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Villegas Duran v. Arribada Beaumont: The Second Circuit Court's Interpretation of Custody Rights Undermines the Purpose of The Hague Convention on the Civil Aspects of International Child Abduction

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NOTES

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I. INTRODUCTION

The troubling and complex problem of international child abduction has recently been in the spotlight as the nation watched David Goldman battle with Brazil's legal system in a desperate effort to reunite with his son Sean. Sean Goldman's mother took him to Brazil in 2004 and he remained with his stepfather in Brazil after his mother passed away.[1] Sean's American father, David Goldman, applied to the Brazilian courts for the return of his son under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), alleging that his ex-wife had tricked him into taking his son away.[2] After a five year legal battle that ended in mid-December, a Brazilian federal court ordered Sean, now nine years old, returned to his father in the United States.[3]

In contrast to the highly publicized *Goldman* case, the lesser known noted case deals specifically with the U.S. courts' resolution of a Chilean father's claim for relief.[4] In *Villegas Duran v. Arribada Beaumont* a mother traveled with her three-year-old daughter to the United States under the premise that she would return to Chile in three months.[5] After the three-month period expired, however, the mother and daughter remained in the United States in violation of a Chilean court order.[6] The left-behind father, Hugo Alejandro Villegas Duran, applied to the United States courts for return of his daughter under the Hague Convention, but the Second Circuit refused to order her return,

1. Daniel B. Wood, *Sean Goldman Case Highlights Rising International Child Abduction*, CHRISTIAN SCI. MONITOR, Dec. 23, 2009, http://www.csmonitor.com/USA/2009/1223/Sean-Goldman-case-highlights-rising-international-child-abduction.

2. Wood, *supra* note 1.

3. Wood, *supra* note 1.

4. *See generally* Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008).

5. *Id.* at 145.

6. *Id.*

holding that Villegas Duran did not possess "rights of custody" as defined by the Convention.[7] Although no custody determination had been decided in Chile, the father was granted visitation rights coupled with a *ne exeat* clause under Chile's default law.[8] A *ne exeat* clause allows the father to prohibit the mother from taking his child out of the country.[9] The Second Circuit held that visitation rights, even when coupled with a *ne exeat* clause, do not constitute rights of custody within the meaning of the Hague Convention.[10] As heart wrenching as these stories are, the sad reality is that neither are unique cases.[11] A substantial number of children are abducted into and removed from the United States each year.[12]

International parental child abduction is a growing epidemic stemming from advances in communication, technology, and the relative affordability of transnational travel.[13] The increased mobility of the global population has led to a vast number of binational relationships, imposing greater challenges in determining custody arrangements when marriages break down and divorces are finalized.[14] In a desperate effort to ensure that that they will be granted custody rights of their children, one parent may remove the children to a foreign jurisdiction that will presumably be more favorable to his or her claim.[15] This imposes dra-

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7. *See generally Villegas Duran*, 534 F.3d 142.

8. *Id.* at 147-48.

9. *Id.*; *see also* TheFreeDictionary.com, *Ne exeat* defined, http://www.thefreedictionary.com/Ne+exeat (last visited Feb. 21, 2010) ("A writ to restrain a person from leaving the country, or the jurisdiction of the court.").

10. *See generally Villegas Duran*, 534 F.3d 142.

11. *See* Wood, *supra* note 1 (more than 1,000 new cases involving 1,615 children abducted from the United States were reported by a parent in the year 2008 alone).

12. *See generally* Andrea J. Sedlak et al., *National Estimates of Missing Children: An Overview*, NISMART (Off. Juv. Just. & Delinq. Prevention, D.C.), Oct. 2002, at 1, http://www.ncjrs.gov/pdffiles1/ojjdp/196465.pdf; DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5 (2008), http://travel.state.gov/pdf/2008HagueAbduction ConventionComplianceReport.pdf [hereinafter COMPLIANCE REPORT] (In the year 2007 alone, 575 applications were filed with the U.S. Central Authority alleging that 821 children were abducted from the U.S. and 355 cases were filed involving 518 children who were brought to the U.S.).

13. Laura McCue, *Left Behind: The Failure of the United States to Fight for the Return of Victims of International Child Abduction*, 28 SUFFOLK TRANSNAT'L L. REV. 85, 87 (2004).

14. *Id.*

15. Gitter v. Gitter, 396 F.3d 124, 129-30 (2d Cir. 2005); *see also* Shealy v. Shealy, 295 F.3d 1117, 1121 (10th Cir. 2002); Elisa Perez-Vera, Explanatory Report, Hague Convention on Private International Law, Actes et documents de la Quatorzieme session 426, 429 (1982), *available at* http://hcch.e-vision.nl/upload/expl28.pdf

matic, emotionally charged effects on both the children who are uprooted and transplanted to a new home and the left-behind parent who is unable to visit with his children and, in some cases, does not even know where his children have gone.[16] As of the year 2004, more than 10,000 American children were reported to be living abroad as victims of parental child abduction.[17] Equally disturbing, of all children who have been reported as abducted in the United States, most of the children were determined to be abducted by family members.[18] These figures do not even attempt to address the extent of this problem on a worldwide scale, and international abductions and retentions of children are only increasing.[19]

Understanding that global cooperation is needed to effectively combat such a massive international problem, several nations met at The Hague on October 25, 1980 and negotiated the Hague Convention on the Civil Aspects of International Child Abduction.[20] Drafters of the Convention agreed that international parental abductions of children is harmful to their well-being and that persons should not be allowed to obtain custody rights by abducting their children over international borders.[21] The drafters also agreed that uniform enforcement of the Convention's provisions is of utmost importance in resolving Hague cases and in combating

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(explaining that the Hague Convention is intended to prevent parents from abducting their children in order to evade a court order that they do not believe is favorable or from forum shopping for a jurisdiction that may be more sympathetic to their position).

16. Robin Jo Frank, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. INT'L L. & POL. 415, 416-17 (1984); COMPLIANCE REPORT, *supra* note 12, at 48.

17. McCue, *supra* note 13, at 85.

18. At the time of this study, only a small portion of all missing children in the U.S. were classified as "abducted." Sedlak et al., *supra* note 12, at 9-10. This study determined that most of the abducted children in the U.S. were abducted by family members and family abductions accounted for nine percent of all 1,315,600 missing children in the U.S. *Id.*

19. In an attempt to address this problem, many nations have taken part in the Hague Convention on International Child Abduction; however, the Hague Convention is not a self-executing treaty. The treaty requires member state implementing legislation to make it fully binding after ratification. *See* Hague Convention on the Civil Aspects of International Child Abduction, art. 41, Oct. 25, 1980, 19 I.L.M. 1501, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24 [hereinafter Hague Convention on Child Abduction]. ICARA is the implementing legislation in the United States. International Child Abduction Remedies Act (ICARA), 42 U.S.C.A. §§ 11601-11610 (West 2010); *see also* discussion *infra* Part II.A.

20. 42 U.S.C.A. § 11601(a)(3)-(4).

21. *See* Hague Convention on Child Abduction, *supra* note 19, Preamble, art. 1.

the problem of international child abductions.[22] The Hague Convention provides an international legal forum to aid parents who claim their children have been wrongfully removed to another nation and a remedy of return to those left-behind parents.[23]

Under the Hague Convention, four elements must be satisfied in order for any court to order return of a child; the "child" must be under sixteen years of age, the child must have been wrongfully removed or retained in breach of the left-behind parent's custody rights, those custody rights must have been exercised, and the child must have been removed from his or her place of habitual residence.[24] The noted case, *Villegas Duran v. Arribada Beaumont*,[25] specifically addresses the question of what constitutes "rights of custody" under the Hague Convention.

This Note suggests that the Hague Convention was inappropriately applied in the *Villegas Duran* decision, as well as argues that the definition of "rights of custody," established by the Second Circuit in *Croll v. Croll*[26] and reaffirmed in *Villegas Duran*, undermines the purpose of the Hague Convention agreement between the United States and Chile specifically, along with any other nation that uses a *ne exeat* clause as a means to create rights of custody under their law. Part II of this Note provides an historical background of the intent and purpose of the Convention while also providing a detailed overview of the relevant law established by the provisions of the treaty and implemented in the United States through the International Child Abduction Remedies Act. Part III focuses specifically on the definition of "rights of custody" under the Hague Convention by examining the decision in *Croll v. Croll* and other relevant case law interpreting the Convention's language and intent as it applies to the purpose of a *ne exeat* clause. Part IV of this Note details the court's reasoning and decision in the noted case while Part V explains why the court erred in determining that a *ne exeat* clause does not create custody rights under Chilean law. In its analysis, the court ignored Chile's interpretation of its own domestic custody law, attempted to look at the case as a custody determination, and followed prior precedent that was easily distinguished. Part VI analyzes the possible unspoken policy reasons behind the decision and the public policy implica-

22. *See id.* at art. 7.
23. *See id.* at Preamble.
24. *Id.* at arts. 3-4.
25. Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 145 (2d Cir. 2008).
26. Croll v. Croll, 229 F.3d 133 (2d Cir. 2000).

tions intertwined with the court's rejection of the *ne exeat* clause's purpose.

II. HISTORICAL BACKGROUND: THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty currently in force between the United States and eighty other nations.[27] The treaty is focused on protecting children from international parental child abductions[28] and the provisions only apply between countries that are parties to the Convention. The treaty was unanimously adopted on October 25, 1980 by representatives from twenty-nine contracting states of the Hague Convention, and its provisions are implemented by each country's own domestic laws.[29] By adopting the Hague Convention, each contracting state agreed that the "interests of children are of paramount importance in matters relating to their custody" and each state committed to "take all appropriate measures to secure within [its] territories the implementation of the objects of the Convention."[30]

A. Implementing Legislation in the United States

Since the Hague Convention is a non self-executing international treaty, Congress enacted a federal statute to implement its provisions. The implementing legislation in the United States, enacted in 1988, is the International Child Abduction Remedies Act ("ICARA").[31] ICARA gives courts in the United States authority to determine rights under the provisions of the convention and empowers them to order return of children who have been wrongfully removed to the United States.[32] The purpose of ICARA is to "establish procedures for the implementation of the Convention in the United States" and the provisions of ICARA are meant to be "in addition to and not in lieu of the provisions of the Convention."[33]

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27. Hague Conference on Private International Law (HccH), Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Feb. 21, 2010).

28. *See* Hague Convention on Child Abduction, *supra* note 19.

29. *See id.* at Preamble.

30. *Id.* at Preamble, art. 2.

31. 42 U.S.C.A. § 11601(a)(4)-(b)(1) (West 2010); *see also* note 19.

32. 42 U.S.C.A. § 11601(b)(4).

33. 42 U.S.C.A. § 11601(b)(1)-(2).

B. Abduction Convention Objectives and Definitions

The objectives of the Hague Convention are "to protect children internationally from the harmful effects of their wrongful removal or retention,"[34] "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."[35] If the country in which the child has been taken finds that the child has been wrongfully abducted from his or her home country, the court has the authority to order the child returned to his or her prior country of residence.[36] Under the Convention, a child has been wrongfully removed from her habitual place of residence if the child is under sixteen years of age, removal or retention constitutes a breach of custody rights "under the law of the State in which the child was habitually resident immediately before the removal or retention," and the rights of custody were actually being exercised.[37] If the child is found to have been wrongfully removed and a period of less than one year has elapsed from the date of the wrongful removal, then the return of the child shall be ordered forthwith.[38]

For purposes of the Convention, rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[39] A parent seeking return of his or her child

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34. Hague Convention on Child Abduction, *supra* note 19, Preamble.

35. *Id.* at art. 1. The U.S. made the following related findings under ICARA: "(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. (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem." 42 U.S.C.A. § 11601(a).

36. Hague Convention on Child Abduction, *supra* note 19, art. 12; 42 U.S.C.A. § 11601(a)(4), (b)(4).

37. Hague Convention on Child Abduction, *supra* note 19, art. 3 ("The removal or the retention of a child is to be considered wrongful where - *a)* 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 *b)* 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. The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."); *see also infra* note 51 (defining the exercise of custody rights and listing guiding case law).

38. Hague Convention on Child Abduction, *supra* note 19, art. 12.

39. *Id.* at art. 3.

must possess rights of custody under the law of the child's habitual residence, in order for a court in the state in which the child was taken, to order the child returned.[40] If a parent merely possesses rights of access, which are synonymous with visitation rights, then the parent cannot seek the remedy of return of their child.[41] That parent can only seek to exercise their visitation rights.[42]

Under the Convention, rights of custody 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."[43] A lesser right of access includes "the right to take a child for a limited period of time to a place other than the child's habitual residence."[44] Whether a person possesses rights of custody is determined by the governing domestic laws in the child's State of habitual residence.[45] Access rights are protected to a lesser extent by the provisions of the Convention.[46]

C. *The Role of the Central Authority and the Return of Wrongfully Removed Children*

The Convention provides that each Contracting State must designate a Central Authority to be responsible for discharging the administrative duties imposed by the treaty agreement.[47] The Central Authority in each Contracting State is charged with promoting cooperation between Central Authorities of the various signatories in order to secure the prompt return of children and to achieve all other objectives of the Convention.[48] Any person or

40. *Id.* at arts. 3, 5, 12.
41. *Id.* at arts. 3, 5.
42. *Id.* at arts. 3, 12, 21.
43. *Id.* at art. 5.
44. *Id.*
45. *See id.* at arts. 3, 5.
46. *See id.* at arts. 3, 5, 21.
47. *Id.* at art. 6. The implementing federal legislation in the U.S. states that all provisions of ICARA are "in addition to and not in lieu of the provisions of the Convention." Therefore, the United States, as a contracting state to the convention, is required to maintain a Central Authority as well as comply with all other provisions of the Hague Convention. 42 U.S.C.A. § 11601(b)(2) (West 2010).
48. *See* Hague Convention on Child Abduction, *supra* note 19, art. 7. ("[The Central Authority] shall take all appropriate measures - *a)* to 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

institution claiming that a child has been removed from their habitual place of residence in breach of custody rights may apply to the Central Authority for assistance in any Contracting State.[49]

If it is determined that a child has been wrongfully removed or retained through appropriate legal proceedings, the judicial or administrative authority in the Contracting State where the child is currently residing shall order the return of the child forthwith.[50] However, the language of the Convention does allow the court to refuse to order return of the child in a few limited exceptions. For instance, the court can refuse to order return of the child if the person claiming breach of custody rights was not actually exercising those rights at the time of removal.[51] Also, if the judicial or administrative authority finds that the child is mature enough to understand the proceedings and the child objects to being returned, the authority can take the child's view into account and refuse to order return.[52] In addition, 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," then the authority may refuse to order the return of the child.[53]

Notwithstanding those limited exceptions, the language of the Convention makes it clear that a wrongfully removed child should be returned and that Convention proceedings are not to be used as

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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 organizing or securing the effective exercise of rights of access; *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 by 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.").

49. *Id.* at art. 8.

50. *Id.* at arts. 12, 18. A person claiming breach of custody rights should apply to the appropriate authority within one year from the date of the child's wrongful removal or retention. *Id.* If a person claiming breach of custody rights fails to request proceedings within one year, the court can still order return of the child unless it is demonstrated that the child is now settled in its new environment. *Id.*

51. *Id.* at art. 13; *see* Friedrich v. Friedrich, 78 F.3d 1060, 1063-65 (6th Cir. 1996); Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 344-45 (5th Cir. 2004); Bader v. Kramer, 484 F.3d 666, 671 (4th Cir. 2007) (illustrating that the circuits appear to be in agreement about what constitutes "exercising" rights of custody). Courts have generally held that a parent is exercising custody rights unless the parent's acts demonstrate clear and unequivocal abandonment of the child. Generally the court will acknowledge any sort of regular conduct with the child as exercising custody rights and will not analyze whether the parent is exercising those rights well or badly.

52. Hague Convention on Child Abduction, *supra* note 19, art. 13.

53. *Id.*

custody determinations.[54] The language reads:

> the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under [the rules of] this Convention.[55]

Likewise, the Convention states "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."[56] The stated reasoning for this provision is that the most appropriate venue to rule on a custody determination is in the habitual place of the child's residence prior to removal, which is also usually where the parent seeking return of the child is.[57] Allowing all Contracting States to order return of wrongfully removed children, but not authorizing States to make custody determinations, allows each state to realize the mutual benefits of uniform enforcement of the treaty while also preserving the national law in the State of habitual residence.

III. PERSPECTIVE: "RIGHTS OF CUSTODY" DEFINED

Several courts have considered questions regarding what constitutes a valid claim for relief under the various elements of the Hague Convention. *Villegas Duran* deals specifically with the question of what constitutes rights of custody versus the lesser rights of access under the Convention.[58] As previously mentioned, if a child is removed from his or her habitual place of residence in breach of the left-behind parent's custody rights, then the Contracting State to which the child has been removed has jurisdiction to order return of the child.[59] However, if the child has been removed in breach of access rights only, then the court does not have jurisdiction to order return of the child to his or her habitual

54. *See* 42 U.S.C.A. § 11601(b)(4) (West 2010). *See generally* Hague Convention on Child Abduction, *supra* note 19.

55. Hague Convention on Child Abduction, *supra* note 19, art. 16; *see also* 42 U.S.C.A. § 11601(b)(4) ("The 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.").

56. Hague Convention on Child Abduction, *supra* note 19, art. 19.

57. Perez-Vera, *supra* note 15, at 430 ("[T]he Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal.").

58. *See* Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 145 (2d Cir. 2008).

59. Hague Convention on Child Abduction, *supra* note 19, arts. 3, 12.

place of residence.[60] The left-behind parent must seek another means of recourse if he or she is not found to possess custody rights.[61]

The court's decision in *Villegas Duran* is based almost entirely on precedent established by the reasoning of the Second Circuit in *Croll*.[62] Even though the facts of these two cases are easily distinguishable and a myriad of other opinions interpreting the Convention's meaning of custody rights exist, the *Villegas Duran* court looked only to *Croll*'s interpretation for guidance in deciding the noted case.

A. Croll v. Croll

"Stephen and Mei Yee Croll, both United States citizens, were married in Hong Kong in 1982."[63] "Their daughter Christina was born in Hong Kong in 1990 and lived with both of her parents until they separated in 1998."[64] The couple lived in Hong Kong while separated; "Christina lived with her mother, and was regularly visited by her father.[65] Later in 1998, "Mr. Croll commenced divorce proceedings in the District Court of the Hong Kong Special Administrative Region, Matrimonial Causes," and the Hong Kong court issued a custody order granting Mrs. Croll sole "custody, care and control" of their daughter.[66] Mr. Croll was granted a "right of reasonable access."[67] The order also granted Mr. Croll a *ne exeat* clause, which provided that Christina could "'not be removed from Hong Kong until she attain[ed] the age of 18 years' without leave of court or consent of the other parent."[68]

Mrs. Croll brought Christina to New York on April 2, 1999 so Christina could interview at schools in New York City.[69] Mrs. Croll stated that she planned for Christina to "attend school for a few weeks, and then return to Hong Kong for the summer."[70] Mrs. Croll also admitted, however, that "in the back of her mind she intended to remain in the United States permanently" with her

60. *See id.* at arts. 3, 13, 21.
61. *See id.* at art. 21.
62. *See Villegas Duran*, 534 F.3d 142; Croll v. Croll, 229 F.3d 133 (2d Cir. 2000).
63. *Croll*, 229 F.3d at 135.
64. *Id.*
65. *Id.*
66. *Id.* (citation omitted).
67. *Id.* (citation omitted).
68. *Id.*
69. Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000).
70. *Id.*

daughter.[71]

"On April 8, 1999, Mrs. Croll filed an action in Family Court in New York County seeking custody, child support, and an order of protection" against Mr. Croll.[72] The day before Mrs. Croll filed the action Mr. Croll returned from a business trip and learned that his wife had taken their daughter to the United States.[73] "Mr. Croll filed a missing persons report with the Hong Kong Police and then later filed a petition "in the Southern District of New York seeking Christina's return to Hong Kong pursuant to the Hague Convention."[74]

The question in this case was whether Mr. Croll held and actively exercised "rights of custody" within the meaning of the Convention when Christina was taken from Hong Kong.[75] The district court held that Mr. Croll possessed custody rights and "ordered that Christina be returned to Hong Kong."[76] The appeals court rejected the district court's reasoning, however, holding that rights of access, even when coupled with a *ne exeat* clause, do not constitute rights of custody within the meaning of the Hague Convention.[77]

The court of appeals in *Croll* took this opportunity to define how federal courts should distinguish between rights of custody and the lesser rights of access as the terms are applied under the language of the Hague Convention. The court determined that they were faced with a case of first impression and decided to "start from scratch" in examining the purpose, language and intent of the Convention.[78] The *Croll* court came to two important conclusions: that Mr. Croll's *ne exeat* right was not a right to determine the child's place of residence, but only a limitation on Mrs. Croll's right to determine the child's place of residence, and that the history and drafters' intent of the Hague Convention supported the view that a *ne exeat* right was not custodial.[79]

In coming to these conclusions, the *Croll* court first estab-

71. *Id.* (internal quotation marks omitted).
72. *Id.*
73. *Id.*
74. *Id.*
75. Croll v. Croll, 229 F.3d 133, 136 (2d Cir. 2000).
76. *Id.*
77. *Id.* at 135.
78. *Id.* at 136 ("So far as we can tell, we and the district court in this case are the only courts in the United States to consider whether rights of access coupled with a *ne exeat* clause confer 'custodial rights' on a non-custodial parent within the meaning of the Hague Convention.").
79. *See Croll*, 229 F.3d 133.

lished its definition of custody rights.[80] The Convention explicitly defines custody rights as "rights relating to the care of the person of the child and, *in particular, the right to determine the child's place of residence*."[81] Under ICARA, the United States courts are supposed to implement all provisions of the Hague Convention and are charged only with determining rights afforded by the treaty.[82] Instead of using the Convention's explicit definition of custody rights, the *Croll* court consulted several American dictionaries as a proper means to define the term.[83] Combining the various definitions, the court determined that "custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things."[84]

The court then turned to the history of the Convention and determined that the drafters of the convention intended to define "rights" of custody as a "bundle of rights" since they chose to transcribe it in the plural.[85] The court inferred that possessing a single strand in that bundle, for instance a veto power, could not amount to what the drafters envisioned as "rights of custody."[86] The *Croll* court reasoned that a *ne exeat* clause is considered a single veto power because it limits the other parent's ability to remove a child from the country, but does not afford the clause holder the right to actually determine the child's place of residence within the child's home country.[87] For example, Mr. Croll had the right to veto Christina leaving the country, but could not determine where Christina would live within Hong Kong.

Following this reasoning, the court held that Mr. Croll did not possess rights of custody because he was afforded a single right in the bundle that merely amounted to a limitation on Mrs. Croll's rights, the single power of a veto conferred by a *ne exeat* clause,

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80. *Id.* at 137-39.

81. Hague Convention on Child Abduction, *supra* note 19, art. 5 (emphasis added).

82. *See* International Child Abduction Remedies Act (ICARA), 42 U.S.C.A. §§ 11601-11610 (West 2010).

83. *Croll*, 229 F.3d at 138-39. Using American dictionaries to define the term is not in line with the provisions of ICARA which state: "In enacting this chapter the Congress recognizes—(A) the international character of the Convention; and (B) the need for uniform international interpretation of the Convention." 42 U.S.C.A. § 11601(b)(3)(A)-(B).

84. *Croll*, 229 F.3d at 138.

85. *Id.* at 139.

86. *Id.*

87. *Id.*

and Mr. Croll had no legal say over any other custodial issue.[88] The court opined:

> If we were to enforce rights held pursuant to a *ne exeat* clause by the remedy of mandatory return, the Convention would become unworkable. A foundational assumption in the Convention is that the remedy of return will deliver the child to a custodial parent who (by definition) will receive and care for the child. It does not contemplate return of a child to a parent whose sole right—to visit or veto—imposes no duty to give care.[89]

From this idea, the court concluded that a *ne exeat* clause is not a significant decision making power because Mr. Croll had no power or duty to make decisions about Christina's childrearing other than determining her geographical location in the broadest sense.[90]

Judge Sotomayor vehemently disagreed with the majority's reasoning in her dissent stating, "the majority seriously misconceive[d] the legal import of the *ne exeat* clause and, in so doing, undermine[d] the Convention's goal of 'ensur[ing] the rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States.'"[91] Judge Sotomayor argued that a *ne exeat* clause is a significant decision making power that amounts to custody rights in Hong Kong because Mr. Croll had the power to require his daughter to remain in Hong Kong or, alternatively, he could have used his veto power as leverage in negotiating the selection of Christina's residence with Mrs. Croll.[92] Citing the Convention's broad goal of deterring parents from shopping for a friendlier forum for custody disputes, Sotomayor reasoned that the concept of wrongful removal clearly must encompass violations of *ne exeat* rights:

> [w]hen a parent takes a child abroad in violation of *ne exeat* rights granted to the other parent by an order from the country of habitual residence, she nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child.[93]

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88. *Id.*

89. *Id.* at 140 (emphasis omitted).

90. Croll v. Croll, 229 F.3d 133, 140 (2d Cir. 2000).

91. *Id.* at 144 (Sotomayor, J., dissenting) (third alteration in original) (quoting Hague Convention on Child Abduction, *supra* note 19, art. 1).

92. *Id.* at 145.

93. *Id.* at 147.

Sotomayor concluded that the narrow reading of the majority's opinion would allow parents to undermine the very purpose of the Convention by legitimizing the action—removal of the child—that the home country sought to prevent through a court decree by nullifying that decree's *ne exeat* clause.[94]

The dissent also rejected the majority's approach to defining custody rights on several other grounds. First, Sotomayor argued that the language of the convention does not indicate some minimum number of rights that a parent must possess in order to qualify as holding rights of custody.[95] In her view, "the Convention's definition of 'rights of custody' contemplates a bundle of rights that are protected regardless of whether a parent holds one, several or all such custody rights, and whether the right or rights are held singly or jointly with the other parent."[96] Second, Sotomayor argued that Article 5 of the Convention explicitly states that rights of custody include "the right to determine the child's place of residence" indicating that the drafters of the Convention intended for this specific power to be viewed as a custody right.[97] Lastly, Sotomayor refuted the majority's argument that returning a child to a parent that only possesses a *ne exeat* right would render the Convention unworkable.[98] She reasoned that a custody order in any given case is not the sole source of a parent's rights and duties regarding his or her child.[99] Sotomayor stated,

> [t]hat the custody order in this case granted "custody, care and control" of Christina to Ms. Croll, therefore, does not direct the conclusion that Mr. Croll will have no responsibility to care for Christina upon her return to Hong Kong. I therefore reject the majority's dire forecast that ordering Christina's return, without Ms. Croll at her side, risks leaving Christina helpless in Hong Kong without parental care.[100]

She concluded that Mr. Croll possessed custody rights and thus would have ordered Christina returned to Hong Kong.[101]

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94. *Id.*
95. *Id.*
96. Croll v. Croll, 229 F.3d 133. 147 (Sotomayor, J., dissenting) (2d Cir. 2000).
97. *Id.* at 146 (internal quotation marks omitted).
98. *Id.* at 149.
99. *Id.* at 148.
100. *Id.* at 148-49 (footnote omitted).
101. *Id.* at 153-54.

B. Guiding Case Law Interpreting the Ne Exeat *Clause as Creating Rights of Custody under the Hague Convention*

The *Croll* court stated that the presented question was a case of first impression in the United States, but the court also acknowledged that several other opinions existed regarding custody rights.[102] The court concluded that no consensus view existed in the various opinions, however, and decided to brush aside other courts' reasoning for the simpler method of using American dictionaries for defining custody rights.[103] Following is a brief selection of cases that interpret the *ne exeat* clause as conferring rights of custody under the Convention.

In *David S. v. Zamira S.*, a Canadian father petitioned the Family Court of New York, Kings County, for the return of his children to Canada.[104] The couple separated after the birth of their eldest child, a son, and while the mother was still pregnant with their daughter.[105] When the couple separated the custody agreement provided that the mother "shall make [the son] available [to the father] within the Metropolitan Toronto vicinity."[106] After their second child was born, the father was granted a *ne exeat* clause, preventing the mother from removing both children from Canada until a final custody determination could be decided.[107] The mother disobeyed the court order, however, and removed the children to the United States.[108] The court held that the children were wrongfully removed under the Convention because "the [father] was exercising his rights, as to his son, and would have exercised his rights, as to his daughter, but for her removal."[109] The court ordered the children returned to Canada.[110]

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102. Croll v. Croll, 229 F.3d 133, 140, 143 (2d Cir. 2000).

103. *Id.* ("No consensus view emerges from the opinions issued by the courts of the signatory nations. Though the 'opinions of our sister signatories [are] entitled to considerable weight,' we are aware of no doctrine requiring our deference to a series of conflicting cases from foreign signatories . . . the cases worldwide are few, scattered, conflicting and sometimes conclusory and unreasoned." (alteration in original) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985))).

104. *See* David S. v. Zamira S., 574 N.Y.S.2d 429, 430 (N.Y. Fam. Ct. 1991).

105. *Id.*

106. *Id.* (first alteration in original) (internal quotation marks omitted).

107. *See id.* at 430-31.

108. *Id.* at 431.

109. *Id.* (finding that the mother "wrongfully and improperly removed the said children from this jurisdiction" even though duly served with the order containing the *ne exeat* provision).

110. *See* David S. v. Zamira S., 574 N.Y.S.2d 429, 431 (N.Y. Fam. Ct. 1991); *see also* Friedrich v. Friedrich, 78 F.3d 1060, 1065 n.4 ("[A]n order giving the non-custodial

Similarly, in *Janakakis-Kostun v. Janakakis* a father petitioned a Kentucky court for return of his daughter to Greece after his wife wrongfully removed her to the United States.[111] When the parents separated, the Greek court issued an interim *ne exeat* order to both parents, assigned temporary custody to the mother, and granted liberal access rights to the father.[112] The court opined that "[v]isitation rights alone, such as those granted to [the father] in the [Greek court] order have been held to fall within the meaning of 'custodial right.'"[113] The Kentucky court found that this custody decree "establish[ed] beyond a preponderance of the evidence that [the father] had custodial rights to [his daughter] under Greek law by virtue of judicial decision."[114]

In addition, in *C. v. C.*, an Australian father petitioned the High Court of England for the return of his child, T., under the Hague Convention.[115] In 1986, C. and C. were divorced and the deputy registrar of the family court in Sydney devised a consent order that gave the mother custody of T. and provided that neither party could remove the child from Australia without consent of the other.[116] The court found that the *ne exeat* clause amounted to custody rights under the convention and ordered that T. be returned to Australia.[117] In making its decision, the court in *C. v. C.* was influenced by the "international character" of the Hague Convention stating that "[t]he whole purpose of [the Convention was] to produce a situation in which the courts of all contracting states may be expected to interpret and apply [the Convention] in similar ways."[118] Lastly, in *B. v. B.*, a Canadian court found that an interim *ne exeat* order granted rights of custody to the court itself and ordered return of the child under the Convention based

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parent visitation rights and restricting the custodial parent from leaving the country constitutes an order granting 'custodial' rights to both parents under the Hague Convention.").

111. *See* Janakakis-Kostun v. Janakakis, 6 S.W.3d 843 (Ky. Ct. App. 1999).

112. *See id.* at 846.

113. *Id.* at 849.

114. *Id.* What also seemed to influence the Kentucky court's decision was that the mother, "with the help of her father, a former Green Beret with multiple European contacts, smuggled [the child] out of Greece" in violation of Greek court orders. *Id.* at 846. This type of conduct is what the Hague Convention seeks to prevent.

115. *See* C. v. C., [1989] 1 W.L.R. 654 (C.A.).

116. *Id.* at 654.

117. *See id.* at 663 (Neill, L.J.); *see also id.* at 656 (Butler-Sloss, L.J.) (noting that the language of Australian law also states that the father and mother are "joint guardians" of the child).

118. *Id.* at 663 (Lord Donaldson of Lymington, M.R.).

on that right alone.[119]

As can be seen from the selected cases, several judicial opinions exist regarding the effect of a *ne exeat* clause and its role in defining custody rights.[120] The Court in *Croll* could have looked to the reasoning in these cases when formulating its opinion, but the court decided to ignore the guidance that existed in other jurisdictions and instead articulated its own idea of how the United States should interpret custody rights applicable to the Convention. The court in *Villegas Duran* followed in *Croll*'s footsteps, reaffirming precedent that undermines the purpose of the Convention.

IV. THE DECISION: *VILLEGAS DURAN V. ARRIBADA BEAUMONT*

Hugo Alejandro Villegas Duran and Johana Ivette Arribada Beaumont, both Chilean citizens, were romantically involved but never married.[121] The couple's daughter "was born on April 22, 2001, in Chile and lived with both parents until they separated in 2004."[122] While separated, the child lived with her mother and her father had visitation rights.[123] Under Chilean law, the father was granted a *ne exeat* clause and the mother was not permitted to remove the child from Chile without the father's permission.[124]

The mother wanted to travel with her child to the United States, but the father refused to give his consent.[125] Therefore, the

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119. B. v. B., [1992] 3 W.L.R. 865 (C.A.).

120. *See generally* Christopher B. Whitman, Croll v. Croll*: The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 9 TUL. J. INT'L & COMP. L. 605 (2001) (offering a more in depth criticism of the *Croll* decision and examining several other cases that interpreted the term "custody rights" before *Croll* was decided).

121. Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 145 (2d Cir. 2008).

122. *Id.*

123. *Id.; see also* Brief for Petitioner-Appellant at 4-5, Villegas Duran v. Arribada Beaumont, 534 F.3d 143 (2d Cir. 2008) (No. 06-5614-cv) ("Around April, 2004 Mr. Villegas and the Respondent separated. The Respondent moved out of Mr. Villegas' parents' home to another residence three blocks away, taking [their daughter] Valentina with her. She [Respondent] later moved with Valentina to Santiago, Chile. Mr. Villegas continued to maintain a relationship with Valentina and to support her financially, including paying for Valentina's medical examinations and other expenses.").

124. *Villegas Duran*, 534 F.3d at 145; *see also* Brief for Petitioner-Appellant, *supra* note 123, at 5 ("Under Chilean law, a parent who has not been granted sole custody by a Chilean court may not remove his/her child from Chile without either the consent of the other parent or a court authorization [pursuant to Article 49 of the Chilean Civil Code].").

125. *Villegas Duran*, 534 F.3d at 145.

mother "petitioned the Eighth Minors' Court of Santiago, and the court issued an order authorizing her to travel to the United States with her daughter for three months."[126] The mother left Chile with the child on August 3, 2005 and was supposed to return by November 3, 2005.[127] The mother, however, remained in the United States with the child in violation of the Chilean court's order.[128] In addition, "[a]ccording to a certification issued by the Eighth Minors' Court of Santiago on August 28, 2006, a final determination of sole custody for the child had not yet been determined."[129]

On July 25, 2006, the Father "filed a Petition for the Return of [his] Child and an Order to Show Cause in the Southern District of New York."[130] The district court held that "it lacked jurisdiction to order the return of the child because [the father] did not [possess] rights of custody under Chilean law."[131] The question on appeal was whether the father possessed custody rights as defined under the Hague Convention.[132] If the father possessed custody rights, then United States courts would have jurisdiction to order the return of his child to Chile under the Hague Convention.[133] If the father merely possessed access rights, then United States courts would lack jurisdiction to order return of the child.[134]

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126. *Id.*

127. *Id.*

128. *Id.*; *see also* Brief for Petitioner-Appellant, *supra* note 123, at 5 n.1 ("On November 14, 2005, Respondent applied to the Eighth Minors' Court of Santiago for an extension of the authorization allowing the Child to remain in the United States, and, on January 6, 2006, the Chilean court *denied* Respondent's request for an extension.").

129. *Villegas Duran*, 534 F.3d at 145.

130. *Id.*

131. *Id.*

132. *Id.* The United States Supreme Court recently granted certiorari in a similar Hague Convention case, Abbott v. Abbott, 542 F.3d 1081, 1082 (5th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (2009), in which the Court of Appeals for the 5th Circuit refused to return a Chilean father's child, finding that the father did not possess custody rights under the Convention. The father was granted a *ne exeat* clause under Chilean law. The U.S. Supreme Court is scheduled to hear the appeal this term and should determine whether a *ne exeat* clause creates custody rights under the meaning of ICARA and the Hague Convention. Jackson's comment details the law on *ne exeat* and custody rights and argues for the Supreme Court to conclude that a ne exeat clause constitutes rights of custody under the Convention. *See generally* Jane A. Jackson, Comment, *Interpreting Ne Exeat Rights as Rights of Custody: The United States Supreme Court's Chance to Advance the Purposes of the Hague Convention on International Child Abduction*, 84 TUL. L. REV. 195 (2009).

133. *Villegas Duran*, 534 F.3d at 145.

134. *Id.*

A. Majority Opinion

In deciding this case, the majority looked only to the text of the Convention and the reasoning in *Croll* as guidance for its decision. The court first determined that, "[u]nder Chilean law, when parents live separately, the responsibility for the personal care of their child rests with the mother."[135] However, as noted, the father was granted a *ne exeat* right.[136] The majority then cited *Croll* stating that, "a *ne exeat* clause does not create rights of custody within the meaning of the Hague Convention."[137] To support this statement, the majority opinion restated the definition of custody as it was established in *Croll* and then repeated *Croll*'s reasoning regarding the Convention's intent that a parent must possess a bundle of custody rights rather than a single veto power.[138]

The majority opinion in *Villegas Duran* showed the *Croll* court too much deference, however, when it completely disregarded an affidavit from the Chilean Central Authority, and instead followed the reasoning in *Croll*. The Chilean Central Authority had issued an affidavit in support of the father, stating that a *ne exeat* clause is considered to confer rights of custody on a parent under Chilean law.[139] The Chilean Central Authority wrote:

> The "right of custody" alluded [to] by the [Hague] Convention, in [Chilean] legislation . . . is linked [to] and includes

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135. *Id.* at 147. The court seems to have determined that "personal care," which is later determined to amount to custody rights, rests with the mother based on the lay testimony of Carlos Bianchi, an attorney admitted to practice in New York, Chile, Spain and England. Even though the district court ruled that Mr. Bianchi could not be considered an expert in Chilean Family Law, the court permitted Bianchi to give extensive testimony about the interpretation of Chilean legislation. It seems that his testimony greatly influenced the court's decision. *See* Brief for Respondent-Appellee at 6-8, Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008) (No. 06-5614-cv).

136. *Villegas Duran*, 534 F.3d at 147-8; *see also id.* at 145 n.1 ("[Chilean] Law N° 16,618 - MINORS LAW, TITLE III, JUVENILE COURT SYSTEM - ORGANIZATION AND POWERS, Art. 49, provides: Should the custody of a child have not been granted by the judge to either parent or to a third party, the minor may not exit the country without the authorization of both parents, or from the one who had recognized him . . . . If such authorization cannot be granted or if, without reasonable grounds, is refused by the person from whom it is required, it may be granted by the juvenile judge having jurisdiction over the place of residence of the minor.").

137. *Villegas Duran*, 534 F.3d at 148 (quoting Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000)).

138. *Id.*

139. *Id.* at 151 (Wesley, J., dissenting).

> the following rights: the "custody," the "personal care of the minor," the "guard[,]" the "patria potestas," and the "right to authorize the minor['s] exit of the country," which are regulated in different articles contained in different laws.[140]

The father in *Villegas Duran* argued that the court failed to afford the Chilean Central Authority appropriate weight and that the court should have adopted the Central Authority's conclusion that joint custody rights exist under Chilean law as a default.[141]

The *Villegas Duran* court rejected the father's argument, opining that American courts are not bound to follow a foreign nation's interpretation of its own laws.[142] The court cited its opinion in *Karah Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, which stated that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference."[143] The court further stated, "[r]easons existed for the district court to refrain from giving the affidavit absolute deference."[144] However, the main reason the majority gives is circular; the Chilean Authority interpreted the

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140. *Id.* (alterations in original); *see also* Letter from Paula Correa Camus, Directora General, Corporación de Asistencia Judicial de la Región Metropolitana, to National Center for Missing & Exploited Children (Jan. 17, 2006), *translated in* Affidavit of Paula Strap Camus, Director General, Corporation of Judicial Assistance of the Region Metropolitana at 3, Villegas Duran v. Arribada Beaumont, 534 F.3d 142 (2d Cir. 2008) (No. 06 Civ. 5608 Ex. D) [hereinafter Chilean Central Authority Affidavit].

141. *Villegas Duran*, 534 F.3d at 148.

142. *Id.*

143. *Id.* (internal quotation marks omitted) (quoting Karah Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002)).

144. *Id.* The Second Circuit Court does not detail the specific reasons for refusing to give the affidavit absolute deference; however, the court may have been reacting to the language in Respondent's brief: "[the affidavit] was procured at [Villegas Duran's] request in January 2006, eight months before the hearing, [it] did not contain any reference to case or statutory authority other than Section 49 of the Chilean Civil Code, was not based on current facts or certified as accurate, was not sworn and, most importantly, no request was made by the district court for such an opinion pursuant to Article 15." Brief for Respondent-Appellee, *supra* note 135, at 10. The Reply Brief for Villegas Duran, however, refuted these contentions. *See* Reply Brief for Petitioner-Appellant, Villegas Duran v. Arribada Beaumont, 534 F.3d 143 (2d Cir. 2008) (No. 06-5614-cv). The Petitioner argued that the point was moot because essentially no facts had changed. *See id.* at 4. Regarding the allegation that the affidavit was not sworn, the petitioner stated that the affidavit was certified under oath. *Id.* at 3. The petitioner argued that caselaw and statutory authority were not needed because "there is no requirement in the Hague Convention that the document provided by the Central Authority . . . cite caselaw." *Id.* at 4. Lastly, the Petitioner argued that the District Court did not make its own request for an affidavit because the Chilean Central Authority had already provided the court with one. *Id.*

ne exeat clause as conferring rights of custody on a parent, but this court's decision in *Croll* explicitly vetoes the idea that a *ne exeat* clause can create rights of custody for a parent and *Croll* should be followed as precedent.[145]

The father also argued that the fact that he was exercising his visitation rights, paid for certain medical expenses and participated in decisions about registering his child for school should be enough to establish that he possessed custody rights over his daughter.[146] The court refuted this argument by reasoning that the default laws in Chile place restrictions on the father but none on the mother.[147] The court stated that the Chilean Civil Code only "provides that a parent who is not personally responsible for the care of a child will not be deprived of the right . . . to maintain a direct and regular relationship with the child."[148] The court opined that this language did not grant the father authority to make any crucial decisions for the child while the only restrictions placed on the mother were that she must allow the father his scheduled visitations and that she could not remove the child from the country without the father's consent.[149] From this reasoning, the *Villegas Duran* court concluded that the "bundle of rights" which the father claimed did not create rights of custody under the Hague Convention; they merely amounted to a right of access.[150] The court ultimately held that the child was not wrongfully removed in breach of rights of custody under the Hague Convention and therefore, the court lacked jurisdiction to return the child to Chile.[151]

B. Dissent

In his dissenting opinion, Judge Wesley stated that the majority in *Villegas Duran* overreads the *Croll* Court's decision as guidance in deciding this case.[152] Wesley did acknowledge that *Croll* "undoubtedly [held] that a *ne exeat* clause cannot convert rights of access into rights of custody," but he also argued that the decision only controls "in the context of an explicit judicial deter-

145. *See Villegas Duran*, 534 F.3d at 148.
146. *Id.* at 149.
147. *See id.*
148. *Id.* (internal quotation marks omitted).
149. *Id.*
150. *Id.*
151. Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 149 (2d Cir. 2008).
152. *Id.* at 150 (Wesley, J., dissenting).

mination of the respective rights of the parents."[153] Wesley emphasized that no judicial determination of custody exists under the facts in *Villegas Duran*.[154] Therefore, establishment of the father's possession of custody rights under the Convention "depends on whether, under Chilean law, the default rule when the unmarried parents of a [child] separate is that they share joint custody [of the child] or that the mother has sole custody."[155]

The dissenting judge's main disagreement with the majority's opinion is that virtually no deference was given to the Chilean Central Authority's interpretation of its own law. The Central Authority's affidavit asserted that the default rule under Chilean Law is for separated, unmarried parents to share joint custody of their children.[156] Emphasizing the *ne exeat* clause, the Chilean Authority concluded that the "right of custody" to which the Convention refers is shared by both parents.[157] The Chilean Authority also stated that "both parents have the guard[ianship] and custody of their daughter" and that "'the decisions of major importance' must be adopted by both parents" under Chilean law.[158] The dissent argued that not affording the Chilean Central Authority's interpretation of its own laws "considerable deference" runs counter to established precedent in the circuit courts overall and goes against the Convention's purpose in establishing a Central Authority.[159] Wesley concluded that he would remand the case for further proceedings, affording some deference to the Chilean interpretation of their own law.[160]

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153. *Id.* (emphasis omitted).

154. *Id.*

155. *Id.*

156. Chilean Central Authority Affidavit., *supra* note 140, at 4-5.

157. *Id.* at 5.

158. *Id.*

159. *Villegas Duran*, 534 F.3d at 152 (Wesley, J., dissenting) (citing Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002); Navani v. Shahani, 496 F.3d 1121, 1128 (10th Cir. 2007) (deference is particularly favored in the context of determining custody rights under the Hague Convention)); *see also* Sumitomo Shoji Am., Inc. v. Avagiliano, 457 U.S. 176, 185 (1982) (As with all international treaties, the Hague Convention on Child Abduction should be interpreted to acknowledge the intentions of the nations that are party to it.).

160. *Villegas Duran*, 534 F.3d at 152 (Wesley, J., dissenting).

V. HAGUE CONVENTION PROVISIONS AND PRIOR PRECEDENT INAPPROPRIATELY APPLIED IN *VILLEGAS DURAN* DECISION

The provisions of the Hague Convention were specifically designed to "preserve the status quo and to deter parents from crossing international boundaries" in order to secure a more favorable forum for the adjudication of custody rights.[161] The drafters of the Convention realized, however, that not all parents would be deterred from wrongfully removing their children to another nation. The objective of the Hague Convention is to provide a remedy of return when one parent removes a child in violation of the left-behind parent's custody rights.[162] The precedent established in *Croll*, and reaffirmed in *Villegas Duran*, creates a pattern of reasoning that works against the purpose of the Hague Convention when citizens in Chile and other foreign states that grant *ne exeat* clauses, seek return of their children from the United States. Further, the *Villegas Duran* court inappropriately toyed with the idea of making a full custody determination in its analysis of this Convention case.

A. Villegas Duran*'s Reasoning Undermines the Purpose of the Convention*

The *Villegas Duran* court's interpretation of what constitutes custody rights under the Hague Convention effectively makes a substantial number of Chilean paternal claims for relief moot. As discussed previously, the default law in Chile when parents live separately and no other official custody determination has been made, is for the child to live with and receive personal care from his or her mother while the father is allowed liberal visitation and holds a *ne exeat* right.[163] The *ne exeat* right allows the father to decide whether his child may leave the country and it ensures that the father will be able to maintain contact with his child.[164]

Even though the Chilean Central Authority, the Hague-mandated agency for discharging the Convention's duties in Chile,[165]

161. Blondin v. Dubois, 189 F.3d 240, 246 (2d Cir. 1999) (quoting Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993)); *see also* Kijowska v. Haines, 463 F.3d 583, 586 (7th Cir. 2006) ("The [Hague C]onvention is aimed at parties to custody battles who remove the child from the child's domicile . . . .").

162. *See* Hague Convention on Child Abduction, *supra* note 19, arts. 3, 12.

163. *Villegas Duran*, 534 F.3d at 147-48.

164. *Id.*

165. Hague Convention on Child Abduction, *supra* note 19, art. 6.

issued an affidavit stating that the *ne exeat* clause is meant to confer custody rights upon the "non-custodial" parent under Chilean law,[166] the court refused to accept the Authority's interpretation that the *ne exeat* clause conferred rights of custody on the father.[167] Instead, the court followed the definition of custody rights that was established in *Croll* by referring to a series of American dictionary definitions of the disputed term "custody rights."[168] As the dissent in *Croll* points out, the *Croll* court's means of interpreting the term "custody rights" ignores the basic international character of the Hague Convention by looking to only traditional American notions of custody rights.[169] In Convention cases the courts must "look beyond parochial definitions to the broader meaning of the Convention, and assess the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention's] object and purpose.'"[170] Judge Sotomayor pointed out in her *Croll* dissent that, by refusing to accept Chile's interpretation of the *ne exeat* right, the court "nullifies [Chile's] custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child."[171]

In *Villegas Duran*, the Central Authority's interpretation of its own law should have been given great deference. The court should have adopted Chile's interpretation of what the language of its law stands for in lieu of the United States' parochial interpretation of what Chile's law actually means. The language of the Convention stresses that a main goal is to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[172] The most appropriate authority to determine whether a parent actually possessed rights of custody in the state of habitual residence is the state of habitual residence itself. The Hague Convention is an international treaty that spans several cultures and belief systems. Legislatures of different countries use diverse language and different methods in writing their laws, which are not always easily interpreted by the United States courts.

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166. *Villegas Duran*, 534 F.3d at 148. *See generally* Chilean Central Authority Affidavit, *supra* note 140.

167. *Villegas Duran*, 534 F.3dat 148.

168. *Id.*

169. Croll v. Croll, 229 F.3d 133, 147 (2d Cir. 2000) (Sotomayor, J., dissenting).

170. *Id.* at 145 (alteration in original) (quoting Vienna Convention on the Law of Treaties art. 31.1, May 23, 1969, 1155 U.N.T.S. 331 (stating the general rule on the interpretation of treaties)).

171. *Id.* at 147.

172. Hague Convention on Child Abduction, *supra* note 19, art. 1.

The Chilean Central Authority stated that conferring a *ne exeat* right on a parent is one method of creating rights of custody under their law and the court in *Villegas Duran* should have been, but was not, receptive to that interpretation. Because of the interpretation in *Villegas Duran*, any paternal claim for relief to the United States from Chile, and any other nation that traditionally uses the *ne exeat* right as a means to create custody rights under their law, will be essentially meaningless and unenforceable in a Hague Convention proceeding, unless an official custody determination altering the default law is obtained before the child is removed. This reasoning makes the United States a friendlier forum for adjudicating custody rights, which is exactly what the Hague Convention attempted to deter.[173]

B. *The Court's Analysis in* Villegas Duran *Inches towards a Determination of Custody*

The *Villegas Duran* court went one step further than *Croll* and allowed the father to prove that he held other custody rights in addition to the *ne exeat* clause.[174] The father presented testimonial evidence that he exercised his visitation rights, paid for certain medical expenses and participated in decisions about registering his child for school.[175] The court, however, decided that these activities were not enough to establish that the father possessed rights of custody under the Convention.[176]

By allowing this inquiry, the court arguably entered the realm of custody determinations when it started considering the amount of involvement the father had in his child's "major life decisions."[177] The language of the convention and of ICARA makes it explicit that the "Convention 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."[178] The United States courts are only supposed to look at whether the left-

173. *See* Blondin v. Dubois, 189 F.3d 240, 246 (2d Cir. 1999).

174. Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 149 (2d Cir. 2008). In *Croll* the court specifically stated that "Mr. Croll bears the burden of showing that the Hong Kong custody decree affirmatively granted him shared or partial custody in some normal sense of the word." *Croll*, 229 F.3d at 141. However, the court did not go into any detail about other rights that Mr. Croll exercised beyond the *ne exeat* clause. This language suggests that they would have allowed Mr. Croll to present evidence to that effect.

175. *Villegas Duran*, 534 F.3d at 149.

176. *Id.*

177. *See id.*

178. 42 U.S.C.A. § 11601(b)(4) (West 2010).

behind parent possessed custody rights under the laws of the country of habitual residence and order the child returned if this was the case.[179] The courts are not entitled to evaluate the parent's claim under traditional American notions of what it means to have custody of a child and come to a conclusion based on those views.[180]

The *Villegas Duran* court's evaluation of the father's involvement in his daughter's life seemed to cross over the line of simply looking at Chilean law to determine vested rights and, in the process, moved away from the language and intent of the Convention. Furthermore, this inquiry seems to be setting an arbitrary standard as to what type of involvement, and how many activities a parent must participate in, in order for the court to recognize that the parent has custody rights. Under this reasoning, no particular line is drawn between what constitutes custody rights and what does not. This is an unfair, arbitrary and capricious standard that should not be permitted in any type of Convention proceeding.

C. Villegas Duran *and* Croll *Distinguished*

Even if the reasoning in *Croll* is accepted as legitimate, the facts in *Villegas Duran* were easily distinguished from *Croll* and therefore, *Croll* was not controlling precedent. In *Croll*, a custody determination had been decided by a court in Hong Kong before the mother removed her daughter from the country. The court detailed that the "custody decree issued in Hong Kong (a) confer[red] the sole 'custody, care and control' of Christina Croll on her mother, (b) confer[red] 'rights of access' on her father, and (c) bar[red] the removal of the child from Hong Kong without the consent of the other parent or the court."[181] Hence, although a *ne exeat* clause was granted to Mr. Croll, it was also explicitly determined by a Hong Kong court that Mrs. Croll maintained sole custody of their daughter.[182] These facts presented a much stronger argument that Mr. Croll merely possessed access rights that did not amount to rights of custody under the Convention.

In *Villegas Duran*, no custody agreement had ever been deter-

179. Hague Convention on Child Abduction, *supra* note 19, arts. 3, 12.

180. *See id.*

181. Croll v. Croll, 229 F.3d 133, 134 (2d Cir. 2000). However, the dissent points out that the Hong Kong court never actually used the word "sole" in regards to Mrs. Croll's custody rights. *Id.* at 145 n.1 (Sotomayor, J., dissenting).

182. *Id.* at 134 (majority opinion).

mined.[183] The court was forced to look at the default laws in Chile and determine what Chile considers rights of custody under their laws. *Croll* does not control in this situation because it is improper to compare a set of facts where a custody determination has been decided in the home country to a scenario where no custody decree was entered at all. The court did not have to dabble in interpreting Hong Kong's laws in *Croll* to the extent that the *Villegas Duran* court did in interpreting Chile's law.

Furthermore, unlike the *Villegas Duran* litigation, no affidavit or testimony was submitted in support of the father in *Croll*, while an affidavit was in fact submitted by the Chilean Central Authority in support of the father in *Villegas Duran*.[184] Therefore, the court in *Croll* may have been guessing as to what the *ne exeat* clause actually afforded the father in terms of custody rights, but the *Villegas Duran* court did not have to engage in such a speculative process about the rights of the left-behind parent. Since the *Villegas Duran* court received a statement from the Chilean Authority itself, the court should have distinguished the definition of custody and the reasoning used in *Croll*, and given the affidavit appropriate deference. The court's receipt of this statement was a significant deviation from the fact pattern in *Croll* and therefore, *Croll* was not controlling.

The *Villegas Duran* Court ultimately used *Croll* as the sole controlling precedent for the presented question. This was in error because the situation presented in *Villegas Duran* was very different from that presented in *Croll*. The reasoning in *Croll* could have been looked to as guidance, but it did not control. The child in *Villegas Duran* should have been returned to Chile.

VI. PUBLIC POLICY IMPLICATIONS OF THE *VILLEGAS DURAN* DECISION

A. *A Possible Unspoken Policy Reason Behind the* Villegas Duran *Decision*

At first glance *Villegas Duran v. Arribada Beaumont* seemed like a straightforward case. Villegas Duran filed an affidavit from the Chilean Central Authority, which clearly stated that he was considered to possess custody rights under Chilean law.[185] The

183. Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 145 (2d Cir. 2008).

184. *Id.* at 148. *See generally Croll*, 229 F. 3d 133.

185. *Villegas Duran*, 534 F.3d at 148. *See generally* Chilean Central Authority Affidavit, *supra* note 140.

court refused to grant this interpretation deference, however, stating that:

> [t]he issue of whether the Central Authority's affidavit constitutes an authoritative interpretation for the purposes of the Hague Convention is inconclusive for a number of reasons, including the fact that the Chilean Authority may not have had all information on this case available to it at the time that it made its assessment.[186]

The court went on to reason that "even if [the affidavit] is authoritative, the district court was not bound to follow it."[187]

It is unclear why the Second Circuit Court did not give the Chilean Central Authority's interpretation greater deference. Article 15 of the Convention suggests that one means of establishing the meaning of the law in the state of habitual residence is to request a determination from the authority in the child's place of habitual residence as to whether the child was wrongfully removed or retained.[188] Similarly, the official report of the Hague Convention suggests that, when one country is interpreting the law of another, the law in the child's habitual place of residence should be viewed in the "widest possible sense."[189]

Unspoken policy reasons could be behind the court's unwillingness to give deference to Chile's Central Authority. For instance, the *Villegas Duran* court could have been reacting to some of the recently publicized cases in which Hague signatories failed to meet their own reciprocal obligations under the Hague Convention. In the *Goldman* case, for example, Brazil failed to meet its reciprocal obligations because it involved a protracted litigation that denied a left-behind U.S. father the right to prompt return of his son.[190] Instead of finding a resolution to the problem

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186. *Villegas Duran*, 534 F.3d at 148. Although the Respondent's Brief describes some faults with the Chilean Central Authority's affidavit, most of the faults are purely procedural and administrative. The Petitioner's Reply Brief refutes the errors asserted by the Respondent in a compelling way and it also appears that the court could have easily requested another interpretation from the Chilean Central Authority that would have resolved the dispute about the affidavit's authority. In sum, the Respondent's alleged grievances with the Chilean affidavit do not appear to be problematic enough to cause the court to completely ignore its content and refuse deference. *See supra* text accompanying note 144.

187. *Villegas Duran*, 534 F.3d at 148.

188. Hague Convention on Child Abduction, *supra* note 19, art. 15.

189. Perez-Vera, *supra* note 15, at 446.

190. Wood, *supra* note 1. In another example, a U.S. father was jailed in Japan when he traveled there in an effort to re-claim his children after his ex-wife abducted them to her native country. Although Japan is not a member of the Convention, this has been another recently publicized case in the U.S. *See* Michael Inbar, *U.S. Dad*

in the intended six-week period, the Brazilian court allowed the litigation to drag on for five years.[191] According to the U.S. Department of State Compliance Report for The Hague Convention, as of September 30, 2007, there were forty-nine such applications for return of U.S. children that had remained open and active for at least eighteen months after the U.S. parent filed with the relevant foreign Central Authority.[192]

In addition, the same compliance report identified ten signatory nations that were either not compliant or that demonstrated patterns of noncompliance in resolving Convention cases.[193] Chile was labeled as a country demonstrating patterns of noncompliance.[194] Similarly, findings from a survey of ninety-seven left-behind U.S. parents demonstrate that implementation and operation of the Hague Convention vary greatly across signatory nations, reflecting a lack of uniformity in enforcement of the Convention provisions that goes beyond merely procedural or administrative application.[195] One of the underlying premises of Hague compliance and enforcement is the doctrine of comity, meaning that nations should respect each other's laws, customs and traditions in interpretation of their rights and obligations under the Convention. An influencing factor in the *Villegas Duran* decision is what appears to be a breakdown in that important bulwark of Hague enforcement.[196] In layman's terms, if other nations refuse

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Jailed in Japan in Child Custody Battle, TODAY, Sept. 30, 2009, http://www.msnbc.msn.com/id/33086856/ns/today-parenting_and_family.

191. Wood, *supra* note 1. Petitions under ICARA and the Convention are meant to be expedited proceedings. Convention applications are supposed to be resolved within six weeks of filing the application. Hague Convention on Child Abduction, *supra* note 19, art. 11.

192. COMPLIANCE REPORT, *supra* note 12, at 26.

193. *Id.* at 7.

194. *Id.*

195. Janet Chiancone, Linda Girdner & Patricia Hoff, *Issues in Resolving Cases of International Child Abduction by Parents*, JUV. JUST. BULL. (Off. Juv. Just. & Delinq. Prevention, D.C.), Dec. 2001, at 3-10, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf.

196. It is widely understood by experts in the field that the Hague Convention provisions are not being enforced uniformly and, although the treaty has provided a remedy to some left-behind parents as well as deterred some from abducting their children, international child abduction is still a huge problem and much more needs to be done. These articles were published as part of a symposium held at the University of Miami School of Law in February 2008. They focus mainly on using mediation as a remedy to the issue of noncompliance by signatory nations, but also discuss other ways in which countries of the Western Hemisphere could work together more closely to achieve the overall goals of the Convention. *See generally* Timothy L. Arcaro, *Symposium Article: Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child*

to comply, then neither should we.

B. Decision Contradicts Expert Suggestions for Minimizing Abduction of U.S. Children

In light of the recent decision in the Sean Goldman case, many experts have stepped forward with suggestions for decreasing the number of children that are abducted from the United States each year. For example, in an article describing the *Goldman* case one U.S. lawyer, experienced in this field, stated:

> One reason "international child abductions are on the rise is that it is fairly easy to accomplish in the United States. . . . In the United States, one parent can leave the country with a child without the consent of the other parent. . . . While exit controls would not have prevented the Brazilian abduction case [of Sean Goldman] as the mother tricked the father into believing she was going back to Brazil for a short vacation, exit controls would be very effective in preventing many other cases."[197]

The article goes on to list several precautions that a parent can take in order to make it less likely that his or her children are abducted across international lines.[198] Some of these suggestions include: asking the State department to flag any attempt to use the child's passport; registering with the Children's Passport Issuance Alert Program to alert them if the other parent applies for a the child's passport; contacting the federal authorities and airlines to detain an abducting parent before leaving the country; and, as part of a divorce agreement in a bi-national marriage, requiring either parent to post a significant bond before taking the child with them on any international travel.[199] These suggestions have been in circulation for a number of years and actually mirror suggestions printed in a U.S. Department of Justice publication in 2001.[200]

The above-mentioned precautions are clearly attempting to

Abduction, 40 U. MIAMI INTER-AM. L. REV. 109 (2008); Jennifer Zawid, *Symposium Article: Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1 (2008).

197. Wood, *supra* note 1 (alteration in original) (quoting Chris Schmidt of the U.S. law firm Bryan Cave LLP).

198. Wood, *supra* note 1.

199. Wood, *supra* note 1.

200. *See* Chiancone, Girdner & Hoff, *supra* note 195, at 12-14; *see also* COMPLIANCE REPORT, *supra* note 12 (offering the same suggestions for prevention).

accomplish the same goal as the *ne exeat* clause that is conferred on parents in Chile and other signatory nations.[201] If several signatory nations, including the United States, are so concerned with establishing precautions that give both parents power to ensure that their children are not taken away from them, then why is this *ne exeat* like right not recognized as custodial in some Convention cases? By conferring a *ne exeat* clause the law seems to intend for both parents to have some decision making power in the child's life. For instance, if a parent is able to veto an international relocation, that parent not only prevents a wrongful removal, but also ensures that the child will remain in his or her country of habitual residence and will learn the customs, culture, traditions and language of that country.[202]

The concern shown for this issue in many signatory nations, including the United States, is contradictory to the U.S. courts' treatment of the importance of the *ne exeat* clause. It is contradictory for nations to be so adamant about giving both parents control over whether their children are allowed to leave the country, but refusing to return these children when this conferred right is blatantly violated. The decision in *Villegas Duran* seems to act against what the *ne exeat* clause is supposed to accomplish even in our own nation's opinion.

VII. CONCLUSION

The dissent's concluding paragraph in *Villegas Duran v. Arribada Beaumont* blatantly illustrates the importance of comity and the U.S. courts' careful attention to the provisions of the Hague Convention when analyzing the complicated legal situation that many left-behind parents find themselves in:

> The bottom line here is that a child has traveled to the United States with her mother and has not returned to Chile as earlier promised. Thousands of miles and two distant and different legal systems separate the child from her father. An international accord provides the substantive and procedural mechanisms to resolve the dispute. Adher-

201. *See* Brief for Petitioner-Appellant, *supra* note 123, at 5. The mother in *Villegas Duran* was actually required to submit a $2,500 bond when she originally removed her daughter from Chile, the purpose of which was to prevent her from abducting the child. *Id.*

202. Furnes v. Reeves, 362 F.3d 702, 716 (11th Cir. 2004). The facts of *Furnes* are similar to the facts in *Villegas Duran*, but the court distinguished *Croll* and labeled the *ne exeat* clause as a substantive joint right which amounted to a right of custody. The court ordered the abducted child returned to Norway. *See id.*

> ence to its provisions and careful attention to rights given a parent under Chilean law are central to a fair and just resolution of the dispute. We would expect the same of a Chilean court if a child from the United States were taken there by her mother and failed to return. I would ask for that same careful attention here . . . .[203]

Like the father's plight in the *Goldman* case, in *Villegas Duran v. Arribada Beaumont*, a father who was active in his child's life and refused to consent to her traveling to another county because of his anxiety that she might not return, woke up one morning to find that his worst fear had come true. In a desperate attempt to get his daughter back, he relied on the only international legal remedy available to him; he applied to the United States courts for his daughter's return under the Hague Convention. Unfortunately, the United States Second Circuit Court did not honor Chile's interpretation of its own laws leaving the father helpless in his efforts. The court instead reaffirmed an American definition of custody rights and, in the process, nullified any paternal claim for relief grounded in Chile's default custody laws. This line of precedent systematically makes the Hague Convention ineffective for any country whose law is written to create custody rights through the use of a *ne exeat* clause. Furthermore, the U.S. did not hold up its end of the bargain in appropriately enforcing the provisions of the Convention.

As of the year 2004, 10,000 children had already become victims of international parental abductions from the United States alone.[204] It is hard to imagine just how many children have become victims of parental abductions on a worldwide scale. Contracting States signed the Hague Convention as a means to provide an international remedy to a devastating problem that spans different legal systems and diverse cultures. The definition of custody rights established in the *Croll v. Croll* and *Villegas Duran v. Arribada Beaumont* line of cases only hinders the goals that the Hague Convention is attempting to achieve.

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203. Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 152-53 (Wesley, J., dissenting).

204. McCue, *supra* note 13, at 85.