

10-17-2014

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### Recommended Citation

Katherine L. Olson, *Access for Access: Ensuring Access to Federal Courts for Parents Seeking to Exercise Rights of Access under the Hague Convention on the Civil Aspects of International Child Abduction*, 63 Cath. U. L. Rev. 1049 (2014).  
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# ACCESS FOR ACCESS: ENSURING ACCESS TO FEDERAL COURTS FOR PARENTS SEEKING TO EXERCISE RIGHTS OF ACCESS UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Katherine L. Olson<sup>+</sup>

Each year, thousands of children are abducted across international borders, often by one of their parents.<sup>1</sup> Of these abductions, many involve travel to or from the United States.<sup>2</sup> In 1980, the Hague Conference on Private International Law drafted the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) to discourage such abductions and provide a remedy for the non-abducting parent.<sup>3</sup> The Convention protects

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1. See Nigel V. Lowe & Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41, 43–44 (2012) (recording a total of 2,321 applications in 2008 for access or return under the Hague Convention on the Civil Aspects of International Child Abduction and reporting that 97% of the abductions are by one parent); see also *2012 Outgoing Cases*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, INT'L PARENTAL CHILD ABDUCTION 5, [http://travel.state.gov/pdf/CY2012-Outgoing\\_Openstats.pdf](http://travel.state.gov/pdf/CY2012-Outgoing_Openstats.pdf) (last visited Aug. 19, 2014) [hereinafter *2012 Outgoing Cases*] (showing 1,144 children were reported to the U.S. State Department as internationally abducted in 2012). Because the vast majority of Convention cases involve inter-family abduction, this Comment focuses on instances of abduction by one of the child's parents.

2. See Lowe & Stephens, *supra* note 1, at 44 (noting that the United States had 598 applications for return or access in 2008); see also *2012 Outgoing Cases*, *supra* note 1, at 5.

3. See ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION ¶ 16, at 429, ¶ 123, at 464 (The Permanent Bureau trans., 1982), available at <http://www.hcch.net/upload/exp128.pdf> [hereinafter PEREZ-VERA REPORT] (explaining the intent of the drafters including “to discourage potential abductors”). Although this report is not a document that was approved by the Conference that drafted the Convention, *id.* ¶ 8, at 428, the report “is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.” Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986). Scholars interpreting the Convention often cite Perez-Vera's report. See, e.g., Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 304, 327 (2002); Kathleen A. O'Connor, *What Gives You the Right?!—Ne Exeat Rights Should Constitute Rights of Custody after Furnes v. Reeves*, 24 PENN. ST. INT'L L. REV. 449, 450 n.10 (2005) (using the report to illustrate which countries signed the Convention); Melissa S. Wills, *Interpreting the*

both custody rights and access rights.<sup>4</sup> The United States is a party to the Convention and has implemented it with legislation that gives federal and state courts concurrent original jurisdiction over claims arising under the Convention.<sup>5</sup>

Despite this grant of jurisdiction, federal courts have answered the following question differently: Does the Convention, and its U.S. implementing legislation, afford a private right of action in federal courts to parents who seek to enforce their right of access in the United States? In 2006, the U.S. Court of Appeals for the Fourth Circuit held that rights afforded by the Convention could only be vindicated in the United States through the U.S. Department of State.<sup>6</sup> In 2013, the U.S. Court of Appeals for the Second Circuit held that “[section] 11603 unambiguously create[d] a federal right of action to secure the effective exercise of rights of access protected under the Hague Convention.”<sup>7</sup>

This Comment addresses the disparity created by the decisions of the Fourth and Second Circuits. It begins with a discussion of the role of treaties in U.S. domestic law focusing on the Convention and its implementing legislation, the International Child Abduction Remedies Act (ICARA).<sup>8</sup> Next, this Comment examines developments in case law concerning whether rights of access convey a private right of action and highlights policy considerations underlying the interpretation and application of the Convention. Then, it discusses the conflicting decisions of the Second and Fourth Circuits. Finally, this Comment argues that access rights should be sufficient to establish jurisdiction, in part because the Convention’s purpose and ICARA demand timely action on cases involving the international abduction of children.

#### I. A TREATY REGARDING CHILD ABDUCTIONS: THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Convention was drafted in 1980 to deter international child abduction and to protect internationally abducted children.<sup>9</sup> The U.S. implementing

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*Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 437–48 (2006).

4. Hague Convention on the Civil Aspects of International Child Abduction art. 1, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter *Hague Convention*].

5. See *infra* notes 18–21 and accompanying text.

6. *Cantor v. Cohen*, 442 F.3d 196, 200, 206 (4th Cir. 2006).

7. *Ozaltin v. Ozaltin*, 708 F.3d 355, 372 (2d Cir. 2013).

8. International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11611 (2012).

9. Hague Convention, *supra* note 4, pmbl.; see also PEREZ-VERA REPORT, *supra* note 3, ¶ 11 (establishing that the Convention’s drafters were concerned primarily with international child abduction by a parent seeking “artificial jurisdictional links on an international level, with a view to obtaining custody of a child”).

legislation, ICARA, provided federal and state courts with concurrent jurisdiction for claims arising under the Convention.<sup>10</sup> In the United States, courts have disagreed over the proper interpretation of both the Convention and ICARA.<sup>11</sup>

One particular area of difficulty in interpretation concerns access claims. In *Cantor v. Cohen*, the Fourth Circuit held that it did not have jurisdiction to hear claims arising from rights of access under the Convention and ICARA.<sup>12</sup> Seven years later, and on similar facts, the Second Circuit held to the contrary in *Ozaltin v. Ozaltin*, finding that it did have jurisdiction over a petitioner's access claims arising under the Convention and ICARA.<sup>13</sup> This circuit split is currently unresolved.

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10. 42 U.S.C. § 11603(a) (2012). This Comment focuses on federal court jurisdiction over claims arising under the Convention and ICARA. In general, there is little dispute over state court jurisdiction over these claims because domestic relations law is traditionally governed by state law. See, e.g., *Maurizio R. v. L.C.*, 135 Cal. Rptr. 3d 93, 98 (Cal. Ct. App. 2011) (finding state court jurisdiction over cases arising under the Convention pursuant to 42 U.S.C. § 11603(a)); *Turner v. Frowein*, 752 A.2d 955, 971–72 (Conn. 2000) (recognizing concurrent state and federal jurisdiction to justify using a federal court's interpretation of the Convention); *In re Klaas Harm Jesse Kamstra*, No. 12-09-00017-CV, 2010 LEXIS 1478, at \*12 (Tex. App. Mar. 2, 2010) (accord). See also Sam Foster Halabi, *The Supremacy Clause as Structural Safeguard of Federalism: State Judges and International Law in the Post-Erie Era*, 23 DUKE J. COMP. & INT'L L. 63, 115 (2012) (stating that “[i]n *Viragh v. Foldes*, a Massachusetts Family Court judge [found jurisdiction over an access claim but] determined that the Hague Abduction Convention did not entitle a non-custodial parent to assert a right of return for violation of access rights only” and also noting that the Second, Fourth, and Ninth Circuits have held that “‘rights to access’ belonged exclusively in state courts”). Additionally, some federal judges abstained from adjudicating claims arising under the Convention by invoking other state doctrines in the interest of preserving and protecting family law values. *Id.* at 118.

11. See *infra* notes 34–41 and accompanying text. In another high-profile case involving a circuit split over the interpretation of the Convention, the Supreme Court of the United States granted certiorari to hear a case involving equitable tolling under one of the exceptions to the Convention's return remedy. *Lozano v. Alvarez*, 133 S. Ct. 2851, 2851 (2013). The Second Circuit had affirmed the district court's ruling that “while an abducting parent's conduct may be taken into account when deciding whether a child is settled in his or her new environment, the one-year period set out in Article 12 is not subject to equitable tolling.” *Lozano v. Alvarez*, 697 F.3d 41, 51 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2851 (2013). However, other courts allow equitable tolling in certain situations. See *In re B. Del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009) (“[E]quitable tolling is available under the Hague Convention only where ‘the abducting parent took steps to conceal the whereabouts of the child from the parent seeking return and such concealment delayed the filing of the petition for return’”) (quoting *Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008)); *Bernal v. Gonzalez*, 923 F. Supp. 2d 907, 924 n.15 (W.D. Tex. 2012); *Edoho v. Edoho*, No. H-10-1881, 2010 WL 3257480, at \*7 (S.D. Tex. Aug. 17, 2010) (noting that petitioner may have a viable equitable tolling defense where she could show that “(1) the abducting parent concealed the child and (2) the concealment caused the petitioner's filing delay”); *Dietz v. Dietz*, 349 F. App'x 930, 933 (5th Cir. 2009) (holding that equitable tolling was appropriate where a mother was unable to locate her sons after their father abducted them from Mexico to Louisiana).

12. *Cantor v. Cohen*, 442 F.3d 196, 197 (4th Cir. 2006).

13. *Ozaltin v. Ozaltin*, 708 F.3d 355, 372 (2d Cir. 2013).

### A. *International Treaties as Domestic Law*

Any treaty to which the United States is a party is equal to federal statutes as a source of domestic law under the U.S. Constitution's Supremacy Clause.<sup>14</sup> U.S. courts "have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch."<sup>15</sup> However, most treaties are not self-executing and only apply domestically through implementing legislation.<sup>16</sup>

### B. *Implementing The Hague Convention on the Civil Aspects of International Child Abduction in the United States Through the International Child Abduction Remedies Act*

The Convention was opened for signature in 1980 with the intent of "protect[ing] children internationally from the harmful effects of their wrongful removal or retention and [] establish[ing] procedures to ensure their prompt return to the State of their habitual residence, as well as [] secur[ing] protection for rights of access."<sup>17</sup> The Convention entered into force in the

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14. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.")

Once a representative of the United States has signed a treaty on its behalf, the treaty becomes law when the President ratifies it with the approval of two-thirds of the Senate. U.S. CONST. art. II, §2, cl. 2 (giving the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"). *See also* Flores v. S. Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003) (noting that treaties are like contracts "insofar as they create legal obligations" that are "legally binding only on States that become parties to them by consenting to be bound" and that, "[u]nder general principles of treaty law, a State's *signing* of a treaty serves only to 'authenticat[e]' its text; it 'does not establish [the signatory's] consent to be bound.' A State only becomes bound by—that is, becomes a party to—a treaty when it ratifies the treaty" (alteration in the original) (citation omitted) (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 610–11 (5th ed. 1998))).

For a detailed explanation of how a treaty becomes legally binding on the international level, *see* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 94–115 (2d ed. 2007).

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 326(2) (1987).

16. *See* Medellin v. Texas, 552 U.S. 491, 506 (2008) (holding that, without implementing legislation, an international treaty cannot bind domestic law and, therefore, does not set federal precedent); *see also* Foster v. Neilson, 27 U.S. 253, 314 (1829) (holding that, in domestic courts, a treaty is "equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision," except "when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court").

17. Hague Convention, *supra* note 4, pmb1. For an overview of the application of the Convention in U.S. custody practice, *see* I JEFF ATKINSON & RICHARD NEELY, MODERN CHILD CUSTODY PRACTICE § 3A-1 (2d ed. 2010).

United States in 1988,<sup>18</sup> and Congress enacted ICARA to implement the treaty in the same year.<sup>19</sup>

To effectively implement the Convention, Congress recognized “the need for uniform international interpretation of the Convention.”<sup>20</sup> ICARA gave state courts and federal district courts “concurrent original jurisdiction of actions arising under the Convention.”<sup>21</sup> Therefore, a petitioner seeking a child’s return may file an action in state or federal district court,<sup>22</sup> which must then determine the case according to the Convention’s provisions.<sup>23</sup>

The Convention distinguishes between rights of custody and rights of access. According to 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” but, “‘rights of access’ [] include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”<sup>24</sup> Elisa Perez-Vera’s report on the Conference that adopted the Convention explains that “access rights are the natural counterpart of custody rights . . . belonging to the parent who does not have custody of the child.”<sup>25</sup> However, the report also states that while the Convention addresses access rights,<sup>26</sup> the Convention’s primary focus is to solve issues that result from a child’s removal from his or her habitual residence.<sup>27</sup>

Under Article 8 of the Convention, “[a]ny person . . . claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of

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18. *Status Table 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abductions*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Mar. 4, 2014).

19. International Child Abduction Remedies Act, Pub. L. No. 100-300, § 2, 102 Stat. 437 (1988) (codified at 42 U.S.C. §§ 11601–11611 (2012)). Congress found that “[t]he Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children,” § 11601(a)(4), and declared that “[i]t is the purpose of this Act to establish procedures for the implementation of the Convention in the United States,” § 11601(b)(1).

20. § 11601(b)(3)(B). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

21. § 11603(a).

22. § 11603(a)–(b).

23. § 11603(d).

24. Hague Convention, *supra* note 4, art. 5.

25. PEREZ-VERA REPORT, *supra* note 3, ¶ 26. While custody rights may be held by legal persons, including institutions and other bodies, access rights by their nature may only be held by individuals, ordinarily the father or mother of the child. *Id.* ¶¶ 79–80.

26. *Id.* ¶¶ 16–19 (highlighting the main objectives of the Convention and mentioning access rights in those provisions).

27. *Id.* ¶ 49. Thus, the drafters of the Convention intentionally placed greater priority on the protection of rights of custody than on rights of access. *Id.* ¶ 65.

the child.”<sup>28</sup> The Convention then requires that the Central Authority “take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.”<sup>29</sup> If voluntary return is not secured, the authorities in the Contracting States, whether judicial or administrative, must promptly initiate and carry out proceedings to return the child.<sup>30</sup>

Similarly, in a case involving the breach of access rights, the Convention directs that:

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. . . . The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.<sup>31</sup>

ICARA expressly adopts the provisions of the Convention.<sup>32</sup> Although the statute does not define custody rights, it defines rights of access as “visitation rights.”<sup>33</sup>

### C. Courts Interpret the Convention and ICARA

A violation of rights of custody gives rise to a claim in U.S. state and federal district courts under the Convention and ICARA.<sup>34</sup> However, because courts distinguish between rights of custody and rights of access, it is unclear whether a violation of rights of access gives rise to a private right of action for those

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28. Hague Convention, *supra* note 4, art. 8. The Central Authority for the purposes of the Convention in the United States is the Department of State. Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (Aug. 11, 1988).

29. Hague Convention, *supra* note 4, art. 10.

30. Hague Convention, *supra* note 4, art. 11. Under the Convention, authorities in an abducted-to state have the power to order the return of the child to the child’s state of habitual residence, but do not have the power to determine the merits of any underlying custody claims. Hague Convention, *supra* note 4, art. 19; *see also* 42 U.S.C. § 11601(b)(4) (2012) (“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.”).

31. Hague Convention, *supra* note 4, art. 21.

32. § 11601(b)(2) (“The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.”).

33. § 11602(7) (2012).

34. *See, e.g.,* Shealy v. Shealy, 295 F.3d 1117, 1121–22 (10th Cir. 2002) (holding that removal or retention of a child must be in breach of a petitioner’s custody rights to give rise to a claim and listing the elements of such a claim: “(1) the child was habitually resident in a given state at the time of the removal or retention; (2) the removal or retention was in breach of petitioner’s custody rights under the laws of that state; and (3) petitioner was exercising those rights at the time of removal or retention”).

whose rights have been violated. In 2000, the Second Circuit held in *Croll v. Croll* that rights of access, even when combined with *ne exeat* rights, do not amount to custody rights as defined by the Hague Convention and ICARA.<sup>35</sup> The court held that, because custody rights were not involved, it had no jurisdiction to hear the claim of the non-custodial father of a child who had been removed from Hong Kong to the United States by the child's custodial mother.<sup>36</sup> However, the U.S. Courts of Appeal for the Fourth and Eleventh Circuits have held that *ne exeat* rights constitute a right of custody and confer jurisdiction on federal courts to hear a claim under the Convention and ICARA.<sup>37</sup> Thus, jurisdiction over claims involving such rights would exist under this precedent because the non-custodial parent would have a right of custody and, therefore, a private right of action.<sup>38</sup> However, these two circuit court decisions did not determine whether something less than a right of custody would be sufficient to grant federal jurisdiction over a non-custodial parent's claim.

Ten years after *Croll*, the Supreme Court partially abrogated the Second Circuit's holding.<sup>39</sup> In *Abbott v. Abbott*, the Court held that (1) *ne exeat* rights constitute a custody right under Article 5(a) of the Hague Convention, (2) U.S. federal courts have jurisdiction to hear such claims, and (3) the remedy for violating the right of custody is one of return to the child's habitual place of residence.<sup>40</sup> However, although the *Abbott* Court noted that there is no return remedy provided for violations of access rights,<sup>41</sup> the Court did not determine if access rights alone constituted a right cognizable under the Convention in U.S. federal courts.

Courts are divided on the question of whether federal courts have jurisdiction to hear claims based on access rights, as opposed to claims based

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35. *Croll v. Croll*, 229 F.3d 133, 135, 143 (2d Cir. 2000). *Ne exeat* rights are the rights of the non-custodial parent to grant or deny consent before the custodial parent can remove the child from the country. *Id.* at 139–40.

36. *Id.* at 135.

37. *Furnes v. Reeves*, 362 F.3d 702, 714 (11th Cir. 2004) (holding that, under Norwegian family law, the non-custodial parent's *ne exeat* right constituted a right of custody under the Convention when the mother had removed her child from Norway to United States); *Fawcett v. McRoberts*, 326 F.3d 491, 499 (4th Cir. 2003) (holding that the right to determine residence would ordinarily be a right of custody, but, in this case, the non-custodial parent had no such right because the Scottish court had modified her rights and given the father the exclusive right to determine the child's legal residence).

38. *Furnes*, 362 F.3d at 714; *Fawcett*, 326 F.3d at 499.

39. *Abbott v. Abbott*, 560 U.S. 1, 7, 10 (2010) (abrogating the holding in *Croll*).

40. *Id.* at 8–11. The Court's holding in *Abbott* was presaged by then-Judge Sotomayor's dissent in *Croll*. See *Croll*, 229 F.3d at 150 (Sotomayor, J., dissenting) (arguing that the mother's removal was wrongful under the Convention because a *ne exeat* right is a right of custody and, thus, the father and the Hong Kong court jointly held a right of custody).

41. *Abbott*, 560 U.S. at 13 (quoting Hague Convention, *supra* note 4, art. 21).



on custody rights.<sup>42</sup> In *Cantor*, the Fourth Circuit held that rights of access afforded by the Convention could only be vindicated in the United States through the State Department, because the court lacked jurisdiction to consider claims regarding access rights under ICARA.<sup>43</sup> Ms. Cantor and Mr. Cohen lived in Israel when they were married in 1990.<sup>44</sup> They had four children before getting divorced in 1998 in an Israeli Rabbinical Court.<sup>45</sup> After the divorce decree was issued, Ms. Cantor and Mr. Cohen made several modifications to their custody arrangements.<sup>46</sup> Mr. Cohen moved to Germany and retained custody of the couple's two boys, while Ms. Cantor retained custody of the couple's two girls in Israel.<sup>47</sup> However, the girls eventually went to live with their father, who subsequently moved to the United States with all four children.<sup>48</sup> Ms. Cantor brought suit in the U.S. District Court for the District of Maryland seeking the return of, and access to, her children.<sup>49</sup> The district court "found that it lacked jurisdiction to hear Ms. Cantor's access claims and dismissed the complaint insofar as it request[ed] access to" the children, who were in Mr. Cantor's custody.<sup>50</sup> On appeal, the Fourth Circuit affirmed the lower court's decision.<sup>51</sup>

The Second Circuit, in direct (and acknowledged) disagreement with the holding in *Cantor*, held in 2013 that ICARA "unambiguously creates a federal right of action to secure the effective exercise of rights of access protected under the Hague Convention."<sup>52</sup> In *Ozaltin*, both parents and their two children were dual citizens of Turkey and the United States and all parties primarily lived in Turkey.<sup>53</sup> Following an argument, the mother took the

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42. State and federal courts both clearly have authority to hear claims arising from alleged breaches of custody rights. 42 U.S.C. § 11603(a) (2012); Hague Convention, *supra* note 4, art. 12. The return remedy for a breach of custody rights is not available for a breach of access rights. *See id.* art. 12. However, claims for access are likely to arise on facts similar to those in *Ozaltin*, where a parent asserts both custody and access claims. *See infra* note 91 and accompanying text.

43. *Cantor v. Cohen*, 442 F.3d 196, 197 (4th Cir. 2006). The State Department is the designated Central Authority for the United States. *See supra* note 28 and accompanying text.

44. *Cantor*, 442 F.3d at 197.

45. *Id.*

46. *Id.* at 197–98.

47. *Id.* One daughter was staying in Germany with her father on an "extended visit." according to one of the divorce decrees. *Id.* The decree did not give Mr. Cohen custody of this daughter; however, neither did it give a date for the child to return to Israel. *Id.*

48. *Id.* at 198. This change was apparently with Ms. Cantor's consent. *Id.* The couple later agreed that their other daughter would move to Germany to live with Mr. Cohen and her siblings. *Id.*

49. *Id.* Ms. Cantor sought a return remedy to exercise her rights of access with the children. *Id.*

50. *Id.*

51. *Id.* at 197.

52. *Ozaltin v. Ozaltin*, 708 F.3d 355, 372 (2d Cir. 2013).

53. *Id.* at 360.

children to New York City to stay with her family.<sup>54</sup> The mother alleged that she talked to the father over the phone while she was in Europe on a layover, and that he angrily told her to remain in the United States with the children.<sup>55</sup> About two weeks after the mother and children arrived in New York City, the father sought the return of the children to Turkey by submitting an application under the Hague Convention to the Turkish Ministry of Justice.<sup>56</sup> At approximately the same time, a Turkish court issued a “protective order barring the [f]ather from threatening or disturbing [the mother] and the children.”<sup>57</sup> The mother subsequently filed for divorce in Turkish court.<sup>58</sup>

The Turkish court rejected the father’s request for provisionary custody but granted him visitation for two weekends per month, if he traveled to the United States, as well as for two weeks during the summer of 2011, when he would be allowed to take the children outside of the United States.<sup>59</sup> However, the father kept the children in Turkey beyond the court-ordered deadline to return the children to their mother.<sup>60</sup> He ultimately returned physical custody of the children to their mother seventeen days later in Turkey, but refused to return the children’s passports.<sup>61</sup> The mother subsequently returned to the United States with the children and demanded that the father comply with visitation conditions that had not been imposed by the Turkish court.<sup>62</sup> The father then filed an action in the United States District Court for the Southern District of New York requesting: “(1) an order enforcing his visitation rights, pursuant to Article 21 of the Hague Convention; [and] (2) an order requiring the [m]other to return the children to Turkey, pursuant to Article 12 of the Hague Convention.”<sup>63</sup>

The district court granted interim relief requiring the mother to adhere to the Turkish court’s original visitation order for the father, barring the removal of the children from New York for the duration of the proceedings, and requiring that the children’s U.S. passports be given to the court.<sup>64</sup> The district court’s final order required “the [m]other to (1) comply with the Turkish court’s visitation order, [and] (2) return the children to Turkey” to allow the Turkish

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 360–61.

58. *Id.* at 361.

59. *Id.*

60. *Id.*

61. *Id.* The Mother had to travel to Turkey to secure their return. *Id.* She eventually obtained new passports for the children. *Ozaltin v. Ozaltin (In re S.E.O. & Y.O.)*, 837 F. Supp. 2d 536, 540 (S.D.N.Y. 2012).

62. *Ozaltin*, 708 F.3d at 362.

63. *Id.* (footnote omitted). The father also sought monetary restitution provided for by Article 26. *Id.*

64. *Id.* at 363.

court to determine the issue of custody.<sup>65</sup> On appeal, the Second Circuit affirmed the district court by holding that the court had jurisdiction over the father's access claim when it enforced the Turkish court's visitation order.<sup>66</sup>

#### D. Other Issues in Interpreting and Applying the Convention

Several policy considerations add to the complexity of interpreting and applying the Convention. One such consideration is the increasing blurriness of the line between rights of access and rights of custody<sup>67</sup> and the concomitant difficulty courts face in interpreting these interrelated rights.<sup>68</sup> Furthermore, as

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65. *Id.* at 364. The court also ordered that the mother reimburse the father for court fees and other necessary expenses related to his case. *Id.*

66. *Id.* at 369–72. The court vacated the district court's costs award on the basis of "the [m]other's reasonable basis for thinking that she could remove the children," *id.* at 376, and remanded to determine a more appropriate amount. *Id.* at 378.

Note that the Convention and ICARA are not intended to address the underlying merits of disputes, but merely to provide a deterrent to and remedy for their breach. *See supra* note 30. Thus, in *Ozaltin*, the court was exercising jurisdiction over the father's access claim but not addressing the merits of the underlying dispute when it ordered the mother to abide by the Turkish court's visitation order. *See Ozaltin*, 708 F.3d at 369–70 (declining to comment on the substance of the parent's custody battle).

67. *See, e.g.*, Marilyn Freeman, *Rights of Custody and Access Under the Hague Child Abduction Convention—“A Questionable Result?”*, 31 CAL. W. INT'L L.J. 39, 46 (2000) (arguing that the line between custody and access has blurred in the absence of concrete provisions to protect and enforce access rights); Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 409–11 (2002) (noting that courts often interpret "custody" broadly to protect rights of access because the "Convention appears to do little to facilitate enforcement of access" and arguing that access should be treated as a right of the child as well as of the parent); Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L L.J. 308, 312 (1997) (arguing that the Convention's relaxed treatment of access rights requires courts to resolve cases involving such issues through provisions relating to custody rights, thereby confusing the two, in order to preserve the purpose of the Convention, and that the Convention should be amended so that courts must adhere to access orders dictated by a child's legal resident state); Marguerite C. Walter, Note, *Toward the Recognition and Enforcement of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U. L. REV. 2381, 2382 (2004) (arguing that "the Convention's goal of preventing and redressing abduction will not be fully realized until there is a means of enforcing transnational parent-child contact" and suggesting a protocol to protect rights of contact, including rights of access and visitation).

68. *See e.g.*, *Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000) (holding that access rights, coupled with *ne exeat* rights, do not constitute a right of custody under the Convention); *see supra* notes 35–37 and accompanying text. Many legal scholars were concerned at the result. *See also* Deborah M. Huynh, Note, *Croll v. Croll: Can Rights of Access Ever Merit a Remedy of Return Under the Hague Abduction Convention?*, 26 N.C. J. INT'L L. & COM. REG. 529, 531 (2001) (arguing that "the Second Circuit's decision [in *Croll*] is inconsistent with the object and purpose of the Hague Convention as well as the relevant U.S. and foreign case law"); 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, 623 (2001) (arguing that the court's holding in *Croll* was "inconsistent with both U.S. case law and decisions by courts of other signatory nations of the Hague Convention" (footnote

in *Ozaltin*, these cases are often rapidly evolving, with proceedings in United States and foreign courts simultaneously.<sup>69</sup>

Jurisdiction to hear access claims can be a critical factor in granting or denying a parent relief for the alleged violation of those rights, as evidenced in *Cantor*.<sup>70</sup> This relief or denial can in turn impact the ability of the non-removing parent to have a meaningful relationship with their child.<sup>71</sup>

### III. COURTS' ANALYSES OF THE CONVENTION LEAD TO A CIRCUIT SPLIT

#### A. An Overview of the Courts' Analyses of the Convention

The *Cantor* court began its analysis with the plain language of the Convention because ICARA “states that: [t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention.”<sup>72</sup> The court focused its analysis on Article 21 of the Convention, which addresses rights of access: “Article 21 states that an application may be presented to the Central Authorities for securing the effective exercise of access rights. . . . Notably, Article 21 of the Convention does not provide for presentation to a judicial authority.”<sup>73</sup> The court stated that this language ran counter to Article 12, which addresses actions concerning return or wrongful removal and directly discusses the ways to bring such claims in a judicial proceeding.<sup>74</sup> Because the Convention did not confer upon Ms. Cantor the “right to initiate judicial proceedings for access claims,” the court held that

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omitted) (citing *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999); *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991)).

The Supreme Court later abrogated the holding in *Croll* in its decision in *Abbott*, finding that *ne exeat* rights confer a right of custody on the holder, based on the non-custodial parent’s ability to have a say in the child’s legal residence. *Abbott v. Abbott*, 560 U.S. 1, 11–13 (2010). Scholars have noted the controversial nature of this holding as well. See, e.g., Martha Winterbottom, *The Nightmare of International Child Abduction: Facing the Legal Labyrinth*, 5 DETROIT C. L. AT MICH. ST. U. J. INT’L L. & PRAC. 495, 512 (1996) (noting that “[t]he laws that have been enacted to protect parents [whose children have been internationally abducted] often leave the childless parent with little recourse”); Danielle L. Brewer, *The Last Rights: Controversial Ne Exeat Clause Grants Custodial Power under Abbott v. Abbott*, 62 MERCER L. REV. 663 (2010) (discussing the holdings in *Croll* and *Abbott*, including then-Judge Sotomayor’s dissent in *Croll*).

69. *Ozaltin*, 708 F.3d at 361.

70. *Cantor v. Cohen*, 442 F.3d 196, 197 (4th Cir. 2006).

71. See *Schuz*, *supra* note 67, at 409 (arguing that rights of access belong to both the child and the parent but that the Convention leaves unmarried fathers, in some countries, where a father does not have custody or access rights, without a way to prevent the mother from leaving the country).

72. *Cantor*, 442 F.3d at 199–200 (4th Cir. 2006) (alteration in the original) (quoting 42 U.S.C. § 11601(b)(4) (2012)) (internal quotation marks omitted).

73. *Id.* at 200.

74. *Id.*

“the federal courts are not authorized to exercise jurisdiction over [her] access claims” under ICARA or the Convention.<sup>75</sup>

Other federal courts have also held that they did not have subject matter jurisdiction over claims alleging a breach of access rights.<sup>76</sup> The *Cantor* court cited several district court cases to support its holding that federal courts have no jurisdiction to resolve access claims.<sup>77</sup> The *Cantor* court also cited the State Department’s Legal Analysis of the Convention (State Department’s Analysis),<sup>78</sup> which states that access rights are “protected by the Convention, but to a lesser extent than custody rights” and that “the remedies for breach of access rights are those enumerated in Article 21.”<sup>79</sup> Finally, the *Cantor* court looked to the Senate debate immediately preceding passage of ICARA and noted that the legislative history does not mention any rights other than those specifically listed in the Convention.<sup>80</sup> Because there are no such separate rights, the court reasoned that the language of Article 21 of the Convention must govern, and, therefore, the court did not have jurisdiction over Ms. Cantor’s access claim.<sup>81</sup>

In his dissent in *Cantor*, Judge Traxler argued that the court should have started its analysis with ICARA, the plain language of which “affords aggrieved parents a judicial forum for resolving claims that involve either

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75. *Id.*

76. *Adams ex. rel. Naik v. Naik*, 363 F. Supp. 2d 1025, 1030 (N.D. Ill. 2005) (holding that because Article 12 does not explicitly give courts the power to grant rights of access, the court had no jurisdiction to grant access to a child where petitioner had not been granted such rights before); *Wiggill v. Janicki*, 262 F. Supp. 2d 687, 690 (S.D.W. Va. 2003) (holding that although federal courts have jurisdiction over wrongful removal cases under ICARA and the Convention, jurisdiction over access rights and breaches of those rights was limited to state courts); *Teijeiro Fernandez v. Yeager*, 121 F. Supp. 2d 1118, 1125 (W.D. Mich. 2000) (holding that because there was no specific remedy for access claims, access issues should be left to state courts); *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860–61 (E.D. Pa. 1998) (stating that “the plain language of the Convention does not provide federal courts with jurisdiction over access rights”).

77. *Cantor*, 442 F.3d at 201 (citing *Adams ex. rel. Naik v. Naik*, 363 F. Supp. 2d at 1030; *Wiggill*, 262 F. Supp. 2d at 689; *Yi Ly v. Heu*, 296 F. Supp. 2d 1009, 1011 (D. Minn. 2003); *Teijeiro Fernandez*, 121 F. Supp. 2d at 1125; *Bromley*, 30 F. Supp. 2d at 860).

78. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,494 (Mar. 26, 1986). The State Department’s Legal Analysis is intended to help parents, judges, and lawyers—as well as local, state, and federal authorities—understand, use, and implement the Convention. *Id.*

79. *Cantor*, 442 F.3d at 201–02 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,513).

80. *Id.* at 202–04 (citing 134 CONG. REC. 6482–84 (1988) (statements of Sen. Dixon, Sen. Hatch, and Sen. Simon)).

81. *Id.* at 204–05. The court noted that both ICARA and the Convention lack affirmative defenses to access claims, but provide several defenses for custody claims. *Id.* From this absence, the court reasoned that federal courts were not intended to have jurisdiction over access rights violations. *Id.*

custody rights or access rights.”<sup>82</sup> Traxler noted that the Convention is not self-executing, and thus is only given effect in U.S. courts by the implementing legislation.<sup>83</sup> Because of this, he wrote, “the primary focus for purposes of jurisdiction [must] be on the statutory language” of ICARA, through which “Congress gave the Convention domestic legal effect,” rather than on the language of the Convention itself.<sup>84</sup> Traxler found further support for his position in ICARA’s “creation of separate proof requirements for custody rights and access rights ‘in an action brought under subsection (b) of [the Judicial remedies] section.’”<sup>85</sup>

In *Ozaltin*, the mother’s argument was similar to the court’s holding and rationale in *Cantor*.<sup>86</sup> She argued that the federal court did not have jurisdiction over the father’s access claims and that rights of access may only be enforced in state court or through the State Department as the designated Central Authority.<sup>87</sup> The court, however, held that “[t]he statutory basis for a federal right of action to enforce access rights under the Hague Convention could hardly be clearer.”<sup>88</sup> Specifically, the court stated that ICARA

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82. *Id.* at 208 (Traxler, J., dissenting). Judge Traxler argued that ICARA’s judicial remedies provision gives federal courts concurrent jurisdiction over claims regarding rights under the Convention, which includes both custody and access rights. *Id.* (Traxler, J., dissenting) (citing 42 U.S.C.A. § 11601(b)(4) (West 2005)). Additionally, Judge Traxler wrote: “even assuming for analytical purposes that the Hague Convention itself does not afford the non-custodial parent a judicial forum to enforce his rights to access, Congress nevertheless has done so.” *Id.* at 210 (Traxler, J., dissenting).

Judge Traxler also noted that ICARA does not distinguish between state and federal courts with respect to the appropriate “judicial forum to ensure the exercise of access rights.” *Id.* at 211–12. Noting that the inquiry is a limited one, he argues that jurisdiction over such claims “does not require federal courts to plumb the depths of family law” and serves the Convention’s purpose of rapidly restoring the status quo. *Id.* at 212–13. *See also supra* note 10 and accompanying text (discussing issues of state and federal jurisdiction under the Convention and ICARA).

83. *Id.* at 210 (Traxler, J., dissenting) (quoting *Auguste v. Ridge*, 395 F.3d 123, 132 n.7 (3d Cir. 2005)).

84. *Id.* (Traxler, J., dissenting) (quoting *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980)).

85. *Id.* at 211 (Traxler, J., dissenting) (alteration in original) (quoting 42 U.S.C.A. § 11603(e)(1)). In response to Cohen’s argument that the purpose of ICARA, as described in its preamble, limits courts to the remedies set forth in the Convention, Judge Traxler argued that “[t]he language in ICARA’s Judicial remedies section is unambiguous and cannot be altered by the general policy pronouncements in the preamble. Furthermore, the language of the preamble in any case does not preclude a judicial remedy.” *Id.* at 211. This refusal to limit the remedies is in keeping with the object and purpose of the treaty, which provides considerable flexibility to each Contracting State for compliance. PEREZ-VERA REPORT, *supra* note 3, ¶ 88 (“It is for each Central Authority to choose one or the other options [to discharge its obligations under the Convention], while working within the context of its own internal law and within the spirit of the general duty of co-operation imposed upon it.”); *see also id.* ¶¶ 101, 104, 134, 138.

86. *Ozaltin v. Ozaltin*, 708 F.3d 355, 371 (2d Cir. 2013).

87. *Id.*

88. *Id.* at 372.

“straightforwardly establish[es] that a petitioner may ‘initiate judicial proceedings under the Convention . . . for organizing or securing the effective exercise of rights of access to a child,’ and that ‘United States district courts shall have concurrent original jurisdiction’ over such actions.”<sup>89</sup> Moreover, the court pointed out, ICARA also establishes the burden of proof in access cases, from which it follows that an action to exercise access rights falls under the Convention’s purview.<sup>90</sup>

The *Ozaltin* court also attacked the rationale of the Fourth Circuit’s decision in *Cantor*, arguing that the *Cantor* court was incorrect when it “interpreted Article 21 as stating that access rights can *only* be vindicated by applying to the State Department.”<sup>91</sup> According to the *Ozaltin* court, Article 21 should be interpreted as allowing access rights to be secured by application to the State Department, but the court emphasized that the State Department was not the *only* way to secure access rights.<sup>92</sup> Moreover, Article 29 of the Convention allows a person claiming breach of a custody or access right to seek a remedy directly from the judicial authorities of a Contracting State to vindicate those rights.<sup>93</sup> The court also found support for this interpretation in the State Department’s Analysis, which states that petitioning the Central Authority “is a nonexclusive remedy.”<sup>94</sup>

Although the courts in *Ozaltin* and *Cantor* reach nearly opposite conclusions, the opinions have much in common. Both follow the State Department’s guidance and agree that custody and access rights are to be treated differently.<sup>95</sup> However, this difference is somewhat elided in *Ozaltin* because the court found that it had jurisdiction over the father’s access claim within the greater context of his custody claim.<sup>96</sup>

The district court’s decision in *Ozaltin*, notably, hinged in part on the father’s simultaneous allegation that his rights of custody had been breached and his pursuit of return remedy under Article 12:

In neither case [cited by the mother to show lack of jurisdiction to enforce the father’s access rights], however, was the petitioning

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89. *Id.* (internal citations omitted) (quoting 42 U.S.C. §§ 11603(a)–(b) (2012)).

90. *Id.* (citing § 11603(e)(1)(B)).

91. *Id.* at 373.

92. *Id.* (“Article 21, however, provides that efforts to secure rights of access ‘may’ be initiated through an application to a country’s Central Authority, not that they ‘may *only*’ be pursued in this way.” (emphasis in original)).

93. *Id.* (quoting Hague Convention, *supra* note 4, art. 29).

94. *Id.* (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986)) (internal quotation marks omitted).

95. *Cantor v. Cohen*, 442 F.3d 196, 200 (4th Cir. 2006); *Ozaltin*, 708 F.3d at 360, 372–73 (detailing the different remedies for each right according to the Convention).

96. *Ozaltin*, 708 F.3d at 363, 370, 371 n.24 (quoting *Ozaltin v. Ozaltin (In re S.E.O. & Y.O.)*, 837 F. Supp. 2d 536, 540 (S.D.N.Y. 2012)) (noting that the district court had ordered that the mother allow the father visitation, as granted by the Turkish court, during the pendency of the action).

parent alleging wrongful removal of a child under Article 12 and seeking, *as ancillary relief, rights of access as ordered by a court in the country of habitual residence*. . . . [T]his [c]ourt finds that it has jurisdiction to enforce Petitioner's rights of access to the Children, and orders Respondent to comply with the visitation rights set forth by the Turkish Court's May 13, 2011, Order, so long as the Children remain in the United States.<sup>97</sup>

On appeal, however, the Second Circuit painted with a much broader brush, holding that ICARA provided a statutory basis for a petitioner to use judicial proceedings, under the Convention, to seek an order establishing or enforcing access rights and, moreover, that concurrent jurisdiction exists for such action in the U.S. district courts.<sup>98</sup>

The elision of the differences between custody and access rights in a case like *Ozaltin*, where the petitioner asserts both, further muddies the waters on the issue of whether or not rights of access give rise to a private right of action in U.S. courts.<sup>99</sup> The *Ozaltin* court held that it had jurisdiction over the father's custody claim because he had rights of custody under the Convention.<sup>100</sup> Further, the district court suggested that it only had jurisdiction to hear the father's access claim because the court had jurisdiction over his claim that his rights of custody had been breached.<sup>101</sup> On these facts, the Second Circuit arguably overstepped its bounds when it held that a parent has a right of action in federal court for breach of rights of access.<sup>102</sup>

Significantly, the courts in both cases used very similar analytical processes, focusing on the language of the Convention and ICARA—though to varying degrees—as well as the State Department's Analysis and other courts' treatment of the issue.<sup>103</sup> Highlighting that ICARA specifically (and only) empowers courts to hear cases arising out of rights granted by the Convention, the court in *Cantor* focused its analysis on a narrow reading of Article 21 of the Convention.<sup>104</sup> Working from the same sources, the *Ozaltin* court gave more weight to ICARA and read the Convention broadly, applying both

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97. *Ozaltin*, 873 F. Supp. 2d at 545–46 (emphasis added).

98. *Ozaltin*, 708 F.3d at 372 (quoting 42 U.S.C. §§ 11603(a)–(b) (2012)).

99. *Id.* at 363 (quoting *Ozaltin*, 873 F. Supp. 2d at 540) (discussing the district court's order that the mother comply with the visitation ordered by the Turkish court during pendency of the action over both access and custody claims). Note that, unlike in *Cantor*, there was an allegation of wrongful removal or retention, which triggered Article 12. Hague Convention, *supra* note 4, art. 12.

100. *Ozaltin*, 708 F.3d at 364, 371 n.24, 371–72.

101. *Ozaltin*, 873 F. Supp. 2d at 545.

102. *Ozaltin*, 708 F.3d at 372.

103. *See id.* at 371–73; *see also* *Cantor v. Cohen*, 442 F.3d 196, 199–204 (4th Cir. 2006).

104. *Cantor*, 442 F.3d at 199–201, 206. Although the primary basis of the Court's holding was Article 21, it also found support for its holding in other sources. *See supra* notes 76–81 and accompanying text.



Article 29 and Article 21, and construing the latter Article more broadly than the Fourth Circuit.<sup>105</sup>

While both courts turned to the State Department's Analysis, they relied on different sections to support their positions.<sup>106</sup> The court in *Cantor* primarily relied on the State Department's Analysis to bolster its reliance on Article 21.<sup>107</sup> However, the language that the *Cantor* court focused on refers only to the *remedy* for breach of access rights, and not to the determination of whether or not a court has original jurisdiction to hear a claim for breach of access rights.<sup>108</sup> The court in *Ozaltin*, on the other hand, cited to the State Department's finding that petition to the Central Authority was not the only remedy for breach of rights under Articles 18, 29, and 34 of the Convention.<sup>109</sup>

Moreover, Article 29 allows the petitioner to use any judicial or administrative means to return the child or enforce custody or access rights, even if doing so bypasses the Convention entirely.<sup>110</sup> Finally, Article 34 allows for the application of any domestic law that would allow the parent to obtain the child's return or to exercise his or her access rights.<sup>111</sup>

These provisions allow an aggrieved party to have recourse to any relief or remedy available under the internal law of the State where the child is located, in addition to having recourse under the Convention. Indeed, the State Department's Analysis posits:

In at least one case it is foreseeable that a parent abroad will opt in favor of local U.S. law instead of the Convention. A noncustodial parent abroad whose visitation rights are being thwarted by the custodial parent resident in the United States could invoke the [The Uniform Child Custody Jurisdiction Act (UCCJA)] to seek enforcement of an existing foreign court order conferring visitation

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105. *Ozaltin*, 708 F.3d at 373 (quoting Hague Convention, *supra* note 4, art. 29). Article 29 provides that aggrieved parties may use means other than those established by the Convention to seek vindication of their rights. Hague Convention, *supra* note 4, art. 29.

106. *Cantor*, 442 F.3d at 201–02 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,513 (Mar. 26, 1986)); *Ozaltin*, 708 F.3d at 373 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,504).

107. *See Cantor*, 442 F.3d at 201–02 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,513).

108. *Id.* The court was correct to hold that there is no return remedy for the breach of access rights. *See Abbott v. Abbott*, 560 U.S. 1, 13 (2010) (quoting Hague Convention, *supra* note 4, art. 21); Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,513.

109. *Ozaltin*, 708 F.3d at 373 (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,504).

110. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,504. "Article 29 permits the person who claims a breach of custody or access rights . . . to bypass the Convention completely by invoking any applicable laws or procedures to secure the child's return." *Id.*

111. *Id.*

rights. Pursuant to section 23 of the UCCJA, a state court in the United States could order the custodial parent to comply with the prescribed visitation.<sup>112</sup>

In this case, U.S. law affords more relief than the Convention, because the custodial parent can be ordered to send the child to visit the parent living outside the United States; the Convention does not include a remedy like this for breach of access rights.<sup>113</sup>

Indeed, the Supreme Court has made it clear that, when a parent alleges violation of access rights, federal courts do not have recourse to the return remedy that is provided by the Convention for breaches of custody rights.<sup>114</sup> This holding, however, concerns the remedy (of return to the child's state of habitual residence), rather than whether or not a parent has a right of access, and leaves open—even implies—the possibility of federal court jurisdiction over claims arising from alleged breaches of rights of access. The Supreme

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112. *Id.* at 10,514. The Uniform Child Custody Jurisdiction Act (UCCJA) was proposed by the National Conference of Commissioners on Uniform State Laws in 1968 in an attempt to resolve disputes over child custody cases that involve international and interstate claimants with custody decrees issued by other jurisdictions. FAMILY LAW STATUTES: SELECTED UNIFORM LAWS, FEDERAL STATUTES, STATE STATUTES, AND INTERNATIONAL TREATIES 67–68 (Walter Wadlington & Raymond O'Brien eds., 4th ed. 2011). In 1997, the UCCJA was replaced by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which was adopted by all of the U.S. states, as well as the District of Columbia. *Id.* at 68. The UCCJA and the UCCJEA have similar provisions; the latter was an attempt “to bring the UCCJA into conformity with the [Parental Kidnaping Prevention Act], and . . . to resolve other jurisdictional issues.” *Id.*

However, the remedies under the UCCJA or UCCJEA would be insufficient to protect the rights of all parents, including the father in *Ozaltin*, because application of that statute requires the existence of a valid custody decree. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 303, 9 U.L.A. 690. (1999). Rights under the Convention, on the other hand, do not require a custody decree as a prerequisite for relief. See Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,505. See also *International Child Abduction Act of 1988: Hearing on H.R. 2673 and H.R. 3971 Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 100th Cong. 34 (1988) (statement of Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State) (noting that, without the Convention, the State Department would be “very limited in what it can do to help resolve the abduction to, or wrongful retention in, foreign countries in custody-related disputes of children from the United States”).

113. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,514.

114. *Abbott v. Abbott*, 560 U.S. 1, 13 (2010) (“The Convention provides no return remedy when a parent removes a child in violation of a right of access but requires contracting states ‘to promote the peaceful enjoyment of access rights.’” (quoting Hague Convention, *supra* note 4, art. 21)). See also Hague Convention, *supra* note 4, art. 12 (providing a return remedy for breach of custody rights: “[w]here a child has been wrongfully removed or retained . . . the judicial or administrative authority . . . shall order the return of the child forthwith”).

In contrast, Article 21 provides no such remedy but does provide that “[a]n application to make arrangements for organising or securing the effective exercise of rights of access may be presented . . . in the same way as an application for the return of the child.” *Id.* art. 21 (emphasis added).

Court has also noted that courts have used a variety of other remedies in cases where the rights of access of a parent have been breached.<sup>115</sup>

### B. *The Second and Fourth Circuit Analyses of the Convention*

Perhaps the most significant difference between the Second and Fourth Circuits' analyses is their interpretation of the Convention itself.<sup>116</sup> The Fourth Circuit relied almost exclusively on Article 21 of the Convention.<sup>117</sup> On the other hand, the Second Circuit looked at other parts of the Convention and gave more consideration to the Convention's objectives.<sup>118</sup>

According to its text, the Convention's objects are: "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>119</sup>

The Perez-Vera report explains that "the object of the Convention [] is to discourage potential abductors."<sup>120</sup> More specifically, the Convention seeks to ensure that the unilateral actions of one parent do not influence a future decision about the custody of the child.<sup>121</sup> As the State Department's Analysis explains, the Convention only "seeks restoration of the *factual* status quo ante"

115. *Abbott*, 560 U.S. at 13 (hypothesizing that "a court may force the custodial parent to pay the travel costs of visitation, or make other provisions for the noncustodial parent to visit his or her child" (citation omitted) (citing *Viragh v. Foldes*, 612 N.E.2d 241, 249–50 (Mass. 1993)).

116. *Ozaltin*, 708 F.3d at 373 (describing the ways the court's analysis of Article 21 differs from the Fourth Circuit's interpretation).

117. *Cantor v. Cohen*, 442 F.3d 196, 199–201 (4th Cir. 2006).

118. *Ozaltin*, 708 F.3d at 373 (quoting Hague Convention, *supra* note 4, art. 29).

119. Hague Convention, *supra* note 4, art. 1. Similarly, the preamble to the Convention states, in part:

The States signatory to the present Convention . . . [d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access . . . .

*Id.* pmb1.

120. PEREZ-VERA REPORT, *supra* note 3, ¶ 123. *See also id.* ¶ 16 (explaining that, because abductors often claim that the authorities of State to which the child has been abducted have rendered the abduction lawful, one means of deterring abduction is to ensure that the abductor's actions have no legal or practical consequences).

121. *Id.* ¶ 71. Additionally, "it can firmly be stated that the problem with which the Convention deals . . . derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial." *Id.* ¶ 15. Arguably, the risk of one party being able to change circumstances to his or her benefit unilaterally is substantially lower in access cases, because the non-custodial parent is usually the one to seek relief in a foreign court, and the custodial parent has sufficient ties to the jurisdiction, as in both *Cantor* and *Ozaltin*. *See Ozaltin*, 708 F.3d at 360–62 (noting that the parents and children were all dual citizens of Turkey and the United States); *Cantor*, 442 F.3d at 198 (noting that the custodial parent lived in Maryland and the non-custodial parent lived in Israel).

and does not require a pre-existing custody decree.<sup>122</sup> Once the child is promptly returned to his or her habitual residence, as required by the Convention, the courts of the Contracting State can adjudicate the custody dispute to award custody based on the child's best interests.<sup>123</sup>

Although focused on the interest of the child, the Convention does *not* allow courts or other authorities to make a determination of the child's best interests; this determination is left to the authorities in the child's State of habitual residence.<sup>124</sup>

### C. U.S. Courts Analyze the Object and Purpose of the Convention

Scholars have noted the importance of interpreting the Convention uniformly and in accord with the Convention's object and purpose.<sup>125</sup> Both the Second Circuit and the Fourth Circuit considered the object and purpose of the Convention in interpreting it, but the Second Circuit did so far more extensively.<sup>126</sup> Although the Convention's rule on rights of access is incomplete, it demonstrates that maintenance of regular interaction between the parents and the children remains a priority of the Contracting States, "even when custody has been entrusted to one of the parents or to a third party."<sup>127</sup> The Second Circuit's holding is therefore in keeping with the Convention's object "to ensure that rights . . . of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>128</sup>

However, in some ways the provisions regarding access rights are meant primarily to support the Convention's underlying purpose of protecting

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122. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986).

123. *Id.* at 10,505.

124. PEREZ-VERA REPORT, *supra* note 3, ¶¶ 19, 23. Notably, the Convention does not leave the responsibility of determining the best interests of a particular child in a particular case to any jurisdiction, because doing so "involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched." *Id.* ¶ 22.

125. Weiner, *supra* note 3, at 293–96 (discussing how the United States and other signatories have interpreted the Hague Convention and arguing for a purposive analysis of the Hague Convention).

126. *Ozaltin*, 708 F.3d at 367, 376 (quoting Hague Convention, *supra* note 4, art. 1) (emphasizing that one of the key purposes of the Convention is to ensure that rights of custody and access granted by one Contracting State are respected by all Contracting States); *Cantor*, 442 F.3d at 199 (quoting 42 U.S.C. § 11601(b)(4) (2012)).

127. PEREZ-VERA REPORT, *supra* note 3, ¶ 17.

128. Hague Convention, *supra* note 4, art. 1. *See also* Weiner, *supra* note 3, at 293–96 (discussing how the United States and other signatories have interpreted the Convention and arguing for a purposive analysis of the Convention).

custody rights.<sup>129</sup> Article 21 is designed as much to ease the fears of custodial parents in allowing their children visitation with the non-custodial parent as it is concerned with the exercise of visitation rights by non-custodial parents.<sup>130</sup> Specifically, according to the State Department's Analysis: "The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visitation period."<sup>131</sup> By providing this return remedy, the Convention attempts to alleviate a custodial parent's concerns about allowing a child to travel abroad "to visit the non-custodial parent."<sup>132</sup>

Thus, the Convention supports access rights in part by providing a remedy against those who abuse these rights. The Convention's provisions are designed to protect both rights of custody and of access, but such protection is necessarily interrelated.<sup>133</sup>

Although Article 21 does not explicitly refer to "the judicial or administrative authority"<sup>134</sup> to which Article 12 refers, it is reasonable, in light of the treaty's object and purpose, to conclude that Article 21 is not meant to proscribe the authority of judicial authorities to enforce rights of access.<sup>135</sup> Moreover, Article 21 states that the Central Authorities are bound to "promote the peaceful enjoyment of access rights" and to "take steps to remove, as far as possible, all obstacles to the exercise of such [access] rights."<sup>136</sup>

This Article also confers upon the Central Authorities the duty to conduct "proceedings which prove to be necessary for organizing or securing the effective exercise of rights of access."<sup>137</sup> The Convention envisions this duty to "secur[e] . . . access rights as an essential function of the Central Authorities."<sup>138</sup> As throughout the rest of the Convention, however, Article 21

129. See Letter of Submittal from George P. Shultz to Ronald Reagan 3, 4-5 (Oct. 4, 1985), reprinted in Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,496-97 (Mar. 26, 1986).

130. *Id.*

131. *Id.*

132. *Id.* at 10,497.

133. Hague Convention, *supra* note 4, art. 1.

134. Hague Convention, *supra* note 4, art. 12. Article 21 states that "[a]n application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child." *Id.* art. 21 (emphasis added).

135. This is even more the case where the Central Authority has declared that petitioning to it is a nonexclusive remedy. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986).

136. Hague Convention, *supra* note 4, art. 21.

137. PEREZ-VERA REPORT, *supra* note 3, ¶ 95. Individuals are free to apply to the Central Authorities to establish access rights or to enforce access rights already existing. *Id.* ¶ 126.

138. *Id.* Notably, however, "the Convention does not seek to regulate access rights in an exhaustive manner; this would undoubtedly go beyond the scope of the Convention's objectives." *Id.* ¶ 125. In keeping with the Convention's overall flexibility, the text "gives no examples of

“envisages the possibility of Central Authorities initiating or assisting in such proceedings [for access rights], either directly, or through intermediaries,” such as courts.<sup>139</sup> In this context, the Convention’s drafters foresaw frequent use of judicial proceedings.<sup>140</sup>

#### D. Court Analysis of ICARA

In addition to analysis of the Convention, both the Second and Fourth Circuits relied on the legislative intent of ICARA.<sup>141</sup> In the statute, Congress established its intentions in the declarations:

- (1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.
- (2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.
- (3) 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.
- (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.<sup>142</sup>

ICARA’s main purpose is to implement the Convention; the statute thus necessarily relies on the Convention and circumscribes the authority of courts in the United States, limiting their authority to determining rights under the Convention.<sup>143</sup> Notably, the Convention—and, thus, ICARA—includes provisions for the protection of rights of access, thereby giving courts in the United States the authority to hear claims relating to rights of access under the Convention.<sup>144</sup>

ICARA also explicitly states that its provisions “are in addition to and not in lieu of the provisions of the Convention,” leaving open the possibility for a broader reading of the court’s authority under ICARA and the Convention.<sup>145</sup> Particularly in conjunction with the provisions for the protection of rights of access, the text of ICARA supports federal jurisdiction over access claims.

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how Central Authorities are to organize this co-operation so as to secure the ‘innocent’ exercise of access rights, since such examples could have been interpreted restrictively.” *Id.* ¶ 128.

139. *Id.* ¶ 126.

140. *Id.* (describing the need for cooperation between Central Authorities, as well as the latitude such entities need to secure a non-custodial parent’s access rights).

141. See *Ozaltin v. Ozaltin*, 708 F.3d 355, 372 (2d Cir. 2013) (discussing the stated purpose of ICARA); *Cantor v. Cohen*, 442 F.3d 196, 202–04 (4th Cir. 2006).

142. 42 U.S.C. § 11601(b) (2012).

143. *Id.*

144. Hague Convention, *supra* note 4, art. 21.

145. § 11601(b)(2).

*E. Other Policy Considerations in Applying the Convention*

Several scholars have noted that the Convention and ICARA do not adequately protect the access rights of parents and that, consequently, the line between rights of access and rights of custody is increasingly blurred.<sup>146</sup> Courts have had difficulty in parsing this line.<sup>147</sup> Furthermore, protection of these rights is interrelated,<sup>148</sup> and the breach of both access and custody rights often arise in the same case.<sup>149</sup>

These blurred lines and the evolving nature of many of these cases (with cases often pending in U.S. and foreign courts simultaneously, as in *Ozaltin*)<sup>150</sup> may also make it difficult to determine at the outset if the parent bringing a claim has a right of access, a right of custody, or both. Under the Second Circuit's holding in *Ozaltin*, where the court found it had jurisdiction over access claims, the courts need not concern itself with the distinction between rights of access and rights of custody at the initial stages of litigation when determining jurisdiction. Conversely, under the holding in *Cantor*, a federal court would be required to make this determination at the outset.

A final policy consideration for courts faced with this issue is protection of the access rights of the non-custodial parent.<sup>151</sup> Because jurisdiction allows a court to hear a potential claim, a determination of jurisdiction can be dispositive for a parent trying to enforce access rights, as it was in *Cantor*.<sup>152</sup>

V. THE INTENT OF THE CONVENTION AND ICARA REQUIRE ACCESS TO U.S. FEDERAL COURTS FOR CLAIMS OF BREACHES OF ACCESS RIGHTS

Courts in the United States must interpret the Convention in conjunction with ICARA, which affords parents a private right of action if international child abduction has infringed upon their rights of access. The Fourth Circuit's interpretation neither followed the object and purpose of the Convention, nor adhered to the legislative intent behind ICARA.<sup>153</sup> While the Second Circuit's holding in *Ozaltin* is more in line with the object and purpose of the Convention and the implementing legislation, it is still troubling insofar as the father clearly had taken advantage of forum shopping, which the Convention

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146. See *supra* note 67 and accompanying text.

147. *Ozaltin v. Ozaltin*, 708 F.3d 355, 362 (2d Cir. 2013). See also *supra* note 68 and accompanying text.

148. *Ozaltin*, 708 F.3d at 362–64. See also *supra* notes 67–68 and accompanying text.

149. See, e.g., *Ozaltin*, 708 F.3d at 361.

150. *Ozaltin*, 708 F.3d at 361.

151. See *supra* note 71.

152. *Cantor v. Cohen*, 442 F.3d 196, 197 (4th Cir. 2006). See also *supra* notes 70–71 and accompanying text.

153. *Cantor*, 442 F.3d at 204 (finding the courts did not have jurisdiction for separate rights of access under ICARA).

expressly seeks to prevent.<sup>154</sup> Moreover, had the *Ozaltin* court ordered a return of the children to secure the Father's rights of access alone, the remedy would have gone too far.<sup>155</sup> Indeed, to make such a ruling based solely on the rights of access would breach the other parent's custody rights.

However, courts should have jurisdiction over a parent's cause of action to enforce rights of access even in the absence of an allegation of wrongful removal or retention, especially in cases where (as in *Ozaltin*) the access claims are brought in conjunction with the custody claims. Refusing to enforce visitation orders of foreign courts—or even access rights during pendency—is not in keeping with the object and purpose of the Convention.<sup>156</sup> Moreover, the Convention expressly requires expeditious procedures to remedy any breach of the rights afforded by the Convention.<sup>157</sup> Barring access to courts and providing a remedy only through petition to the State Department would not serve this goal.

In light of this emphasis on expeditious procedures, the Convention's object and purpose require broad access to remedies for the parents of abducted children, including access to courts in cases where access rights have been violated. Because ICARA provides for concurrent jurisdiction in cases brought under the Convention, federal courts must necessarily have jurisdiction over access claims under the Convention. Particularly in cases like *Ozaltin* where access claims are brought in conjunction with custody claims, it would be a *non sequitur* for courts to have jurisdiction and the ability to provide a remedy for custody claims, where the remedy is to return the child back to the State of habitual residence, but not for access claims, enforcement of which is significantly less draconian than the return remedy.

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154. *Ozaltin*, 708 F.3d at 376 (noting the court's "concern that certain actions of the [f]ather may reveal forum-shopping efforts that run contrary to the purpose of the Hague Convention, thus possibly increasing the difficulty and cost of resolving this dispute"). Such forum shopping is particularly troubling in light of the desire of the Convention's drafting Conference "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." PEREZ-VERA REPORT, *supra* note 3, ¶ 71.

155. PEREZ-VERA REPORT, *supra* note 3, ¶ 71 (detailing that the Convention's purpose is not to give Central Authorities the power to alter the arrangements of a previous custody determination).

156. See *supra* notes 136–39 and accompanying text (explaining the duties of Central Authorities to maintain access rights, including seeking enforcement from the courts).

157. Hague Convention, *supra* note 4, art. 2 ("Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose *they shall use the most expeditious procedures available.*" (emphasis added)). This provision suggests a certain amount of flexibility for each Contracting State to implement the treaty within its own territory, so long as that implementation is in keeping with the Convention's object and purpose. See *id.* Rather than focusing on particular methods for enforcing the rights protected by the treaty, the drafters attempted to ensure that any breach of those rights is immediately remedied, leaving to each Contracting State the method of implementation. See *supra* note 85 (discussing flexibility afforded by the Convention for each Contracting State to discharge its obligations).



Moreover, because the line between rights of access and rights of custody is increasingly blurred,<sup>158</sup> it is difficult to endorse the court's overly technical reasoning in *Cantor*, much less reconcile it with the Convention's object and purpose. To require courts to parse the distinctions between rights of access and rights of custody in the earliest phase of litigation would almost certainly lead to confusion and inefficiency in what is already a difficult system to navigate.<sup>159</sup> Furthermore, because these rights are interrelated<sup>160</sup> and both rights are often breached in the same case,<sup>161</sup> it would be difficult to justify excluding claims arising from alleged breaches of rights of access from the jurisdiction of federal courts. The refusal to hear access claims (and thus to allow the parent to visit their child), while a court will hear a custody claim (which can result in the return of the child to another State), is incongruous, especially when the access claim is brought in conjunction with a custody claim. Consequently, it would be difficult to justify the refusal to grant such comparatively minor relief as access rights, while granting a return remedy.

There are many other policy considerations in favor of allowing parents to vindicate rights of custody by private right of action in U.S. courts. Chief among these reasons is the very real potential that a parent and child may be denied the opportunity to have a meaningful relationship when the non-custodial parent cannot enforce their access rights in federal court; indeed, this was the result in *Cantor*.<sup>162</sup> Finally, Supreme Court jurisprudence in related cases interpreting the Convention has not foreclosed the possibility of federal jurisdiction over access claims.<sup>163</sup> Accordingly, federal courts should exert jurisdiction over claims for breach of rights of access.

## VI. CONCLUSION

Courts must proceed carefully in cases where one parent alleges that the other parent has violated his or her right of access in contravention of the Hague Convention, given how much is at stake. Holding that the only remedy in such cases is to petition the State Department, as the Fourth Circuit did, affords no meaningful relief to parents who have lost access to their children. Because of the nature of these cases, access to U.S. courts is often required for non-custodial parents to exercise their access rights. In performing the critical role of interpreting treaties and their implementing legislation, it is important for federal courts in the United States to abide by the object and purpose of each treaty the courts are called upon to interpret. Denying jurisdiction over

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158. See *supra* note 67 and accompanying text.

159. See, e.g., Lowe & Stephens, *supra* note 1, at 70–71 (noting that, in 2008, the United States took an average of 207 days to dispose of seventy-three court claims under the Convention); Winterbottom, *supra* note 68, at 511.

160. See *supra* notes 67–68 and accompanying text.

161. See, e.g., Ozaltin v. Ozaltin, 708 F.3d 355, 361 (2d Cir. 2013).

162. *Cantor v. Cohen*, 442 F.3d 196, 197 (4th Cir. 2006).

163. *Abbott v. Abbott*, 560 U.S. 1, 13–14 (2010).

access claims brought under the Convention fails to do so. Because ICARA gives concurrent jurisdiction over issues arising under the Convention, federal courts should exercise jurisdiction over rights of action for access claims.

