

A CASE IN EXPLOITATION: ELIAN GONZALEZ, SHOULD HE STAY OR SHOULD HE GO?

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By now we have all heard the issues framed. A young five-year-old boy is found clinging to a life raft after two days at sea adrift. He is a victim of a terrible accident, resulting from his mother's attempts to immigrate to the United States from Cuba. Paying thousands of dollars, a boat-load of hopeful refugees overturns in high seas while making the ill-fated, dangerous journey ninety miles across the Florida straits. The boy, his mother and her new husband are cast into the sea with all future hope for a newer, freer life lost. The mother and husband peril at sea, while the young boy's spirit for life triumphs and he somehow manages to survive for two days at sea holding unto a life ring. The boy is rescued at sea by passing fishermen. Dehydrated, but alive, one would think that Elian Gonzalez's nightmare was over. But unfortunately for him and his immediate and extended family in the United States and Cuba, the worst was yet to come. Elian was about to become a part of the highest profile, political and legal debate to rock Cuban-American

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politics in years. Without the love of his mother, he was about to become a political pawn of both governments, unleashing over forty years of resentment harbored by supporters and dissidents of the Cuban Revolution in the United States and Cuba. Elian's story was just beginning.

Immediately, Elian's family, part of the politically powerful Cuban exile community in Miami, sought for the boy to remain with them while his fate was to be determined. Elian's family, at once, filed with the Immigration and Naturalization Service (INS) to keep the boy in the United States. The resulting ruling was that only Elian's father in Cuba could speak for the boy and that he would have to be returned to Cuba by January 14, 2000.¹ The extended family in Miami then filed in state court for temporary custody to stay the return deadline until Elian's fate could be determined in a United States court. While legal posturing ensued, President Fidel Castro continued making demands, organizing rallies, and acting as liaison between the boy's father, Juan Miguel Gonzalez, and the rest of the world media, personally calling for the boy's immediate return and an end to the "kidnapping" of Elian Gonzalez. The boy's extended family in Miami continued on their track of legal maneuvering to keep the boy here in the United States.

This article will attempt to describe some of the legal issues surrounding the hotly contested legal debate of whether six year old, Elian Gonzalez should remain in the United States with his extended family or return to Cuba to live with his father. One aspect of this legal debate, that has not entirely surfaced within the courts, is the international legal authority controlling on the issue. To this point, most legal and political action has taken place at the state court level controlling the family law issues and the Federal level regarding the immigration issues. This paper will focus on the international legal aspects surrounding this case, while merely describing the other legal involvement as a backdrop.

I. HISTORY OF LEGAL PROCEEDINGS TO DATE

Upon Elian's arrival to the home of his extended family in Miami, the family filed with the INS to keep the boy in Miami, while his father remained in Cuba. This was the first of many actions to try to keep the boy in the United States. On January 5, 2000 an INS Commissioner, Doris Meissner said that an INS investigation did not find any information calling into question the father's paternal and legal rights.² Under United States law, any Cuban is eligible to apply for permanent residence upon reaching this country. Because Elian is

1. Mike Williams & Jenny Staletovich, *INS Decision Sparks Miami Protests*, Palm Beach Post, January 8, 2000 at 1A, 11A.

2. Karen DeYoung & Sue Anne Pressley, *INS Orders Boy's Return to Cuba*, Washington Post, January 6, 2000 at A01.

“too young to make legal decisions for himself,” Meissner stated, “the only question before INS was who could legally represent him in deciding whether to make that application.”³ Demonstrations and letters to the Attorney General and President of the United States ensued and the response was that the INS ruling would stand.⁴ The INS also invited the boys father to come to the United States, in which they would order a temporary visa for him to do so, to pick up Elian.⁵

Elian’s Miami relatives appealed the INS decision in federal court, where his lawyers have asked the court to issue a temporary restraining order against the INS ruling mandating Elian’s return to his father in Cuba.⁶ The Justice Department stated that it will ask the United States Court of Appeals to address the issue, calling it an emergency.⁷

On other legal fronts, the extended family filed a petition to appoint a guardian for Elian in state court in Miami, Florida. United States’ Representative Dan Burton, co-author of the Helms-Burton Act, issued a subpoena for Elian to appear on February 10th in front of a House Committee on Government Reform in Washington, both of which worked to push back the INS deadline set for Elian’s return on January 14, 2000.⁸

A. *The State Custody Proceedings*

On Friday, January 7, 2000, Elian’s extended family in Miami filed for temporary guardianship.⁹ Circuit Court Judge Rosa Rodriguez of Miami-Dade family court decided the issue and eventually did grant the temporary guardianship order. The family in Miami elated, the father in Cuba devastated, but the question remains whether or not this order really had little meaning other than a small political battle was won in the war over Elian. This section analyzes the significance of Judge Rodriguez’s ruling to award a temporary guardianship to the Miami relatives of Elian Gonzalez.

Although this case has not ripened into an actual custody dispute, it is likely to move in that direction and the Florida law on this issue is helpful in determining the ultimate question: where is Elian better off? The rule in Florida regarding a custody dispute between a parent and third parties is quite

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Pressley, *supra* note 2 at A01.

8. Associated Press, *For Elian, Another Month in the States*, The Palm Beach Post, January 8, 2000 at 1A and 8A.

9. Elaine De Valle et al., *Protest Plans Scaled Back as Legal Battles Renew Hope*, The Miami Herald, January 9, 2000 at A1.

clear. "When the custody dispute is between a natural parent and third parties, . . . the test must include consideration of the right of a natural parent to enjoy the custody, fellowship, and companionship of his offspring. This is a rule older than the common law itself."¹⁰ The case goes on to state that Florida law "clearly provides that custody should be denied to the natural parent only when such an award will, in fact, be detrimental to the welfare of the child."¹¹ This court found nothing to suggest that the children were abandoned by their father, only clear, convincing and compelling evidence showing the father is unfit or that placement of the child with the father would be detrimental to the welfare of the child would warrant such a denial.¹² Finally, without a finding such as unfitness or a detrimental effect on the child, "the right of a natural parent is paramount."¹³

In *Sparks v. Reeves*, the court stated directly, "Once the father's ability reaches adequacy, his legal right should not be overcome by the fact that the respondent's offerings may be more adequate than his, or that they may continually out-do him, at least in material matters."¹⁴ Courts have also determined what the meaning of detriment and that is "more than the normal trauma caused to a child by uprooting him from familiar surroundings such as often occurs by reason of divorce, death of a parent, or adoption. It contemplates a longer term adverse effect that transcends the normal adjustment period in such cases."¹⁵ What these rules show is that mere ability to give more material possessions to a child, or being in a more prosperous economic environment to do so, may not transcend what is best for the child. But detriment, must be determined within a longer term context. If Elian's relatives can make a longer term argument that there will be detriment to Elian if he is returned to Cuba, they might fit somewhat within this standard. The hardest standard to overcome will be the predisposition of the courts and the paramount nature of the parental rights. Based on this line of cases, state court family law is not favorable to Elian's relatives in Miami.

There is case law very clearly stating that "where a parent has proved that he or she is adequately able to care for his or her child in a manner keeping with the child's welfare, the legal right of such parent may not be overcome by the

10. *In re the Marriage of Carter Robert Matzen and Judy C. Matzen*, 600 So. 2d 487, 488 (Fla. 1st DCA 1992), citing *In re Guardianship of D.A. McW.*, 460 So. 2d 368, 370 (Fla. 1984), quoting *State ex. Rel. Sparks v. Reeves*, 97 So. 2d 18, 10 (Fla. 1957).

11. *Id.* at 488 (Fla. 1st DCA 1992), citing *In re Guardianship of D.A. McW.*, 460 So. 2d 368, 370.

12. *Id.*

13. *Id.* at 488, quoting *Daugharty v. Daugharty*, 571 So. 2d 85 (Fla. 5th DCA 1990).

14. *Reeves*, 97 So. 2d 18, at 21.

15. *Matzen*, 600 So. 2d at 488, quoting *Filter v. Bennett*, 554 So. 2d 1184 (Fla. 2d DCA 1989).

fact that another's offerings may be more copious."¹⁶ Whatever economic advantages the family in Miami has, this rule clearly states that the right of the parent may not be overcome by that fact. The *Foster v. Sharpe* court went on to conclude that:

[I]t is often true that parents may not be able to provide for their children as fully and completely as another may be able to provide. However, no parent could agree with a law which would demand that a parent must relinquish his or her right of custody to another person upon the basis of superior material advantages.¹⁷

B. *The Immigration and Naturalization Implications*

Currently, The United States-Cuba bilateral Migration Agreement controls immigration policy of Cubans fleeing to the United States.¹⁸ The Agreement provides approval of a floor of at least 20,000 Cubans for legal admission to the United States, annually.¹⁹ This number was originally contemplated as an absolute ceiling, but in 1991, this number was expanded to include human rights activists, displaced professionals, and others.²⁰

Cuba, in exchange agreed to take "effective measures to deter unsafe departure."²¹ Those picked up at sea by the United States Coast Guard were returned to and confined to Guantanamo Bay Naval Base and a United States Military base in Panama, and as of 1995, this number was approximately 32,000.²² Upon arrival to the United States, an asylee, one reaching the United States, has one year after the arrival to file an application for asylum.²³ A "credible fear" interview takes place determining whether or not the applicant has a credible fear of persecution if they are removed.²⁴ If a credible fear is

16. *Foster v. Sharpe*, 114 So. 2d 373, 374 (Fla. 3d DCA 1959), quoting *Martens v. State ex rel. Grossman*, 100 So. 2d 440 (Fla. App. 1958), *Sparks v. Reeves*, 97 So. 2d 18 (Fla. 1957), cf. *Frazier v. Frazier*, 109 Fla. 164, 147 So. 2d 464, 466 (Fla. 1933).

17. *Foster v. Sharpe*, 114 So. 2d 373, 376 (Fla. 3d DCA 1959).

18. *Latin America and The Caribbean Refugee Admission Program*, (visited January 17, 2000) <www.state.gov> (U.S. Department of State Website).

19. *Id.*

20. *Id.*

21. Matias F. Traverso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERK. J. INT'L LAW 234, 244 (1998).

22. *Id.*

23. Immigration and Naturalization Service, *Fact Sheet: U.S. Asylum and Refugee Policy*, (visited January 17, 2000) <www.ins.usdoj.gov> (U.S. Immigration and Naturalization Service Website) [hereinafter *Fact Sheet*].

24. *Id.*

determined, the alien is detained because they remain in removal proceedings until a judge can rule on their asylum claim.²⁵ In Elian's case his family has filed for an asylum claim, but the INS ruled that Juan Miguel Gonzalez has the "sole legal authority to speak on behalf of his son, regarding Elian's immigration status in the United States."²⁶

II. INTERNATIONAL LEGAL ANALYSIS

One of the most compelling aspects of the Elian Gonzalez tragedy at this point is the lack of application of international law. There is an amount of authority regulating what happens to children in situations such as these where there is a potential custody dispute, where asylum is sought on behalf of a minor or within the father's perspective an abduction has occurred. An action brought by the father in Cuba under certain applicable international law could bring more conflict and controversy to the issue, but may result in a swifter resolution. One can only speculate on the reasons Juan Miguel Gonzalez has not initiated an action under international authority or come to the United States to seek the return of his son based on the original INS ruling, or initiated a federal action through the United States legal system to seek the return of Elian. Practically speaking,

[T]he international law of the child has no single source, but must also be found in specific and general treaties, in the broad field of human rights at both universal and regional levels, in the rules of international humanitarian law, in customary international law and in the law and practice of States and international agencies such as UNICEF and UNHCR.²⁷

Even though a state, for instance the United States or Cuba, is not a signatory to a specific treaty regulating children's right or human rights for that matter does not mean the state will not be bound. It can still be bound through customary international law. Even though states may end up being a signatory to certain treaties regulating these issues, the ultimate authority is up to the individual state where someone is seeking entry. A survey of applicable international authority follows.

25. *Id.*

26. Immigration and Naturalization Service, *Statement of Commissioner Doris Meissner: INS Decision in the Elian Gonzalez Case*, (visited January 17, 2000) <www.ins.usdoj.gov> (U.S. Department of Justice Website).

27. Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors*, 3 INT'L J. OF CHILDREN'S RIGHTS 405 (1995) [hereinafter *Refugee Minors*].

A. *The United Nations and the Convention on the Rights of the Child*

One such source of international law relative to the protection of child refugees is the United Nations High Commissioner for Refugees (UNHCR) established by the General Assembly under Article 22 of the United Nations Charter.²⁸ It operates within the narrow confines of the definition of a refugee who are those “outside their own countries, with a well-founded fear of persecution and [are] unwilling to return.”²⁹ Over the years, the UNHCR has been called on to afford that protection for those outside the narrow definition.³⁰ The 1989 Convention on the Rights of the Child uses a “best interests” of the child type standard, but also looks at the rights and duties of the family and the reasons for the displacement in the first place. Article 5 states:

[S]tates are called on to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.³¹

One profound provision is found in Article 29. It states “education should not only prepare the child for responsible life in a *free society*; it should also be directed to the development of respect for human rights and fundamental freedoms . . .” This provision is strong, stating, children have a right to develop their lives in a free society with fundamental freedoms, questionable in Cuba at this time.³²

The Convention discusses “durable solutions” which:

[C]ontribute to the child’s survival and development, protect his or her right to life, provide support for parents and caregivers, maintain respect for culture and religious origins, protect the child against *all forms of exploitation*, and ensure recognition of the child’s right to a name, a nationality and an identity.³³

28. *Id.* at 407.

29. *Id.*

30. *Id.*

31. *Id.* at 410.

32. Refugee Minors, *supra* note 27, at 411.

33. *Id.* at 412.

These durable solutions would be factors that a tribunal would have to weigh in determining what shall be in the best interest of the child.

Also, of utmost importance under the convention, is the protection of the family. This is linked to the protection of the child.³⁴ The intent is to preserve family life, and the family should receive special protection from society and the state.³⁵ This argument is strong for Juan Miguel Gonzalez in Cuba, in that, it is the obligation of states to maintain and protect the family unit. Durable solutions must take into consideration all factors, with the best interest of the child paramount, but the Convention on the Rights of the Child would highlight "the questionable nature of any solution that might either seek to 'officially' remove the child from the (actual or potential) family environment . . ."³⁶ These provisions are equally as strong for an action by Elian's father in Cuba.

These rights are also attached to the Convention of Rights of the Child. Article 12, §1 states that parties should "assure to the child who is capable of forming his or her own view the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."³⁷ The difficulty of this provision is demonstrated by the current case in that Elian is six years of age, calling into question his ability to determine what his views are about where his interests are best served. This must be treated in a different way with regards to such a young child. The standard is for the child who is capable of forming their own views and this may not be likely in the case of Elian Gonzalez, due to his young age.

Article 12 also states in pertinent part:

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.³⁸

These Articles mandate an opportunity to be heard, through individual representation or that of another, but the actual weight these provisions receive is unclear in Elian's case.

34. *Id.* at 414.

35. *Id.*

36. *Id.*

37. Refugee Minors, *supra* note 27, at 415.

38. Marie-Francoise Lucker-Babel, *The Right of the Child to Express Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child*, 3 INT'L J. OF CHILDREN'S RIGHTS 391, 394 (1995) [hereinafter *Article 12*].

The right to be heard is also bestowed upon the parent. Article 9.2 states, "all interested parties shall be given an opportunity to participate in the proceedings and make their views known."³⁹ Once again this leads us to the conclusion that it should be imperative for Juan Miguel Gonzalez to be permitted to be included in the proceedings with respect to Elian. Clearly, within Article 9.2, it is a protected right for him to invoke.

Article 12.1 also addresses the issue of the capacity of the forming views. It states that the child should be capable of forming his or her own views, but does not require that the child "enjoy full development" because his or her opinion will be considered with their age and maturity in mind.⁴⁰ The standard in the Article is that we must first determine if the child is in a position to have an idea about the issue, but they do not have to understand the "full spectrum" of all the issues.⁴¹ To understand the value of the feelings of the child, there must be interaction and determination by a specialist such as a child psychologist.⁴²

The most important aspect of the provision is that the child's opinion is given freely or "without any external pressure or influence liable of damaging the formation of the child's own and original opinion."⁴³ This is all but impossible in Elian's case. With trips to Disney World, a new puppy, and enrollment in a new school, it is difficult to arrive at any decision that would be free from some level of pressure. Also, we are not privy to the conversations that Elian has with his father on the phone to determine if there is any pressure from him. There is an implied responsibility to assure that the child can arrive at such an opinion without direct or indirect pressure and that "they have not received any partial or abridged information."⁴⁴ If there is such an influence:

[T]he judge will not consider the child's opinion if he finds out that the child expresses an opinion influenced by the position of one of his or her parents, or that the circumstances under which the opinion is expressed are not favorable to free expression (stress, fear, inhibition of the child).⁴⁵

Because of situations like these, where it is next to impossible to arrive at a determination of the child's feelings without some level of influence, Article

39. *Id.*

40. *Id.* at 397.

41. Article 12, *supra* note 38, at 394.

42. *Id.* at 397.

43. *Id.* at 398.

44. *Id.*

45. *Id.*

12.1 simply requires “consideration” of the child’s opinion and not that the decision shall be what the child wishes.⁴⁶ Therefore, in relation to Elian’s case, a statement made by Elian to Senator Smith of New Hampshire upon visiting Elian, “Ayúdame, Señor Smith, por favor (Please help me Mr. Smith)” cannot be highly considered.⁴⁷ Then Smith continued by saying that “he said to me that he does not want to go back to Cuba.”⁴⁸ These statements cannot be taken to be anything other than used for their media value. Senator Smith is not an expert in child psychology, nor can there be any determination whether or not Elian was coached into making the statements. These types of statements cannot come within the context of this provision of Article 12.

Another aspect of the Convention, that is stronger in relation to the side of the relatives in Miami seeking to keep Elian in the United States, is the procedural aspect of the right to be heard. Article 12.1 is general but states, “Parties have the obligation to promote this right [to be heard] without excluding either any aspect of the child’s life or the authors, persons and institutions playing a role in his or her life.”⁴⁹ These procedural safeguards should include someone in charge of receiving the child’s opinion, deadlines respected, follow-up to continually gather the child’s opinion, and the right to appeal a decision.⁵⁰ It would seem that the relatives in Miami are pulling out legal stops to afford Elian his right to be heard, but it is unclear whether they are utilizing the necessary professionals to do so, and giving Elian the environment where he can express such views without any pressure. The one issue left open in this provision is the role of Juan Miguel Gonzalez, and this involvement is questionable at best in that he has continually stated publicly that he has no intention of coming to the United States to further involve himself in proceedings.

B. *The Hague Convention*

The original Hague Convention was held in 1980 and included rules regarding when a parent of a signatory country takes a child to another signatory state in order to avoid a custody decision.⁵¹ Although Cuba is not a

46. Article 12, *supra* note 38, at 394.

47. Elaine De Valle et al., *Protest Plans Scaled Back as Legal Battles Renew Hope*, *The Miami Herald*, January 9, 2000 at A1.

48. *Id.*

49. Lucker-Babel, *supra* note 38, at 400.

50. *Id.* at 401.

51. June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century’s End*, 15 *ARIZ. J. INT’L & COMP. L.* 791, 793-94 (1998).

signatory to the Convention as of 1996, the United States is, signing on in 1988.⁵²

The Hague is a procedurally based authority, and in Article 1(a) it's goal is to "secure the prompt return of children wrongfully removed to or retained in one Contracting State."⁵³ Article 1(b) states that another goal is to "ensure that rights of custody and of access under the law of some Contracting States are effectively respected in the other Contracting States."⁵⁴ In addition, it requires that an administrative Central Authority is established to deal with the requests coming in and going out for the use of the Convention to aid in that process.⁵⁵

One must prove that a child is wrongfully detained in order for the Convention to be invoked. Article 3 lists the factors that must be proven:

[B]reach 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 a resident immediately before the removal or retention; and at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.⁵⁶

The concept of "pre-custody" rights is used to determine the rights that arise out of the marriage and are vested in both parents.⁵⁷ These rights are abridged when "one parent wrongfully leaves the country with the child, which is the action that constitutes wrongful removal."⁵⁸ This is the situation that is stated to have occurred by Juan Miguel Gonzalez, in that, his ex-wife, Elian's mother Elisabeth Brotons, wrongfully removed him from Cuba.

The major problem in the use of invoking the Hague Convention is that Cuba appears to not be a signatory to the treaty. There were an original twenty-one countries that signed on in 1980, the United States signed on in 1988, and another twenty-four countries signed on in 1996 of which Cuba is not listed.⁵⁹ Whether Cuba has acceded or the Convention can be invoked through other principles such as customary international law, may not overcome the principle

52. *Id.* at 794.

53. *Id.*

54. *Id.*

55. *Id.*

56. Starr, *supra* note 51, at 795.

57. *Id.*

58. *Id.*

59. *Id.* at 794, quoting Hague Convention on Private International Law, Convention on the Civil Aspects of International Child Abduction, Oct. 6, 1980, 19 I.L.M. 1501 art. 4.

that a country cannot be bound by that to which it has not signed. Plainly, the "focus is on the child and the States; both States must have signed the Hague convention for a parent or custodial guardian to invoke its formal institutional structures."⁶⁰

Our inquiry does not end there. There are situations between a Hague signatory country and non-signatory country. A specific line of cases deals with cultural differences and disputes in child custody involving the Muslim culture and a non-Muslim parent. One aspect that must be considered, is that there are seven defenses to keep a child from being returned to their habitual residence. One of these defenses would be in the case of the other parent consenting to or subsequently acquiescing in the removal or retention of the child, having not brought legal action within one year's time.⁶¹ If Cuba was a signatory country, this could possibly be one defense which has been raised by the extended family in Miami seeking custody. But, since Cuba is not a signatory, these seven defenses are deemed inapplicable, thus strengthening Juan Miguel Gonzalez's position.

Currently, in non-Hague cases, not only do the defenses not apply, but the child has no representation or voice in the proceedings.⁶² The parties to the dispute in Elian's case would be his father and mother, but since his mother is now deceased, the family in Miami is filling that roll. The current trend in international law is to allow input from the child. "In the last decade, the international community has begun to recognize that children do have human and civil rights and are not merely appendages of their parents."⁶³

Now, when a non-Hague parent is involved, American judges tend to consider the country as a state under United States Federal law and invoke the Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act.⁶⁴ Invoking these two domestic federal laws is the non-Hague parent's advantage.

When courts interpret foreign country as a state it means that:

(1) the child is returned to the country and place of "habitual residence" regardless of *any* extenuating circumstances (i.e. Hague defenses) that may exist, or (2) the American court gives comity to the custody hearing in a non-Hague country and accedes to their jurisdiction.⁶⁵

60. *Id.* at 797.

61. Starr, *supra* note 51, at 808.

62. *Id.*

63. *Id.* at 795.

64. *Id.* at 808.

65. *Id.*, quoting *Hosain v. Malik*, 108 Md. App. 284 (Md. Ct. Spec. App. 1996) and *In re Marriage of Laila Adeb Sawaya*, 182 Cal. App. 3d 1018 (Ct. App. 1986).

Thus, a parent from a non-signatory country such as Cuba, would have an advantage over the Miami family in a United States federal court.

The Hague Convention must be viewed as only a procedural device to determine where the actual custody dispute should take place. Under the Hague Convention, the custody dispute should be heard in "the country and community which constituted the 'habitual residence' of the child."⁶⁶ This determination does not look at the custody dispute at all, the quality of care the child would be receiving, but creates the "status quo" of what was occurring before the child's abduction.⁶⁷ Invoking these provisions would probably mean an immediate return of Elian to his father, and any challenge would meet dismal failure in a Cuban court.

The biggest flaw in the use of this Convention is the lack of appearance of rights of the child. The best interests of the child are not taken into account, thus more favorable for Elian's father than his Miami relatives. This philosophy is in direct contradiction with the Convention on the Rights of the Child which spells out specific norms and right the child has. Without even discussing the problems of conflict of laws between international, federal, and state law, philosophies governing international authority themselves contradict one another, thus making Elian's plight even more confusing.

III. UNITED STATES DOMESTIC LEGISLATION ENACTING THE HAGUE CONVENTION

A. *The International Child Abduction Remedies Act*

The International Child Abduction Remedies Act 42 U.S.C. § 11601 (ICARA), is the domestic Act which "links" United States law to the Hague Convention.⁶⁸ "ICARA authorizes parties seeking to enforce rights under the Convention to file a petition in a court of appropriate jurisdiction in the place where the child is located."⁶⁹ State and federal courts have concurrent jurisdiction to hear a petition, but if wrongful retention occurs, it is the Parental Kidnapping Prevention Act of 1980 that is invoked.

On July 27, 1999, an action was brought in the United States District Court, Southern District of Florida in *Pesin v. Rodriguez*, under ICARA and the Hague Convention on the Civil Aspects of International Child Abduction.⁷⁰ The facts of the dispute were that a father brought the action claiming, the wife

66. Starr, *supra* note 51, at 828.

67. *Id.*

68. *Id.* at 800.

69. *Id.*

70. *Pesin v. Rodriguez*, No. 99-6962, 1999 WL 1249760, at *1 (S.D. Fla. Dec. 16, 1999).

“wrongfully retained their two children in the United States, and that the children must therefore be returned to their “habitual residence” of Venezuela.⁷¹ The wife was contending that the children’s habitual residence was the United States, that the father was not exercising custody at the time of the wrongful detention, and that the father acquiesced to the children’s residency in the United States.⁷² The court held the father had established a case of wrongful retention and that the children should return to their habitual residence in Venezuela. The court found that the habitual residence was Venezuela and the wife’s retention of the children was in violation of Venezuelan law and that the father was exercising custody at the time of the wrongful retention.⁷³ The court also found that the father did not acquiesce to the wife’s retention of the children in the United States.⁷⁴

In situations where there is a petition for return of the children in state court and another is subsequently filed in federal court, this court stated that the federal district court had jurisdiction.⁷⁵ Further, under ICARA, “a person may file a petition for the return of a child in any court authorized to exercise jurisdiction in the place where the child is located at the time the petition is filed.”⁷⁶ Only the abduction claim, not the actual custody dispute, may be decided under ICARA.⁷⁷

To show wrongful retention the petition must show the following by a preponderance of the evidence: (1) the habitual residence of the children “immediately before” the date of the alleged wrongful retention was not where the child is now; (2) the retention is in violation of [Venezuelan] law; and (3) petitioner was exercising custody of the child at the time of the alleged wrongful retention.⁷⁸ Habitual residence in this instance probably does not warrant discussion because it is fairly apparent that Elian’s habitual residence is Cuba. Here, there is no public knowledge whether there was a joint custody decree in Elian’s case. If there was, and it stated that Elian’s mother could not remove him from Cuba without Juan Miguel’s permission, she may have indeed violated Cuban law. Therefore, the retention of Elian by his relatives in Miami, could be a breach of Cuban law. To determine whether Juan Miguel was exercising custody of the child, the standard identified was whenever “such a

71. Venezuela was a signatory to the Hague Convention in the second twenty-four countries that signed on in 1996. Starr, *supra* note 51, at 791 n. 14.

72. *Pesin*, 1999 WL 1249760, at 1.

73. *Id.*

74. *Id.*

75. *Id.* at 5, citing *Lops v. Lops*, 140 F.3d 927, 934-42 (11th Cir. 1998).

76. *Pesin*, 1999 WL 1249760 at 5.

77. *Id.* quoting Article 19 of the Hague Convention and 42 U.S.C. § 11601(b).

78. *Id.* citing Hague Convention art. 3.

parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.”⁷⁹ This was already determined in the INS ruling.⁸⁰

Custody rights may arise under three different operative mechanisms: (1) by operation of law; (2) by judicial or administrative decision, or (3) an agreement having legal effect under the law of that state.⁸¹ Unless there is “clear and unequivocal abandonment of the child” and the parent has valid custody rights in the country of habitual residence, a court will be hard pressed to find that there was no exercise.⁸² This issue seems to have already been resolved by the INS.

In regards to the issue of acquiescence, use of this defense must “be shown by a preponderance of the evidence that the petitioner consented to or subsequently acquiesced the children remaining in the United States.”⁸³ Acquiescence must be an “act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written enunciation of rights; or a consistent attitude of acquiescence over a significant period of time.”⁸⁴ “Subsequent acquiescence requires more than an isolated statement to a third-party. Each of the words and actions of a parent during separation are not to be scrutinized for a possible waiver of custody rights.”⁸⁵ The *Friedrich*⁸⁶ court, found that the secretive nature surrounding the circumstances in which the wife left with the children is “extremely strong” evidence that the husband would not have consented to removal of the children.⁸⁷ Finally, regarding acquiescence, it is a “question of the actual subjective intention of the wronged parent, not of the outside world’s perception of his intentions.”⁸⁸ These rules are quite clear in that Elian’s father has made it known to the world that he seeks the return of Elian, no matter what the political implications are of whether he is free to speak his mind. The law seems quite clear, that he must manifest this with some level of formality and that statements to the family are not enough to meet

79. *Id.* quoting *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996).

80. DeYoung & Pressley, *supra* note 2.

81. *Pesin*, 1999 WL 1249760, at 9.

82. *Id.* quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996).

83. *Id.* citing Hague Convention art. 13(a) and 42 U.S.C. § 11603(e)(2)(B).

84. *Id.* quoting *Friedrich v. Friedrich*, 78 F.3d at 1070 (6th Cir. 1996).

85. *Id.* citing *Wanninger v. Wanninger*, 850 F. Supp. 78, 81-82 (D. Mass. 1994).

86. *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996).

87. *Pesin*, 1999 WL 1249760, at 9.

88. *Id.*, citing *Re H and Others*, 2 W.L.R. 563, 573B (1997), *Friedrich v. Friedrich*, 78 F. 3d at 1060 (6th Cir. 1996), *Wanninger v. Wanninger*, 850 F. Supp. At 78 (D. Mass. 1994), and *Horlander v. Horlander*, 1992 Bull. Civ. I, No 91-18.177.

this standard.⁸⁹ The father has neither given any written manifestation of renunciation of rights or conveyed a consistent attitude of acquiescence over a significant period of time. Quite to the contrary, he has used worldwide media attention to say exactly the opposite.

Another defense that is available under ICARA is "grave risk." Article 13(b) states that a "court may refuse to order the return of a child wrongfully removed or retained if there is a grave risk that his or her return would expose the child to physical or psychological harm."⁹⁰ The only evidence that could be admitted was that regarding the child's surroundings; that the child would be returned to and the basic qualities of the people there.⁹¹ Arguments under this exception for Elian's relatives in Miami would be tenuous at best, and courts have "found in all cases that the exception did not apply."⁹²

This case can be distinguished from Elian's situation in several ways. The first difference is that both the United States and Venezuela are signatories to the Hague Convention, while Cuba is not. Both parents were alive fighting for custody of the child, while Elian's mother is deceased and there is no publicly known testamentary documentation conveying her wishes. In specific instances it has been stated by the family and politicians there is evidence that Juan Miguel Gonzalez knew about the fateful trip, but cannot communicate so because of Cuba's oppressive Communist regime.⁹³ Unfortunately, it would seem that this new evidence would have to be very compelling to overcome the standard set out to meet "acquiescence." Under ICARA, it would seem Juan Miguel Gonzalez would have a very strong case, in which the typical defenses under the Hague Convention, including acquiescence, could not be invoked since Cuba is not a signatory to the Convention.

B. *The Uniform Child Custody Jurisdiction Act*

The Uniform Child Custody Jurisdiction Act, (UCCJA) was adopted by forty-seven states in 1981, for the purpose of preventing parents from kidnapping their children and taking them to a state where they can get a better decision in a child custody dispute.⁹⁴ Before the act, parents who abducted their children had a very good chance of receiving custody because courts had the authority to issue a custody order simply based on the parent's physical

89. *Cuban Boy Spends Holidays in U.S.* (visited January 2, 2000) <www.msnbc.com/local>.

90. Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act*, 42 U.S.C.A. § 11601, 125 A.L.R. 217, 214 (1999).

91. *Id.*

92. *Id.*

93. Luisa Yanez & Jose Dante Parra Herrera, *Cuban Boy's Father Allowed Trip to U.S.*, *Senator Says*, *The Sun Sentinel*, January 9, 2000 at A1.

94. Starr, *supra* note 51, at 801.

presence in a state with the child.⁹⁵ When the UCCJA was enacted it's primary focus was to prevent this from occurring by: "setting standards concerning the state's right to make a custody determination, limiting the right of state courts to modify sister state custody orders, and requiring recognition and enforcement of custody orders in other states."⁹⁶ The mechanism for doing this was the custody suit was to be heard in the child's home state because of the general thought that it is the jurisdiction with the most information regarding the child.⁹⁷

"By 1997, a majority of United States' states had stated that the UCCJA could be extended to apply to international child kidnapping."⁹⁸ The UCCJA had a specific provision, International Applications, that if enacted by a state, would make the Act applicable to international kidnappings.⁹⁹ Six states have provided that they do not exist on an equal footing with a foreign country including: Missouri, Ohio, Oregon, New Mexico, South Dakota, and Indiana taking a somewhat hybrid approach allowing modification if the child is likely to be moved outside of the United States, the courts may modify the foreign custody agreement.¹⁰⁰ In *Elian's* case, since Florida is not identified as a state rejecting this notion, Florida state law will likely consider a state to include a foreign country in it's application and therefore would require a custody hearing to occur in the home state of the child.

C. The Parental Kidnapping Prevention Act of 1980 and the International Parental Kidnapping Crime Act of 1993

To fill the gaps in the UCCJA and require the respect between sister states of child custody agreements, the Parental Kidnapping Prevention Act (PKPA) of 1980 was drafted and passed.¹⁰¹ The Act, Section 8, 28 U.S.C. § 1738(A), requires all states UCCJA and non-UCCJA to respect a sister state's divorce and custody decrees if they are made in conformity with federal jurisdictional criteria.¹⁰² States must enforce, not modify, child custody determinations made by courts of sister states.¹⁰³ The PKPA even puts a priority on a home state

95. *Id.* at 802.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Starr, supra* note 51, at 803.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

decree over one made by a state with a significant connection to the child.¹⁰⁴ In this way, any custody decree that may exist in Cuba would trump a state court's ruling awarding custody to Elian's family in Miami.

Another interesting aspect of the PKPA is that simply because a child is absent from a state, a court is not precluded from determining the child's custody.¹⁰⁵ Further, an action in a home state, could preclude proceedings "from being brought later or continued in a different state."¹⁰⁶ With respect to Juan Miguel Gonzalez, under the United States law, a Cuban decree bestowing custody of Elian upon him, would have to be honored and the custody hearing would have to take place in Cuba.

Similar to the PKPA, in 1993, Congress enacted the International Parental Kidnapping Crime Act (IPKCA) of 1993, which focused on closing the gap of when a child is abducted to a non-Hague Convention country.¹⁰⁷ The Act is applicable in situations where a child is removed from the United State or a child is retained outside the United States with the intent to obstruct the lawful exercise of parental rights.¹⁰⁸ Although this Act would seem to have very limited applicability in the Elian Gonzalez case, it is no less important to note that United States domestic legislation does attempt to address the kidnapping issue within an international context.

Although legally it has not been established that Elian's mother did indeed kidnap Elian, without Juan Miguel Gonzalez's consent, a survey of the applicable law is relevant to determine if he does indeed bring an action, what the likely outcome will be. It would seem that proof to refute such an action would be difficult, since Elian's mother is now deceased and that Gonzalez may indeed have a claim under some of these Acts.

D. *Other Controlling International Authority*

There are other sources that provide guidance and authority regarding the custody of Elian Gonzalez, including resolutions of the United Nations. One such resolution is one which adopted Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption.¹⁰⁹ Section A sets out the goals of the Resolution including: "high

104. Starr, *supra* note 51, at 803.

105. *Id.* at 804.

106. *Id.*

107. *Id.* at 807.

108. *Id.* at 805.

109. GENERAL ASSEMBLY RESOLUTION ADOPTING THE DECLARATION ON SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION AND WELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT AND ADOPTION, 26 I.L.M. 1096 (1986) [hereinafter *THE RESOLUTION ON THE PROTECTION AND WELFARE OF CHILDREN*].

priority to family and child welfare, paramount consideration of the child's best interests, needs for affection and right to security, . . . guarantee of a name, a nationality and a legal representative for the child."¹¹⁰ The Resolution also reaffirms Principle 6 of the Declaration of the Rights of the Child, which states that "the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security."¹¹¹

Section A, Article 3 states explicitly, "The first priority for a child is to be cared for by his or her own parents."¹¹² Article 4 states, "When care by the child's parents is *unavailable or inappropriate*, care by relatives of the child's parents, by another substitute - foster or adoptive family or, if necessary, by an appropriate institution should be considered."¹¹³ Article 5 states, "In all matters relating to the placement of a child outside the care of the child's own parents; the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the *paramount* consideration."¹¹⁴ These provisions affirm Juan Miguel Gonzalez's strong argument for the return of Elian.

Section B, relates to foster care but also explicitly states in Article 11, "Foster family care, though temporary in nature, may continue, if necessary, until adulthood but *should not preclude* either prior return to the child's own parents or adoption."¹¹⁵ Article 12, mandates that in proceedings regarding foster care placement, the child's parents should be "properly involved."¹¹⁶ Article 19, states procedural aspects of the provisions in that "policies should be established and laws enacted, where necessary, for the prohibition of abduction and of any other act for illicit placement of children."¹¹⁷

Although these provisions are probably not widely utilized, what they do indicate is a strong predisposition of the United Nations to place the child with his or her natural parents. It can also be implied that no such action shall take place unless the parents are involved; and the Resolution suggests that nations invoke provisions within their domestic laws furthering these objectives, which the United States has done. Elian's relatives in Miami seeking custody have a large hurdle to overcome, since it seems to be implied from these provisions that the best interests of the child is by default, custody with the natural parent.

110. *Id.* at 1097.

111. *Id.* at 1098.

112. *Id.* at 1099.

113. *Id.*

114. THE RESOLUTION ON THE PROTECTION AND WELFARE OF CHILDREN, *supra* note 109, at 1099.

115. *Id.* at 1100.

116. *Id.*

117. *Id.* at 1101.

IV. CONCLUSION

One merely has to pick up the newspaper or turn on CNN to hear about the Elian Gonzalez tragedy. The thought of a five-year-old child clinging to a life ring for two days and being rescued at sea by fishermen on the day when the United States is celebrating a day of giving thanks is heartwrenching. Understanding that his mother and stepfather drowned on the perilous journey, is even more heartwrenching, and knowing that he is with relatives, but without his living parent brings little comfort. It matters not what side a person is on in this tragedy, but what remains difficult is distancing ourselves from the plight and analyzing the situation within the context of law.

State law on the issue seems fairly clear providing that custody should be denied to the natural parent only when such an award will, in fact, be detrimental to the welfare of the child.¹¹⁸ International law under several authorities seems to indicate a predisposition for placing the child with third parties unless the parent is unfit. International law seems even more biased towards a parent who is seeking custody from a non-Hague signatory country, since the many defenses cannot be invoked. Other sources of federal domestic and international law seem to echo the same premise, but what remains is the necessity for Juan Miguel Gonzalez to bring a recovery action in a United States court.

One thing all those having any knowledge of the issue can be assured of is that continued political posturing will take place. Accusations about Elian's mother and stepfather will continue, but this type of campaigning from the Castro regime will serve no productive purpose in the development of Elian.¹¹⁹ While Castro's accusations fly, Elian's relatives in Miami continue to give him gifts, a new puppy, and a trip to Disney World. A child's perspective of the issues surrounding his plight cannot be unbiased when the family is not providing an environment where he can make choices that are not pressured by the priority items in a six-year-old's life. All sides continue to invoke the use of propaganda and material possessions to try to pressure decisions makers.

This situation becomes even more complicated by the involvement of such entities as the United States Congress, through anti-Castro politicians such as Dan Burton and Jesse Helms, co-authors of the Helms-Burton Act regulating economic relationships with Cuba. Involvement of the United States Council of Churches in this situation further complicates everything by potentially adding religious implications to a political debate that should be grounded in

118. *In re the Marriage of Carter Robert Matzen & Judy C. Matzen*, 600 So. 2d 487, 488 (Fla. 1st DCA 1992) quoting *In re Guardianship of D.A. McW.*, 460 So. 2d at 370.

119. Antonio Paneque Brizuelas, *The Journey on Which Was Taken Was Organized by a Criminal*, Granma International Digital Edition, (visited January 2, 2000) <www.granma.cu>.

the law.¹²⁰ Luckily, these religious implications have been downplayed in the circus of media attention surrounding the situation.

Protests by Miami's powerful anti-Castro exile community have worked in situations to all but shut down the City. Protests in Cuba increase and become angrier.¹²¹ Local politicians in Miami use their Washington relationships to fight for Elian to remain in the United States. Castro continues to posture bringing to the United States attention again, to the problematic policies that exist in relation to larger immigration policy. While all this is occurring, Juan Miguel Gonzalez, for reasons unknown, has initiated no formal legal proceedings seeking the return of his son. Whether that is because he lives under an oppressive Communist regime or simply because he chooses to refuse the necessity of participating in the United States legal process to secure custody of his son, we as outsiders, can only speculate. One thing in this sea of uncertainty does remain certain, however, that the greatest victim in this case is Elian Gonzalez, himself.

V. RULINGS AS OF MARCH 22, 2000

On March 21, 2000, United States District Judge K. Michael Moore, ruled in favor of the Attorney General of the United States, Janet Reno, on a Motion for Summary Judgment, dismissing the law suit brought on behalf of Elian Gonzalez, by Lazaro Gonzalez, his Great Uncle. The Motion for Summary Judgment upheld the decision by Janet Reno,¹²² holding she did not abuse her discretion in ordering Elian's return to Cuba and her decision that only the boy's father speaks for him was found controlling as a matter of law.¹²³ While the arguments brought on behalf of Elian were largely based on a theory that Elian was denied procedural due process rights, these rights were found not to be violated by Reno's actions.¹²⁴ The court found no abuse of her discretion and that her decisions were consistent with statute and congressionally delegated discretion.¹²⁵ The court did find in favor of Elian by holding the United States District Court did have subject matter jurisdiction and Elian Gonzalez did have standing to sue through Lazaro Gonzalez.¹²⁶

120. Tom Gibb, *Churches Back Cuban Boy's Return*, *The Guardian*, January 5, 2000, at 16.

121. Associated Press, *Protests in Cuba Get Angrier as U.S. Fails to Return Elian*, *THE PALM BEACH POST*, January 16, 2000 at 2A.

122. Staletovich, *supra* note 1.

123. *Lazaro Gonzalez v. Janet Reno*, NO. 00-206-CIV-MOORE, 1, 49, order granting summary judgment (March 22, 2000).

124. *Id.*

125. *Id.*

126. *Id.* at 11.

Many arguments were made by the government based on the theory that the decisions made were within the purview of administrative decision making authority, which was broad in this instance.¹²⁷ Many of the decisions Reno made surrounding process were also exempt from judicial review.¹²⁸

In the final analysis, Reno's decisions were upheld as coming within her discretion and that Elian's due process rights were not violated. The court found that a person paroled, or admitted until INS rules on his or her status, is not entitled to the same constitutional protections as a citizen of the United States.¹²⁹

There has been contentions that the family has filed an appeal with the 11th Circuit United States Court of Appeals, which would be inevitable. How high within the United States system will this case go remains unknown, and finally, how long Elian will be allowed to stay in the United States remains unknown as well. In Judge Moore's conclusion, ". . . the reality that each passing day is another day lost between Juan Gonzalez and his son, [this] Court can only hope that those on each side of this litigation placed the interests of Elian Gonzalez above all others."¹³⁰ This hope can be the only clear aspiration that is guiding both family and citizens on both sides of the issue and on both sides of the Florida Straits.

127. *Id.* at 14.

128. *Janet Reno*, NO. 00-206-CIV-MOORE, at 15.

129. *Id.* at 35.

130. *Id.* at 49.