L. Sloss et al. eds., 2011) (discussing the Court's recognition of its own duty to enforce treaties because of the supremacy of the Constitution).

3. Nina Totenberg, *Law Beyond Our Borders: Justice Breyer Is on a Mission*, NPR (Sept. 14, 2015, 7:10 PM), <http://www.npr.org/2015/09/14/439514086/law-beyond-our-borders-justice-breyer-is-on-a-mission> [<http://perma.cc/Z2HX-5K9L>].

4. *Id.*

5. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, *INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW* 2 (2015) (noting that the precedential value of international agreements remains ambiguous, especially as American courts treat these agreements as persuasive).

6. See, e.g., 22 U.S.C. § 9004(a) (2012) (providing courts with jurisdiction the

In the case of international child abduction, close to 100 countries are signatories to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention).<sup>7</sup> The United States is a signatory to the Hague Abduction Convention, which has been codified through the International Child Abduction Remedies Act (ICARA).<sup>8</sup> Concurrently, the United States has its own laws and policies regarding asylum law. Refugees may apply for asylum in the United States when they are seeking protection because of the persecution or fear of persecution they have suffered in their home country.<sup>9</sup> In addition to codifying the Hague Abduction Convention, Congress has also delegated authority to U.S. Citizenship and Immigration Services (USCIS) to review a refugee's claim for asylum.<sup>10</sup>

In certain cases, a conflict of law may arise between the Hague Abduction Convention and U.S. asylum law when a parent may have one goal (to bring her child back to her home country) while the child may want to pursue another goal (to remain in the United States as a refugee). Although the topic has been broached in the Fifth Circuit, United States courts have not yet resolved this conflict of law.

A recent Fifth Circuit case touched on the subject of children seeking asylum in the United States while their mother sought their return through a Hague petition.<sup>11</sup> While the District Court for the Western District of Texas suggested that the children's asylum proceedings would be relevant, it did not indicate the

---

measures to protect the well-being of children involved in the relevant proceedings); *see also* Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 L. & CONTEMP. PROBS. 210, 249-51 (1994) (suggesting that a statutory basis exists under ICARA for courts to take the well-being of a child into account when reviewing Hague Convention actions).

7. *Status Table, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> [<http://perma.cc/PD88-TMCZ>] (last visited Mar. 22, 2017).

8. *Id.*; 22 U.S.C. § 9001 (2012).

9. 8 U.S.C. § 1101(a)(42)(A) (2012).

10. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<http://perma.cc/FUP9-DXXM>].

11. *Sanchez v. R.G.L.*, 743 F.3d 945, 948-49 (5th Cir. 2014).

extent of that relevance when it decided that the children should be returned to Mexico under the Hague Abduction Convention.<sup>12</sup> The Fifth Circuit overruled the District Court and found the court should have taken the children's pending application for asylum into account.<sup>13</sup> However, the Fifth Circuit failed to confront the larger issue of the conflict of law: whether the court should uphold U.S. domestic law over an international treaty.<sup>14</sup> This comment argues that the Fifth Circuit's interpretation of the "conflict of law" between U.S. asylum law and the Hague Convention is incorrect, and that courts should consider the intent of the laws to determine how the laws can work in tandem, rather than in conflict, with one another.

Part II of this comment will detail foreign relations law in the United States. Part III of this comment will outline the purposes of the Hague Abduction Convention and U.S. asylum law. Part IV will tackle the conflict of international and domestic law. Part V will outline the conflict of law, examine foreign resolutions of the conflict of law, and propose a new approach to the conflict of law.

## II. INCORPORATION OF FOREIGN RELATIONS LAW

### A. *The Domestic Side: Constitutional Framework*

The separation of powers within the federal government is a fundamental tenet that has shaped the development of domestic and international law in the United States.<sup>15</sup> Both the Supremacy Clause and Treaty Clause in the Constitution provide the foundation for the incorporation of treaties, executive agreements, and foreign law in the United States.<sup>16</sup>

---

12. The District Court noted that there was no certainty the children's asylum application would be accepted. To give a prompt order, the court did not consider the children's asylum application as evidence of grave risk of harm. *Sanchez v. Sanchez*, No. SA-12-CA-568-XR, 2012 WL 5373461, at \*12 (W.D. Tex. Oct. 30, 2012), *vacated and remanded sub nom. Sanchez*, 743 F.3d 945.

13. *Sanchez*, 743 F.3d at 958.

14. Geoffrey A. Hoffman, *A Collision Between Asylum Law and The Hague Convention on Civil Aspect of International Child Abduction*, INSIDE IMMIGRATION, July 2014.

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (holding that judicial review of acts of Congress is permissible to uphold the Constitution).

16. U.S. CONST. art. II, § 2, cl. 2; *id.* art. VI, cl. 2; Michael P. Van Alstine, *Federal*

The Treaty Clause authorizes the President to make treaties “by and with the Advice and Consent of the Senate,”<sup>17</sup> while the Supremacy Clause states “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>18</sup> Once Congress ratifies a treaty, federal courts have the authority to adjudicate cases arising under the treaty.<sup>19</sup> However, the Treaty Power is still subject to limits in order to safeguard constitutional rights.<sup>20</sup> First, the federal government may not ratify treaties that would infringe on a constitutionally protected right.<sup>21</sup> Second, because the House of Representatives does not take part in treaty ratification, the Senate and the executive branch may not use treaty ratification as a means to create federal law and bypass the House of Representatives.<sup>22</sup> Once the treaty is ratified and binds the United States, it is the judiciary’s responsibility to uphold the treaty<sup>23</sup> and provide judicial review.<sup>24</sup> The Supreme Court provides the most important

---

*Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 900-01 (2004); see also David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 1, 32-37 (David Sloss ed., 2009) (explaining the status of treaties in domestic law in the United States and Israel and how the two countries harmonize domestic law with treaty obligations).

17. U.S. CONST. art. II, § 2, cl. 2.

18. *Id.* art. VI, cl. 2.

19. *Id.* art. III, § 2, cl. 1.

20. David Sloss, *United States*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, *supra* note 16, at 504, 508. Sloss points out that the Supreme Court ruled that “constitutional limits on the scope of Congress’s powers under Article I of the Constitution do not apply to the Treaty Power.” *Id.* (citing *Missouri v. Holland*, 252 U.S. 416 (1920)). However, this does not mean that no limits on the Treaty Power exist. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.”).

21. Sloss, *supra* note 20, at 508. For instance, a treaty cannot obligate the United States to restrict constitutionally protected freedom of speech.

22. *Id.* For instance, the Constitution requires bicameral legislation to appropriate funds if a treaty requires the expenditure of money before the United States can comply with the treaty.

23. U.S. CONST. art. VI, cl. 2 (“[A]ll treaties made, or shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby.”)

24. See Sloss, *supra* note 20, at 510 (describing the greater role that the judiciary must play in applying treaties that have the force of law within the domestic system).

safeguard because it is responsible for applying the law and the Court must address international matters where there is a conflict of law.<sup>25</sup>

### 1. Forms of International Agreements

Not all international agreements are created equal and not all agreements are subject to the Constitution in the same way.<sup>26</sup> Legally binding international agreements come in two varieties: treaties and executive agreements.<sup>27</sup> The Constitution gives the executive branch exclusive authority to negotiate and sign a treaty.<sup>28</sup> However, in order for the treaty to become binding on the United States, the Senate must provide two-thirds consent.<sup>29</sup> This differs from the international use of the term “treaty” which generally refers to a legally binding agreement between nations.<sup>30</sup> Due to the stringent formal requirements of a treaty, the use of executive agreements, or legally binding international agreements entered into without the consent of the Senate,<sup>31</sup> has “far outpaced the use of treaties.”<sup>32</sup> While the executive branch generally notifies Congress of the agreement, the agreement is not subject to the level of scrutiny given to a

---

25. *Id.* However, the nature and scope of the role of the judiciary may vary depending on several outside factors. *Id.*

26. *See* GARCIA, *supra* note 5, at 2 (distinguishing between the international definition of “treaty,” which treats “treaties” and “international agreements” interchangeably, and the American definition of “treaty,” which refers to a more binding subset of international agreements rather than to all binding international agreements generally).

27. *Id.*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102 (AM. LAW INST. 1987) (using the term “international agreement” to describe the general category of binding international law).

28. U.S. CONST. art. II, § 2, cl. 2.

29. *Id.*

30. Sloss, *supra* note 20, at 506.

31. GARCIA, *supra* note 5, at 4.

32. Sloss, *supra* note 20, at 507 (“In the first 150 years of U.S. constitutional history, from 1789 to 1939, the United States entered into 799 treaties and 1,182 nontreaty international agreements (executive agreements). Since that time, though, the use of executive agreements has far outpaced the use of treaties. In the fifty years from 1939 to 1989, the United States entered into 702 treaties and 11,698 executive agreements. In the ten years from 1990 to 1999 the United States concluded another 2,857 executive agreements.”).

formal treaty.<sup>33</sup>

## 2. Self-Executing v. Non-Self-Executing Agreements

The Supremacy Clause states “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>34</sup> When looking at treaties over time, courts have distinguished self-executing agreements from non-self-executing agreements.<sup>35</sup> An international agreement is self-executing when it has the force of law without the need for any congressional action.<sup>36</sup> In comparison, non-self-executing agreements require implementing legislation from Congress delegating authority to U.S. agencies to carry out the functions and obligations of the agreement.<sup>37</sup> With no clear constitutional outline of the requirements of a self-executing agreement, examples have been provided through Supreme Court rulings.<sup>38</sup> In *Medellin v. Texas*, the Supreme Court stated: “What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”<sup>39</sup> While there is still scholarly debate regarding the distinction between the two types of treaties,<sup>40</sup> non-self-executing treaties generally have at least

---

33. See GARCIA, *supra* note 5, at 2. There are three different types of legal executive agreements with a formal treaty, which requires approval by two-thirds majority of the Senate: (1) *congressional-executive agreements* where Congress previously or retroactively authorized the agreement; (2) *executive agreements made pursuant to an earlier treaty* where the agreement is authorized by a ratified treaty; and (3) *sole executive agreements* where an agreement is made purely by the President’s constitutional authority without congressional authorization. *Id.* at 5-6.

34. U.S. CONST. art. VI, cl. 2.

35. GARCIA, *supra* note 5, at 12; *e.g.*, *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

36. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject.”); GARCIA, *supra* note 5, at 12.

37. GARCIA, *supra* note 5, at 12.

38. *Id.* at 12 & n.63 (citing *Medellin*, 552 U.S. at 505 n.2; *Cook v. United States*, 288 U.S. 102 (1933); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)).

39. *Medellin*, 552 U.S. at 505 n.2.

40. GARCIA, *supra* note 5, at 12; *e.g.*, Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (“The distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties . . . shall be the

three characteristics: (1) the agreement requires legislation to implement the agreement as domestic law, (2) the Senate or Congress requires implementing legislation, or (3) the Constitution requires implementing legislation.<sup>41</sup> If a treaty lacks the force of law in the domestic legal system, the judiciary cannot enforce the agreement because the judiciary cannot apply “nonlaw.”<sup>42</sup> Therefore, it is imperative for Congress to pass implementing legislation so an international agreement can be domestically enforceable.<sup>43</sup>

*B. The International Side: Implementing Legislation of the Hague Abduction Convention*

Like most countries, the United States has passed specific legislation to implement the Hague Abduction Convention.<sup>44</sup> Although the Hague Abduction Convention was self-executing, the U.S. Congress enacted the International Child Abduction Remedies Act (ICARA) in 1988.<sup>45</sup> Due to the self-executing nature of the treaty and the implementing legislation passed by Congress, the Hague Abduction Convention became enforceable by both state and federal courts in the United States.<sup>46</sup> Under ICARA, parties may seek enforcement of their rights under the Hague Abduction Convention by filing a petition in a court of the appropriate jurisdiction where the child is located.<sup>47</sup> Subsequently, most American states adopted the Uniform Child

---

supreme Law of the Land.”); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1959 (1999).

41. GARCIA, *supra* note 5, at 12.

42. Sloss, *supra* note 20, at 510.

43. See GARCIA, *supra* note 5, at 13. Conversely, the judiciary may play a greater enforcement role when a treaty *does* have the force of law in the domestic courts. *Id.*

44. Silberman, *supra* note 6, at 215-16.

45. 22 U.S.C. §§ 9001-11 (2012) (previously codified at 42 U.S.C. § 11601-11); Silberman, *supra* note 6, at 215-16. In countries such as England and Canada, treaties are not self-executing. However, it is desirable for Congress to pass implementing legislation in the United States to outline the domestic application of the treaty. See Robin Jo Frank, *American and International Responses to International Child Abduction*, 16 N.Y.U. J. INT'L L. & POL. 415, 465, 467-68 (1984).

46. 22 U.S.C. § 9003(a).

47. *Id.* § 9003(b).

Custody Jurisdiction and Enforcement Act (UCCJEA) to implement the Hague Abduction Convention on the state level.<sup>48</sup>

Since the implementation of the Hague Abduction Convention, Congress has updated and passed the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (Goldman Act).<sup>49</sup> The purpose of the Goldman Act is to “ensure compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction by countries with which the United States enjoys reciprocal obligations, to establish procedures for the prompt return of children abducted to other countries, and for other purposes.”<sup>50</sup> In short, the Goldman Act sought to establish measures for the U.S. government to take when countries refused to comply with the Hague Abduction Convention.<sup>51</sup>

In the United States, courts may recognize international agreements as “equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”<sup>52</sup> Although a legislative provision is not required for a self-executing treaty, like the Hague Abduction Convention, it is beneficial to clarify legislative support for the agreement.<sup>53</sup>

### C. General Conflict of Laws

There is an existing hierarchy within U.S. domestic law which is further complicated by the inclusion of international agreements. The three main tiers of domestic law are state law, federal law, and the Constitution.<sup>54</sup> Generally, a ratified self-executing treaty is considered to be equal to federal law,<sup>55</sup>

---

48. Uniform Child-Custody Jurisdiction & Enforcement Act, 9 U.L.A. 657 (1997); Chandra Zdenek, *The United States Versus Japan as a Lesson Commending International Mediation to Secure Hague Abduction Convention Compliance*, 16 SAN DIEGO INT'L L.J. 209, 214 (2014).

49. Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, Pub. L. No. 113-150, 128 Stat. 1807 [hereinafter Goldman Act].

50. *Id.*

51. Robert G. Spector & Melissa A. Kucinski, *International Family Law*, 49 ABA/SIL YIR 147, 148 (2015).

52. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

53. Silberman, *supra* note 6, at 215 & n. 31.

54. GARCIA, *supra* note 5, at 14.

55. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is

with federal law being superior to state law<sup>56</sup> but inferior to the Constitution.<sup>57</sup> When there are conflicts of law within domestic law, the “last-in-time” rule—which states that a more recent statute or treaty that will trump an earlier, inconsistent statute or treaty—will apply.<sup>58</sup>

### III. INTERNATIONAL PROTECTION OF CHILDREN

#### A. *The Purpose of the Hague Abduction Convention on the Civil Aspects of International Child Abduction*

The international meeting resulting in the Hague Abduction Convention concluded in October 1980, and the agreement entered into force between signatories in December 1983.<sup>59</sup> The Hague Abduction Convention has two stated objectives: “a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>60</sup> Simply put, the Hague Abduction Convention establishes a system of administrative and legal procedures to promptly return children who are wrongly removed to or retained in a contracting state and remedies violations of child custody and visitation rights.<sup>61</sup> The Hague Abduction Convention is an agreement within the international community created with the intent to ensure that “custody and visitation matters [are] decided by the proper court

---

placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.”); GARCIA, *supra* note 5, at 14.

56. U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”); GARCIA, *supra* note 5, at 14.

57. GARCIA, *supra* note 5, at 14; *see also* Reid v. Covert, 354 U.S. 1, 17 (1957) (Black, J., plurality opinion) (opining that allowing a treaty to conflict with constitutional rights would be contrary to what the founding fathers of the Constitution had in mind).

58. *Whitney*, 124 U.S. at 194, GARCIA, *supra* note 5, at 15.

59. *See* Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 98 [hereinafter Hague Convention].

60. *Id.* art. 1.

61. Silberman, *supra* note 6, at 210.

in the country of the child's habitual residence."<sup>62</sup>

To a certain extent, the Hague Abduction Convention favors the status quo, aiming to return the child to the country of their habitual residence.<sup>63</sup> The Explanatory Report for the Hague Abduction Convention states that the Convention "places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State.'"<sup>64</sup> However, the Hague Abduction Convention fails to outline the means each State can employ to secure the custody rights of the child's caretaker in another Contracting State.<sup>65</sup> In the United States, Congress specified compliance in ICARA, stating that compliance depends on "the actions of their designated central authorities [and] the performance of their judicial systems."<sup>66</sup>

The Hague Abduction Convention was structured to deter wrongful removals of children and wrongful retentions to "assure that issues of custody be litigated in the jurisdiction where a child was 'habitually resident.'"<sup>67</sup> The Hague Abduction Convention outlines wrongful removal or retention in Article 3 as a "breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the

---

62. *Important Features of the Hague Convention—Why the Hague Convention Matters*, U.S. DEPT OF STATE, <http://travel.state.gov/content/childabduction/en/legal/law-and-regulations/hague.html> [<http://perma.cc/9EHP-A6TX>] (last visited Dec. 14, 2016).

63. Hague Convention, *supra* note 59, art. 1; Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (1980), CHILD ABDUCTION 426, 429 (1982).

64. Pérez-Vera, *supra* note 63, at 429.

65. *Id.* at 430; *see also* England v. England, 234 F.3d 268, 271 (5th Cir. 2000) ("The Convention's primary aims are to 'restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.'").

66. Goldman Act, § 2(a)(7), Pub. L. No. 113-150, 128 Stat. 1807.

67. Silberman, *supra* note 6, at 212. Habitual residence has not been specifically defined in the Hague Convention and international courts have different standards for the definition of habitual residence. *See* Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3327-28, 3357, 3365 (2009) (arguing that a uniform standard for habitual residence is necessary to achieve the aims of the Hague Convention).

removal or retention.”<sup>68</sup> For a parent or guardian to trigger return procedures for a child, removal or retention must be wrongful under Article 3.<sup>69</sup>

To qualify as a “wrongful removal or retention” under Article 3, there must be a breach of custody rights.<sup>70</sup> The petitioner has the burden of proof to show custody rights according to the laws of the child’s habitual residence.<sup>71</sup> According to the United States Department of State, “[i]f a country has more than one territorial unit, the habitual residence refers to the particular territorial unit in which the child was resident, and the applicable laws are those in effect in that territorial unit.”<sup>72</sup> In order to invoke the Hague Abduction Convention, holders of custody rights must demonstrate he or she “actually exercised” custody rights.<sup>73</sup> The First Circuit commented that:

[t]he Convention’s true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision . . . [i]t seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.<sup>74</sup>

The Explanatory Report notes that the Hague Abduction Convention has attempted to regulate situations where a child is “wrongfully removed or retained.”<sup>75</sup> According to this report, the

---

68. Hague Convention, *supra* note 59, art. 3.

69. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,505 (Mar. 26, 1986).

70. Hague Convention, *supra* note 59, art. 3(a); *see also id.* art. 5(a) (“[R]ights 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.”); *Larbie v. Larbie*, 690 F.3d 295, 307 (5th Cir. 2012) (explaining that the Hague Convention uses “wrongful removal or retention” and “right of custody” as terms of art).

71. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. at 10,510.

72. Hague Convention, *supra* note 59, art. 31; Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. at 10,506.

73. Hague Convention, *supra* note 59, art. 3; Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. at 10,507.

74. *Whallon v. Lynn*, 230 F.3d 450, 456 (1st Cir. 2000).

75. Pérez-Vera, *supra* note 63, at 430.

Convention took this approach because the most distressing situations arise after unlawful retention of a child and countries lack a unilateral solution to address these situations.<sup>76</sup> The necessity to address these situations resulted in the Hague Abduction Convention, as the goal of the Convention is to protect the best interests of children through reunification with a parent in their habitual residence.<sup>77</sup> The signatory countries of the Hague Abduction Convention have thus agreed to adhere to the rules the Convention has developed.<sup>78</sup> This united goal by the signatory parties prevents costly and drawn out battles over jurisdiction and forum.<sup>79</sup>

If the petitioner successfully establishes “rights of custody,” the burden shifts to the respondent to establish “by clear and convincing evidence that one of the exceptions set forth in Article 13b or 20 of the Convention applies.”<sup>80</sup> A country may refuse to return a child that has been wrongfully removed when (1) there is a grave risk of the child being exposed to physical or psychological harm in his home country, (2) the child objects to being returned and is considered old enough and mature enough for the court to properly consider the child’s views, or (3) the return would “violate the fundamental principles of human rights and freedoms” of the country where the child is held.<sup>81</sup>

Congress held international abduction hearings to discuss this legislation at the time it codified the agreement in 1988 under ICARA.<sup>82</sup> These hearings concluded with several findings,

---

76. *Id.*

77. *Id.*

78. See Silberman, *supra* note 6, at 210-11 (stating that the Convention’s goal is to assure the return of children to their habitual residences).

79. See Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,507 ((Mar. 26, 1986). In general, a petition for return would be made directly to the appropriate court in the state when the child is located. If the return proceedings are less than a year from the date of wrongful removal or retention, Article 12 requires the court order return the child. If the proceedings take place more than a year after the wrongful removal or retention, the court is obligated to follow Article 12 until the child is settled in his or her new environment. Hague Convention, *supra* note 59, art. 12.

80. 22 U.S.C. § 9003(e)(2)(A) (2012).

81. *Important Features of the Hague Convention*, *supra* note 62; Hague Convention, *supra* note 59, arts. 13, 20.

82. Silberman, *supra* note 6, at 210 n.5; *International Child Abduction Act: Hearing*

including:

1. The international abduction or wrongful retention of children is harmful to their well-being.
2. Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
- . . . .
4. The Convention on the Civil Aspects of International Child Abduction . . . establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained . . . [children wrongfully removed] are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.<sup>83</sup>

Congress intended for compliance by the United States to be carried out in the “legal process and decisions rendered to enforce or effectuate the Hague Abduction Convention, and the ability and willingness of their law enforcement authorities to ensure the swift enforcement of orders rendered pursuant to the Hague Abduction Convention.”<sup>84</sup> Therefore, the United States’ legal and law enforcement authorities adhere to the full tenets of the Hague Abduction Convention.

Most recently, Congress passed the Goldman Act in 2014 to set an example for the international community.<sup>85</sup> Under this Act, the Secretary of State is responsible for submitting an Annual Report on International Child Abduction,<sup>86</sup> implementing

---

on *H.R. 2873 and H.R. 3971 Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 100th Cong. 2, 3, 29, 69, 94 (1988).

83. 22 U.S.C. § 9001(a) (2012).

84. Goldman Act, § 2(a)(7), Pub. L. No. 113-150, 128 Stat. 1807.

85. *Id.*; Cong. Research Serv., *H.R. 3212 (113th): Sean and David Goldman International Child Abduction Prevention and Return Act of 2014*, LIBRARY OF CONG. (Aug. 8, 2014), <https://www.govtrack.us/congress/bills/113/hr3212/summary> [<http://perma.cc/H96R-HKCR>].

86. Goldman Act, § 101(f)(1). The Annual Report should evaluate whether each signatory country has “engaged in a pattern of noncompliance in cases of child abduction

strategic international plans,<sup>87</sup> and notifying Congress of abduction reports.<sup>88</sup> Additionally, the Secretary of State must respond to patterns of noncompliance during cases of international child abductions and engage with foreign government officials.<sup>89</sup> The Act also addresses prevention of international child abduction, charging the Secretary of Homeland Security with establishing a program to prevent children from leaving the country by leveraging local authorities to address the wrongful removal and return of the child.<sup>90</sup> The recent Goldman Act is a signal to the world that the United States takes international child abduction seriously and will take steps to improve systems for recovery of abducted children.<sup>91</sup>

### *B. The Purpose of U.S. Asylum Law*

Asylum and refugee law is an international policy issue and is not limited to the United States.<sup>92</sup> The 1951 Refugee Convention (1951 Convention), adopted in Geneva and later amended by the Convention and Protocol Relating to the Status of Refugees (1967 Protocol), outlines the characteristics of a refugee and the legal protection a refugee is entitled to receive.<sup>93</sup>

---

during the preceding 12 months.”

87. *Id.* § 102. The Secretary of State shall appoint an official to assist with visiting parents and implement strategic plans for engagement with Convention and non-Convention countries where there are five or more cases of international child abduction.

88. *Id.* § 104(a)(1).

89. *Id.* § 202(a)-(c). The Secretary of State must respond to patterns of noncompliance, determine which countries are engaging in patterns of noncompliance, and respond within 90 days. The Secretary must seek resolution of each international child abduction case. *Id.* § 201(b)(1).

90. *Id.* § 301.

91. The Act states the 113th Congress’s findings that more than 1,000 outgoing international child abductions are reported each year and that only one-half of children who are abducted from the United States to signatory countries are returned. Additionally, 40 percent of abduction cases involve non-signatory countries and do not fall under the Hague Abduction Convention. *Id.* § 2(a)(4)-(5), (8).

92. See Niraj Nathwani, *The Purpose of Asylum*, 12 INT’L J. REFUGEE L. 354, 354-55 (2000).

93. Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees art. I(2), Jan. 31, 1967, 606 U.N.T.S. 268.

According to the United Nations Refugee Agency, the international community is responsible for protecting the fundamental human rights of individuals within countries who do not respect or protect these fundamental rights.<sup>94</sup> However, the protections for refugees outlined in the 1951 Convention are not permanent and an individual must apply for asylum to permanently remain in their host country.<sup>95</sup>

Following the Refugee Convention, the United States Congress passed the Refugee Act of 1980 (the Refugee Act).<sup>96</sup> To qualify for asylum, an applicant has the evidentiary burden of proof to show that he or she is being persecuted<sup>97</sup> or “has a well-founded fear”<sup>98</sup> of persecution on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.<sup>99</sup>

To qualify for a grant of asylum, the applicant must establish that he or she is a “refugee” within the meaning of Section 101(a)(42)(A) of the Refugee Act.<sup>100</sup> The applicant must

---

94. U.N. REFUGEE AGENCY, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 2 (Sept. 2011), <http://www.unhcr.org/4ec262df9.html> [<http://perma.cc/8D2A-UMBX>]. (“[I]ndividuals may suffer such serious violations of their human rights that they have to leave their homes, their families and their communities to find sanctuary in another country.”).

95. *Id.* at 3.

96. Refugee Act of 1980, 96 Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. § 1101-1525 (2012)).

97. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(B) (2012).

98. *Id.* Once the applicant has sufficiently shown past persecution, the burden shifts to the Department of Homeland Security to demonstrate, by a preponderance of the evidence, that “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” or that “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so.” If the Department of Homeland Security does not meet its burden of proof, it is concluded that the applicant has a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(ii) (2016).

99. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i).

100. *Id.* § 1158(b)(1)(B)(i). A refugee is defined as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* § 1101(a)(42)(A).

demonstrate that one of the five protected grounds “was or will be at least one central reason for persecuting the applicant.”<sup>101</sup> The applicant must also demonstrate that he or she is “unable or unwilling” to avail himself or herself of the protection of her country of nationality or last habitual residence and has filed the asylum application within one year after his or her arrival in the United States.<sup>102</sup>

The applicant’s credibility may be used to establish asylum if the adjudicator is satisfied that “the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”<sup>103</sup> If the testimony meets these requirements, it “may be sufficient to sustain the burden of proof without corroboration.”<sup>104</sup> Finally, the applicant must demonstrate that she is eligible for asylum as a matter of discretion.<sup>105</sup>

If an applicant is alleging past persecution, the applicant has the burden of establishing that “(1) his treatment rises to the level of persecution, (2) the persecution was on account of one or more protected grounds, and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control.”<sup>106</sup> In general, case law has defined persecution as a “threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”<sup>107</sup> Persecution may also include threats of death, confinement, and torture.<sup>108</sup>

---

101. *Id.* § 1158(b)(1)(B)(i).

102. *Id.* § 1158(a)(2)(B); 8 C.F.R. § 208.13(b)(2)(i)(C).

103. 8 U.S.C. § 1158(b)(1)(B)(ii).

104. *Id.*

105. 8 U.S.C. § 1158(b)(1)(A); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

106. *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010).

107. *Matter of Sanchez & Escobar*, 19 I. & N. Dec. 276, 284 (BIA 1985); *see also* *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding that female genital mutilation can be the basis for a claim of persecution); *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (holding that mistreatment due to sexual orientation can constitute persecution “even though it does not embody a direct and unremitting threat to life or freedom”).

108. *See Chang v. Immigration & Naturalization Serv.*, 119 F.3d 1055, 1068 (3d Cir. 1997) (holding that petitioner faced a “better than even likelihood” of experiencing a term of imprisonment significant enough to constitute persecution if he returned to China); *Madrigal v. Holder*, 716 F.3d 499, 505 (9th Cir. 2013) (holding that if the BIA found that

If past persecution is established, a rebuttable presumption of a well-founded fear arises.<sup>109</sup> In *Matter of Chen*, the Board of Immigration Appeals (BIA) stated that a rebuttable presumption arises that an applicant who has faced previous persecution by his or her country's government has reason to fear similar future persecution.<sup>110</sup> The burden shifts to the government to prove that there has been such a fundamental change in circumstances that the applicant no longer has a well-founded fear.<sup>111</sup> The government may also prove that future persecution could be avoided by showing by a preponderance of the evidence that the applicant could, within reason, relocate within her country of nationality.<sup>112</sup>

Children may be eligible to apply for asylum if they suffered persecution or fear that they will suffer persecution due to race, religion, nationality, membership in a particular social group, or political opinion.<sup>113</sup> While the Hague Abduction Convention provides a mechanism for a parent to seek redress in a country where a child has been "wrongfully removed or retained," asylum law allows a child to seek protection in the United States.<sup>114</sup>

#### IV. THE CONFLICT OF INTERNATIONAL AND DOMESTIC LAW

##### A. *Fifth Circuit Approach to the "Conflict of Law"*

In 2014, the Fifth Circuit discussed the conflict of law between the Hague Convention and U.S. asylum law in *Sanchez v. R.G.L.*<sup>115</sup> However, the question still remains as to which law should govern because the Fifth Circuit failed to address this issue. This comment argues that U.S. courts must balance the intentions behind domestic and international law rather than

---

the Los Zetas attempted murder, that would be sufficient to show persecution which could be further justified by a course of conduct).

109. 8 U.S.C. § 1101(a)(42) (2012).

110. *Matter of Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989).

111. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004); 8 C.F.R. § 208.13(b)(1)(ii) (2016).

112. 8 C.F.R. § 208.13(b)(1)(i)-(ii)

113. 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 208.13(a).

114. *Hoffman*, *supra* note 14.

115. *Sanchez v. R.G.L.*, 761 F.3d 495, 509-11 (5th Cir. 2014).

apply strict adherence to the “last-in-time” rule in order to serve the best interests of the children caught in the middle.

In *Sanchez v. R.G.L.*, the Fifth Circuit considered an appeal from the United States District Court for the Western District of Texas.<sup>116</sup> The Court granted a second appeal by three minor children who fled from their native home in Mexico to El Paso, Texas.<sup>117</sup> Their mother, Angelica Sanchez, filed a petition claiming entitlement under the Hague Convention and ICARA to have her children returned to her in Mexico.<sup>118</sup> The adolescent children claimed that they did not want to return to Mexico because they feared their mother’s boyfriend, Arturo Quinonez, who they alleged was a member of a gang, a drug trafficker, a drug user, and their abuser.<sup>119</sup> Per the treaty agreement, Hague Convention petitions are intended to be addressed expeditiously, and an evidentiary hearing was held a month after Sanchez filed suit.<sup>120</sup> At the same time, the children filed a parallel petition with USCIS for a grant of asylum.<sup>121</sup> Although the asylum petition was still pending, the District Court ignored the petition and issued its own findings of fact and conclusions of law even though “[i]t acknowledged the difficulties presented by the parallel asylum proceedings.”<sup>122</sup>

In the second appeal, the Fifth Circuit remanded the case to the District Court and ordered the court to consider the asylum evidence.<sup>123</sup> According to the Fifth Circuit, the District Court did not err in its finding under the Hague Convention.<sup>124</sup> Sanchez met her burden of proof by establishing that the child “has been wrongfully removed or retained within the meaning of the Convention.”<sup>125</sup> She also established she had “rights of custody” that were derived from her and her children’s home country at

---

116. *Id.* at 499.

117. *Id.* at 499-500.

118. *Id.* at 500.

119. *Id.*

120. *Id.* at 500-01; Hague Convention, *supra* note 59, art. 2.

121. *Sanchez*, 761 F.3d at 501.

122. *Id.*

123. *Id.* at 511.

124. *Id.*

125. 22 U.S.C. § 9003(e)(1)(A) (2012).

the time of their removal.<sup>126</sup> One of the many issues that the Court considered involved the effect of granting asylum on the district court's order.<sup>127</sup> The Court first addressed whether the grant of asylum would override the Hague Convention decision ordering the children's return to Mexico, then allowing the children to remain in the United States.<sup>128</sup> Secondly, the Court looked into whether the grant of asylum should be considered as evidence of an exception under Article 13(b) and Article 20 of the Hague Convention.<sup>129</sup>

Although the Fifth Circuit was the first court to consider the specific conflict of law between the Hague Convention international agreement and U.S. asylum domestic law, the court failed to definitively implement a strategy for courts to follow regarding this conflict of law. U.S. courts must balance the intentions behind the domestic law and international agreements when deciding how to resolve a conflict of law. In this conflict of law, asylum law and the Hague Convention should work in concert with each other to promote the best interests of the child.

#### 1. Revocation of the Hague Convention Order Due to the Grant of Asylum

The children in *Sanchez* argued that “an asylum grant directly conflicts with the district court order, and the more recent asylum grant should take precedence over Convention relief under the last-in-time rule.”<sup>130</sup> The “last-in-time” rule states that “if a statute and treaty are inconsistent, then the last in time will prevail.”<sup>131</sup> The Fifth Circuit failed to address the “last-in-time” issue and instead simply found that the “asylum grant does not supersede the enforceability of a district court's order that the children should be returned to their mother” because the responsibilities of the Attorney General or Secretary of Homeland

---

126. Hague Convention, *supra* note 59, art. 3.

127. *Sanchez*, 761 F.3d at 509.

128. *Id.* at 510.

129. *Id.* at 511.

130. *Id.* at 509.

131. *Ntakirutimana v. Reno*, 184 F.3d 419, 426-27 (5th Cir. 1999); *see also* GARCIA, *supra* note 5, at 15 (stating that a more recent statute will trump earlier inconsistent international agreements and a more recent agreement will trump an earlier inconsistent statute).

Security were not impacted.<sup>132</sup>

Under the “last-in-time” rule, the Hague Convention, first implemented by ICARA in 1988<sup>133</sup> and extended by the Goldman Act in 2014,<sup>134</sup> would likely prevail over U.S. asylum law. U.S. asylum law is based on the Refugee Act of 1980, which amended the Immigration and Nationality Act.<sup>135</sup> However, rather than strict adherence to the “last-in-time” rule, courts should consider the *intent* of the domestic and international law. While the application of the “last-in-time” rule may be clear-cut in traditional treaty disputes, the addition of new amendments has made the “last-in-time” rule confusing, and it can become arbitrary rather than representative of the “sovereign will.”<sup>136</sup> A dynamic approach to the “last-in-time” rule is necessary to ensure that the purpose of the law is enforced.<sup>137</sup> Although the last-in-time rule has been judicially accepted, it has been subject to scholarly attack,<sup>138</sup> leaving room for a new approach to issues involving a conflict of law.

The purpose of the Hague Convention is to “protect children

---

132. *Sanchez*, 761 F.3d at 510.

133. 22 U.S.C. § 9003(a)-(b) (2012).

134. Goldman Act, § 202(a)(2), Pub. L. No. 113-150, 128 Stat. 1807.

135. ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 1 (2015).

136. *See* *Whitney v. Robertson*, 124 U.S. 190, 195 (1888) (stating that when domestic law and international law clash, “[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will”); *see also* Emily S. Bremer, *The Dynamic Last-in-Time Rule*, 22 IND. INT’L & COMP. L. REV. 27, 28 (2012) (“[The last-in-time] rule is clear-cut and easy to apply in most traditional treaty disputes because there are only two relevant events: the ratification of the treaty and the enactment of the statute.”).

137. *See* Bremer, *supra* note 136, at 69.

138. The Supreme Court adopted the last-in-time rule in *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870), stating “[a] treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.” (footnote omitted) In contrast, scholars have criticized the last-in-time rule and have called for its abandonment. *E.g.*, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 303 (2005) (“By allowing federal treaties to repeal federal statutes and, symmetrically, statutes to repeal treaties, the modern judiciary has paid insufficient heed to the text of Article VI itself, ignoring the apparent legal hierarchy implicit in that text.”) (footnote omitted); Michael A. Namikas, *Up in Smoke?: The Last in Time Rule and Empresa Cubana Del Tabaco v. Culbro Corp.*, 22 ST. JOHN’S J. LEGAL COMMENT. 643, 645 (2008) (“Rarely questioned by the courts themselves, the Last in Time rule has become outdated precedent in a global society increasingly reliant on multilateral treaties.”).

internationally from the harmful effects of their wrongful removal or retention.”<sup>139</sup> A grant of asylum by USCIS is an indication that it would be harmful for a child to return to his or her home country.<sup>140</sup> Therefore, the Hague Convention’s goal to protect children from the “harmful” effects of wrongful removal is rendered moot because the asylum ruling clearly finds that a child faces a well-founded fear of persecution if sent back to his or her home country. The court sidesteps the issue of which law should prevail and simply states that the roles of the Attorney General and Secretary of Homeland Security do not conflict. While the Fifth Circuit implies that asylum law would not supersede the Hague Convention, it instructs the lower court to “consider” the grant of asylum.<sup>141</sup> This leads to the second issue considered by the Fifth Circuit.

## 2. Consideration of the Grant of Asylum as Evidence for the Exceptions Under the Hague Convention

The Fifth Circuit agreed with the Sanchez children that the district court ruling should be remanded to reconsider whether the exceptions under Articles 13(b) and 20 are applicable due to the grant of asylum.<sup>142</sup> The exception under Article 13(b) states that a State is not bound to order the return of a child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>143</sup> Under Article 20, an exception exists when the respondent can show the return of the child would result in a violation of basic “human rights and fundamental freedoms.”<sup>144</sup>

To qualify for asylum, the applicant must either have suffered

---

139. Hague Convention, *supra* note 59, pmb1.

140. See 8 C.F.R. § 1208.13(b)(1) (2016) (requiring an applicant prove that he or she has a well-founded fear of future persecution to be eligible for asylum).

141. See *Sanchez v. R.G.L.*, 761 F.3d 495, 510-11 (5th Cir. 2014) (holding that the children’s asylum grant was relevant to whether the Hague Convention exceptions to return should apply, and requiring that the district court consider all available evidence from the asylum proceedings).

142. *Id.* at 511.

143. Hague Convention, *supra* note 59, art. 13(b).

144. *Id.* art. 20.

past persecution or have a “well-founded” fear of persecution.<sup>145</sup> The definition of persecution turns on whether harm is likely to be inflicted on the asylum applicant.<sup>146</sup> The grant of asylum should be considered in regards to Article 13(b) and 20 of the Hague Convention because the level of harm to trigger this exception must be “a great deal more than minimal.”<sup>147</sup>

The court correctly remanded the case, requiring that the district court consider whether the asylum grant was evidence that the Article 13(b) and 20 exceptions were applicable. The evidentiary burden to deny an asylum application based on past persecution is a preponderance of the evidence;<sup>148</sup> in comparison, the opponent of the return of the child must establish by clear and convincing evidence that one of the exceptions under the Hague Convention applies.<sup>149</sup> Therefore, the court concluded that an “asylum finding that the children have a well-founded fear of persecution does not substitute for or control a finding under Article 13(b).”<sup>150</sup> Although it is true that an asylum grant should not substitute for the district court’s independent findings, the asylum grant should be weighed heavily in favor of a Hague Convention exception. These exceptions exist to prevent children from being sent back to their home country due to a “grave risk” of “physical or psychological harm”<sup>151</sup> or where the return of the child would result in the violation of basic “human rights and fundamental freedoms.”<sup>152</sup> Both the Hague Convention exceptions and asylum law seek to protect the human rights and well-being of a child. The district court’s refusal to consider the grant of asylum as evidence in regards to the Article 13(b) and 20 exceptions is an example of strict adherence to the letter of the law without due consideration of the purpose of the law. This strict adherence may render both the international agreement and domestic law moot and so future consideration of this conflict

---

145. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i) (2012).

146. *Sanchez*, 761 F.3d at 510.

147. *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000); *Sanchez*, 761 F.3d at 510.

148. 8 C.F.R. § 1208.13(b)(1)(i) (2016).

149. 22 U.S.C. § 9003(e)(2) (2012).

150. *Sanchez*, 761 F.3d at 510.

151. Hague Convention, *supra* note 59, art. 13(b).

152. *Id.* art. 20.

of law should take into account the intent of both laws.

*B. Foreign Examples of the Resolution of “Conflict of Law”*

1. Canada

Canada is an example of a dualist system of interpretation.<sup>153</sup> *Monism* and *dualism* are used to describe two theoretical perspectives on the relationship between domestic and international law.<sup>154</sup> The monist view holds that domestic and international law are part of a larger, single global legal system.<sup>155</sup> In contrast, dualists view domestic and international legal systems independently.<sup>156</sup> Canada, along with Australia, India, Israel, and the United Kingdom, are considered traditional dualist states where “treaties never have the force of law within their domestic legal systems.”<sup>157</sup> In contrast, the United States, Germany, the Netherlands, Poland, Russia, and South Africa are considered “hybrid monist states” where some treaties have the force of law within the domestic legal system.<sup>158</sup> As a hybrid monist state, the United States may incorporate an international agreement through legislation or self-execution.<sup>159</sup>

Under Canadian law, international conventions are generally integrated into the legal framework through implementation legislation alone.<sup>160</sup> While there are several means of implementation, Parliament often includes textual incorporation of the provisions of a convention into the wording of the Act.<sup>161</sup> In the Canadian strict dualist system, when a statute and an unincorporated treaty conflict, the court will find in favor of the statute.<sup>162</sup> Due to the judicial presumption of conformity, this

---

153. Sloss, *supra* note 16, at 7.

154. *Id.* at 6.

155. *Id.*

156. *Id.*

157. *Id.* at 7.

158. *Id.*

159. *Id.* at 34.

160. ANDRÉ OUELLETTE, BIJURALISM AND TAXATION: INTERNATIONAL ASPECTS § 3 (Jan. 7, 2015), <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/ouell/int2.html> [<http://perma.cc/SVL5-YC4Y>].

161. *Id.*

162. Sloss, *supra* note 16, at 20.

often means that a private party whose treaty-based rights are harmed can usually obtain a domestic legal remedy.<sup>163</sup> In Canada, “when construing domestic laws Canadian courts apply an interpretive presumption that those laws conform to the state’s obligations under treaties and other sources of international law.”<sup>164</sup> In fact, “[n]othing in the written constitution of Canada prevents Canadian legislatures from enacting laws contrary to the state’s obligations under treaties.”<sup>165</sup> Therefore, the question that follows is, “How far will the courts go in asserting the presumption?”<sup>166</sup> According to Justice LeBel, a justice on the Supreme Court of Canada, the presumption applies “unless the wording of the statute clearly compels” an internationally unlawful result.<sup>167</sup> Furthermore, there are very few Canadian decisions that have ever rebutted the presumption of conformity with international law.<sup>168</sup>

In comparison to the hybrid monist system in the United States, the Canadian dualist system’s presumption of international compliance does not directly address conflict of law. Although Canadian parliament can pass laws that conflict with international law, the court has not addressed this conflict. Therefore, this shows that the conflict of law between international and domestic law is complex and there is no singular approach to the matter.

## 2. Israel

Another dualist state, Israel, takes a similar approach to harmonizing domestic law with treaty obligations as the United States does.<sup>169</sup> As a dualist state, Israel must enact legislation to incorporate an international agreement.<sup>170</sup> However, the United States and Israel both “apply a presumption that domestic

---

163. *Id.* at 7; *see also* OUELLETTE, *supra* note 160 (“Legislation is presumed to comply with Canada’s international obligations.”).

164. Gib van Ert, *Canada, in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, *supra* note 16, at 166, 188.

165. *Id.* at 190.

166. *Id.*

167. *Id.*

168. *Id.*

169. Sloss, *supra* note 16, at 34.

170. *Id.*

statutes should be construed in a manner that is compatible with the state's treaty obligations."<sup>171</sup> In Israel, this is referred to as the "presumption of compatibility,"<sup>172</sup> meaning that courts must interpret domestic legislation to avoid noncompliance with international agreements.<sup>173</sup> Furthermore, courts must choose the interpretation that is compatible with international agreements if there is more than one interpretation.<sup>174</sup> If this approach was applied in the United States, this presumption of compatibility would not conflict with the "last in time" rule, nor would it conflict with the idea of considering the intent of both an international agreement and domestic law.

*C. Shifting the U.S. Approach in the International "Custody Battle"*

The international approach to the "conflict of law" is not yet well settled, so courts have the flexibility to shift the law to take a dynamic approach to the "last in time" rule. A dynamic approach would allow courts to consider both the intent of the law and apply the law to the facts of each individual case. In the scenario discussed in this comment, the Hague Abduction Convention collided with U.S. asylum law. Rather than addressing the conflict of international and domestic law head-on, the Fifth Circuit punted the question and did not resolve this question of law. Instead, the court took a different approach to look out for the children's best interests when the case was remanded to the district court to reconsider the evidence presented by the grant of asylum. Although the court did not address the conflict of law at issue, it found a way to take the children's interests into account.

In the future, courts should consider the intent of the international agreement and domestic law, in order to apply a dynamic reading of the "last in time" rule. The United States has a duty to respect the international agreements it joins. At the same time, the federal government has a duty to the people to

---

171. *Id.* at 35.

172. David Kretzmer, *Israel, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY*, *supra* note 16, at 273, 287-88.

173. *Id.* at 287.

174. *Id.*

uphold domestic law. When a situation arises where it is unclear which law should prevail and what the right outcome should be, the courts have the power and responsibility to consider and adhere to the intent of law. While not every situation will allow “conflicting” laws to work in tandem with one another, the judiciary’s consideration of the intent of conflicting laws will result in a more palatable outcome.

## V. CONCLUSION

The Hague Abduction Convention and U.S. asylum law are both intended to assist children who enter the United States. However, the conflict of law issue that arose in *Sanchez v. R.G.L.* raised an important question regarding the conflict of law. Resolving this conflict with a dynamic reading of the “last in time” rule will allow future courts to consider the intent of each law. Because this is a fact-intensive inquiry, courts should use discretion and take the interests of the child into account when making their decision. This inquiry requires both careful thought and careful consideration of the intent behind the conflicting laws.