

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3  
4

5 August Term, 1999  
6

7 (Argued: February 22, 2000 Decided: September 20, 2000)  
8

9 Docket No. 99-9341  
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2  
3 STEPHEN HALLADAY CROLL,  
4

5 Petitioner-Appellee,  
6

7 v.  
8

9 MEI YEE CROLL,  
10

11 Respondent-Appellant.  
12  
13  
14

15 Before: JACOBS, SOTOMAYOR, and MICHEL,\* Circuit Judges.  
16  
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18 Appeal from a final judgment of the United States  
19 District Court for the Southern District of New York (Sidney  
20 H. Stein, Judge), denying appellant's motion to dismiss  
21 appellee's petition for return of the parties' minor child to  
22 Hong Kong under the Convention on the Civil Aspects of  
  
\_\_\_\_\_

\* The Honorable Paul R. Michel, of the United States Court  
of Appeals for the Federal Circuit, sitting by designation.

1 International Child Abduction, and granting appellee's  
2 application for an order of return.

3 Reversed and Remanded.

4 Judge Sotomayor dissents in a separate opinion.

5 ROBERT D. ARENSTEIN, New York,  
6 NY, for petitioner-appellee.

7  
8 LEA HABER KUCK, New York, NY, for  
9 respondent-appellant.

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12 JACOBS, Circuit Judge:

13  
14 Petitioner-appellee Stephen Halladay Croll seeks an order  
15 compelling his wife, respondent-appellant Mei Yee Croll, to  
16 return their minor child, Christina Croll, to Hong Kong under  
17 the Hague Convention on the Civil Aspects of International  
18 Child Abduction, done Oct. 25, 1980, T.I.A.S. No. 11670, 1343  
19 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (1986) ("Hague  
20 Convention" or "Convention"), implemented by the International  
21 Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et  
22 seq. (1995). A custody decree issued in Hong Kong (a) confers  
23 the sole "custody, care and control" of Christina Croll on her  
24 mother, (b) confers "rights of access" on her father, and (c)  
25 bars the removal of the child from Hong Kong without the

1 consent of the other parent or the court. The United States  
2 District Court for the Southern District of New York (Stein,  
3 J.) granted Mr. Croll's petition for an order of return  
4 subject to certain conditions, finding that Mrs. Croll had  
5 wrongfully removed Christina from Hong Kong in violation of  
6 the Convention. See Croll v. Croll, 66 F. Supp. 2d 554, 562-  
7 63 (S.D.N.Y. 1999).

8 We hold that rights of access do not constitute rights of  
9 custody within the meaning of the Hague Convention, even when  
10 coupled with a ne exeat clause. Because courts in the United  
11 States have jurisdiction to enforce the Convention by ordering  
12 a child's return to her habitual residence only if the child  
13 has been removed in breach of a petitioning parent's custodial  
14 rights, the district court lacked jurisdiction to order return  
15 in this case.

16  
17 **BACKGROUND**

18  
19 **A. Facts**

20 Stephen and Mei Yee Croll, both United States citizens,  
21 were married in Hong Kong in 1982. Their daughter Christina



1 power over any place of residence outside Hong Kong, gives him  
2 rights of custody within the meaning of the Convention.

3 Mrs. Croll brought Christina to New York on April 2,  
4 1999, intending (she says) that Christina would interview at  
5 schools in New York City, attend school for a few weeks, and  
6 then return to Hong Kong for the summer. But (Mrs. Croll  
7 admits) "[i]n the back of her mind" she intended to remain in  
8 the United States permanently. On April 8, 1999, Mrs. Croll  
9 filed an action in Family Court in New York County seeking  
10 custody, child support, and an order of protection. Those  
11 proceedings have been stayed pending the outcome of this  
12 federal action.

13 When Mr. Croll returned to Hong Kong from a business trip  
14 on April 7, 1999, he learned that his wife had gone with  
15 Christina to the United States. On April 22, 1999, Mr. Croll  
16 filed a missing persons report with the police in Hong Kong,

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be not removed from Hong Kong without leave until she  
attains the age of 18 years but provided that if either  
parent to give a general undertaking to the Court to  
return the said child to Hong Kong when called upon to do  
so, and unless otherwise directed with the written  
consent of the other parent that parent, may remove the  
said child from Hong Kong for any period specified in  
such written consent.

1 and on May 14, 1999, he filed this petition in the Southern  
2 District of New York seeking Christina's return to Hong Kong  
3 pursuant to the Hague Convention.  
4

5 B. Prior Proceedings

6 Mr. and Mrs. Croll do not dispute that Christina, who  
7 lived in Hong Kong from her birth until arriving in New York  
8 in 1999, was "habitually resident" in Hong Kong within the  
9 meaning of Article 3 of the Convention. In addition, Mrs.  
10 Croll does not claim on appeal that any of the Convention's  
11 recognized exceptions to the petitioning parent's right of  
12 return apply here. The question in this case therefore is  
13 whether Mr. Croll held and actively exercised "rights of  
14 custody"--within the meaning of the Convention--when Christina  
15 was taken from Hong Kong.

16 Mrs. Croll moved in the Southern District to dismiss the  
17 petition on the ground that Mr. Croll could not claim  
18 "custody" of Christina and that therefore (a) the court lacked  
19 subject matter jurisdiction and (b) the petition failed to  
20 state a claim upon which relief could be granted. The court  
21 denied the motion to dismiss, granted Mr. Croll's petition,

1 and ordered that Christina be returned to Hong Kong. The  
2 court reasoned that

3 the Hong Kong order dated February 23, 1999  
4 provides that Christina may not be removed from Hong  
5 Kong before her 18th birthday without either leave  
6 of court or both parents' consent. Accordingly, . .  
7 . Mr. Croll had a right, along with respondent, to  
8 determine Christina's place of residence and he had  
9 a corresponding right of custody within the meaning  
10 of the Convention. Christina's removal from Hong  
11 Kong--her habitual residence--was in violation of  
12 her father's right of custody and was, therefore,  
13 wrongful pursuant to the Convention.  
14

15 Croll, 66 F. Supp. 2d at 559. The court granted Mrs. Croll's  
16 motion to stay its order of return pending expedited appeal to  
17 this Court. See Croll v. Croll, No. 99-3566 (S.D.N.Y. Oct.  
18 29, 1999).  
19

## 20 DISCUSSION

21 At issue on this appeal are two sets of rights recognized  
22 in the Convention to be distinct: rights of custody and rights  
23 of access. If Mr. Croll has custody rights, courts in the  
24 United States have jurisdiction to order return of Christina  
25 to Hong Kong, as the district court has done, and the duty to  
26 do so. If, however, Mr. Croll has the lesser rights of

1 access, jurisdiction is lacking and Mr. Croll must rely on  
2 other remedies.

3 The proper interpretation of the Hague Convention is an  
4 issue of law, which we review de novo. See Klos v. Polskie  
5 Linie Lotnicze, 133 F.3d 164, 167 (2d Cir. 1997).

6 "In construing a treaty, as in construing a statute, we  
7 first look to its terms to determine its meaning." United  
8 States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) (citing  
9 Air France v. Saks, 470 U.S. 392, 397 (1985), and Valentine v.  
10 United States ex rel. Neidecker, 299 U.S. 5, 11 (1936)); see  
11 also Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d  
12 210, 215 (2d Cir. 1999) ("Treaties are construed in much the  
13 same manner as statutes.") (citing Alvarez-Machain, 504 U.S.  
14 at 663)). The text of the treaty must be interpreted "in  
15 accordance with the ordinary meaning to be given to the terms  
16 of the treaty in their context and in light of its object and  
17 purpose." Vienna Convention on the Law of Treaties, done May  
18 23, 1969, art. 31.1, 1155 U.N.T.S. 331 (emphasis added).  
19 Where the text--read in the context of its structure and  
20 purpose--is ambiguous, we may resort to extraneous tools of  
21 interpretation such as a treaty's ratification history and

1 subsequent operation. See Sumitomo Shoji America, Inc. v.  
2 Avagliano, 457 U.S. 176, 180 (1982) ("The clear import of  
3 treaty language controls unless application of the words of  
4 the treaty according to their obvious meaning effects a result  
5 inconsistent with the intent or expectations of its  
6 signatories.") (internal quotation marks and citations  
7 omitted)); cf. Chan v. Korean Air Lines, Ltd., 490 U.S. 122,  
8 134 n.5 (1989) ("Even if the  
9 text were less clear, its most natural reading could properly  
10 be contradicted only by clear drafting history.").

11 So far as we can tell, we and the district court in this  
12 case are the only courts in the United States to consider  
13 whether rights of access coupled with a ne exeat clause confer  
14 "custodial rights" on a non-custodial parent within the  
15 meaning of the Hague Convention. We therefore start from  
16 scratch, and consult (A) the purpose and design of the  
17 Convention, (B) its wording, (C) the intent of its drafters,  
18 and (D) caselaw in other signatory states.

19  
20 A. Purpose and Framework of the Convention

21 The Hague Convention, to which the United States and Hong

1 Kong are signatories,<sup>3</sup> was adopted as an effort "to protect  
2 children internationally from the harmful effects of their  
3 wrongful removal or retention and to establish procedures to  
4 ensure their prompt return to the State of their habitual  
5 residence, as well as to secure protection for rights of  
6 access." Hague Convention, Preamble, 51 Fed. Reg. at 10,498.  
7 The Convention rests on the principle that a child's country  
8 of "habitual residence" is "best placed to decide upon  
9 questions of custody and access." Elisa Pérez-Vera,  
10 Explanatory Report: Hague Conference on Private International  
11 Law, in 3 Acts and Documents of the Fourteenth Session (Child  
12 Abduction) 426, 434-35, ¶ 34 (1980) ("Pérez-Vera Report").<sup>4</sup>

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<sup>3</sup> The Convention remains in effect in Hong Kong following Hong Kong's absorption into the People's Republic of China in 1997. See Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., U.K.T.S. No. 26 (1985) ("Joint Declaration"). The Joint Declaration provides that "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region." Id. Annex I, pt. XI. The People's Republic of China is not a signatory to the Hague Convention, but on June 13, 1997, that country informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands at the Hague that, in accordance with the Joint Declaration, the Convention would continue to apply to Hong Kong after July 1, 1997.

<sup>4</sup> The Pérez-Vera Report is recognized by the Hague Conference as "the official history and commentary on the

1 In order to "preserve the status quo and to deter parents  
2 from crossing international boundaries" to secure a more  
3 favorable forum for the adjudication of custody rights,  
4 Blondin v. Dubois, 189 F.3d 240, 246 (2d Cir. 1999)  
5 (internal quotation marks omitted), the Convention provides  
6 for the return of children "wrongfully removed to or retained  
7 in any Contracting State." Hague Convention, art. 1, 51 Fed.  
8 Reg. at 10,498. A removal or retention is to be considered  
9 "wrongful" where:

10 a) it is in breach of rights of custody  
11 attributed to a person, an institution or any  
12 other body, either jointly or alone, under the  
13 law of the State in which the child was  
14 habitually resident immediately before the  
15 removal or retention; and  
16

17 b) at the time of removal or retention those  
18 rights were actually exercised, either jointly  
19 or alone, or would have been so exercised but  
20 for the removal or retention.

21 Id. art. 3, 51 Fed. Reg. at 10,498 (emphasis added). Rights  
22 of custody "may arise in particular by operation of law or by  
23 reason of a judicial or administrative decision, or by reason

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Convention," and we have previously said that it is an  
authoritative source for interpreting the Convention's  
provisions. Blondin v. Dubois, 189 F.3d 240, 246 n.5 (2d Cir.  
1999).

1 of an agreement having legal effect under the law of that  
2 State." Id.

3 Thus an order of return is available as a remedy only for  
4 wrongful removals or retentions, and removals or retentions  
5 are wrongful only if they are "in breach of rights of  
6 custody." The Convention defines rights of custody as "rights  
7 relating to the care of the person of the child and, in  
8 particular, the right to determine the child's place of  
9 residence." Id. art. 5, 51 Fed. Reg. at 10,498. Rights of  
10 custody are distinguished from rights of access, which are  
11 defined in the Convention as "the right to take a child for a  
12 limited period of time to a place other than the child's  
13 habitual residence." Id. The Convention provides recourse  
14 in the event a child is removed from an habitual residence in  
15 breach of access rights, but those remedies do not include an  
16 order of return to the place of habitual residence. See  
17 id. art. 21, 51 Fed. Reg. at 10,500. To vindicate the breach  
18 of access rights, the Convention authorizes signatory nations  
19 to use one or more remedies (short of return) to "promote the  
20 peaceful enjoyment of access rights," and to "take steps to  
21 remove, as far as possible, all obstacles to the exercise of

1 such rights." Id. One such remedy is a writ ordering the  
2 custodial parent who has removed the child from the habitual  
3 residence to permit, and to pay for, periodic visitation by  
4 the non-custodial parent with access rights. See id. art. 26,  
5 51 Fed. Reg. at 10,500; Viragh v. Foldes, 612 N.E.2d 241, 246-  
6 50 (Mass. 1993) (ordering a custodial parent who brought a  
7 child to the United States in frustration of a Hungarian  
8 access decree to pay the travel costs of visitation). The  
9 Convention makes plain that unless the petitioner has rights  
10 of custody, a court has no authority to order return.

11 In the United States, a petitioner claiming wrongful  
12 removal under the Convention may bring a petition for an order  
13 of return in a United States district court or in a court of  
14 any state. See 42 U.S.C. § 11603(a), (b). The court has the  
15 authority only to determine whether the child's removal was  
16 "wrongful" within the meaning of the Convention, i.e., whether  
17 the removal "was in breach of custody rights" held by the  
18 petitioner. See id. § 11603(e)(1)(A). The petitioner bears  
19 the burden of proving "wrongful removal" by a preponderance of  
20 the evidence. See id. § 11603(e)(1). If the petitioner shows  
21 that the child was wrongfully removed, the court must order

1 the child's return to the country of habitual residence unless  
2 the respondent demonstrates that one of four narrow exceptions  
3 apply. See id. § 11601(a)(4); Blondin, 189 F.3d at 245-46  
4 (discussing enumerated exceptions). The court is not  
5 permitted to consider the merits of underlying custody  
6 disputes. See id. § 11601(b)(4).

7  
8 B. Wording of the Convention

9 We open the dictionary to find the ordinary meaning or  
10 meanings of "custody." See Chan, 490 U.S. at 128 (looking  
11 first to Webster's Second International Dictionary to construe  
12 "irregularity" under the Warsaw Convention). Dictionaries  
13 support the idea that custody entails care, and in any event  
14 confirm the intuition that custody is something other and more  
15 than a negative right or veto.

16 Black's Law Dictionary defines custody generally as  
17 "[t]he care and control of a thing or person for inspection,  
18 preservation or security"; parental custody as "[t]he care,  
19 control, and maintenance of a child awarded by a court"; sole  
20 custody as "[a]n arrangement by which one parent has full  
21 control and responsibility to the exclusion of the other"; and

1 joint (or shared) custody as “[a]n arrangement by which both  
2 parents share the responsibility for and authority over the  
3 child at all times.” Black’s Law Dictionary 390 (7th ed.  
4 1999); see, e.g., Joyner v. Dumpson, 712 F.2d 770, 778 (2d  
5 Cir. 1983) (“[L]egal custody is concerned with the rights and  
6 duties of the person (usually the parent) having custody to  
7 provide for the child’s daily needs--to feed him, clothe him,  
8 provide shelter, put him to bed, send him to school, see that  
9 he washes his face and brushes his teeth.” (quoting Smith v.  
10 Organization of Foster Families for Equality & Reform, 431  
11 U.S. 816, 827 n. 17 (1977) (internal quotation marks  
12 omitted))).

13 Webster's Third defines custody as a “duty of  
14 guardianship and preservation . . . protection, care,  
15 maintenance, and tuition.” Webster's Third New International  
16 Dictionary Unabridged 597 (1986). The Random House dictionary  
17 defines custody as “keeping; guarding; care: in the care of  
18 her father.” Random House Dictionary of the English Language  
19 357 (2d ed. 1987) (emphasis in original).

20 Taking these definitions together, custody of a child  
21 entails the primary duty and ability to choose and give

1 sustenance, shelter, clothing, moral and spiritual guidance,  
2 medical attention, education, etc., or the (revocable)  
3 selection of other people or institutions to give these  
4 things. The dissent characterizes this as a "parochial  
5 definition" that reflects only "traditional American notions  
6 of custody rights," because it is distilled from American  
7 lexical sources. Post at [4]. But this definition reflects  
8 none of the peculiar practices of American child-rearing; it  
9 includes an open-ended "etc."; and the dissent identifies no  
10 feature of custody that is missing except for the dubious  
11 addition of a ne exeat clause.

12 Nothing in the Hague Convention suggests that the  
13 drafters intended anything other than this ordinary  
14 understanding of custody. Article 5 of the Convention defines  
15 "rights of custody" generally as "rights relating to the care  
16 of the person of the child." Hague Convention, art. 5, 51  
17 Fed. Reg. at 10,498 (emphasis added). The plural "rights"  
18 references a bundle of rights exercised by one or more persons  
19 having custody, and is in some tension with the idea (critical  
20 to the district court's opinion in this case) that one can  
21 have custody by holding a single power such as the veto

1 conferred by a ne exeat clause.

2 Mr. Croll emphasizes that the Convention's definitional  
3 phrase "rights relating to the care of the person of the  
4 child" continues immediately to offer as an example, "in  
5 particular, the right to determine a child's place of  
6 residence." Hague Convention, art. 5, 51 Fed. Reg. at 10,498.

7 Mr. Croll reasons that a ne exeat clause gives an otherwise  
8 non-custodial parent a power that amounts to a "right to  
9 determine the child's place of residence" and thereby creates  
10 a "right of custody" that is protected by the Convention's  
11 return remedy.

12 We disagree. The right to determine the "place of  
13 residence" is an apt example of a right of custody because it  
14 is indicative: the parent who decides where the child dwells  
15 is very likely to be the parent who exercises care and  
16 control, and therefore has custody. It is unhelpful and  
17 insufficient to think about the custodial right to designate a  
18 child's "place of residence" in terms of the power to pick her  
19 home country or territory. Such a power protects rights of  
20 custody and access alike, and is no clue as to who has  
21 custody. Every roof is in some country, territory or

1 jurisdiction. A child may be profoundly affected by the  
2 ambient culture and regime of a particular country, but "place  
3 of residence," as a signal example of parental control over  
4 care and upbringing, necessarily entails more specific  
5 choices. A custodial parent cannot discharge the  
6 responsibility of deciding a child's "place of residence" by  
7 picking a country or territory. Depending on many  
8 considerations, the custodial parent must place the child in a  
9 city, suburb, or countryside; in a particular dwelling unit at  
10 some address; at home, or in a boarding school, finishing  
11 school, military academy, or institution. These choices are  
12 unavoidable for a parent who exercises the custodial right to  
13 fix the residence of a child.

14 The wording of the "place of residence" example  
15 buttresses our interpretation of Article 5. The right  
16 specified is the "right to determine" a child's place of  
17 residence, thereby implying an active power to choose (and  
18 change) the residential address, at will, as a matter of  
19 parental and personal judgment. See Webster's Third at 617  
20 (defining "determine" as "to settle or decide by choice of  
21 alternative possibilities; to direct or control the end or

1 course of"); Random House at 393 (defining "determine" as "to  
2 cause, affect or control; to fix or decide causally; to settle  
3 or decide by an authoritative or conclusive decision").

4 The ne exeat clause limits Mrs. Croll's custodial power  
5 to expatriate Christina, but it does not suggest that the  
6 power to "determine" Christina's "place of residence" (in Hong  
7 Kong, New York, or anywhere else) is also Mr. Croll's. The  
8 Custody Order gives Mr. Croll a veto power only--and only over  
9 Christina's expatriation--but gives him no say over any other  
10 custodial issue, including Christina's "place of residence"  
11 within Hong Kong. That single veto power, even if leveraged,  
12 falls short of conferring a joint right to determine the  
13 child's residence, particularly since an earlier clause in the  
14 custody order awards "custody care and control" solely to the  
15 mother.<sup>5</sup>

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<sup>5</sup> The dissent calls this veto a "significant decisionmaking power" tantamount to custody, post at [3], but that characterization proves too much: if Mr. Croll has custody by virtue of that veto, so does the Hong Kong court. Although the Convention recognizes that an "institution or other body" may hold custody rights, nothing suggests that this child, with two living parents, is a ward of the court.

The dissent discusses with seeming approval the view of an English court that whenever a court enters a custody

1           Just as important, Article 3's definition of "wrongful  
2 removal" requires that for a child's removal to be "wrongful"  
3 (and a return remedy available) the removal must be in breach  
4 of custodial rights of the petitioning parent that "were  
5 actually exercised . . . or would have been so exercised but  
6 for the removal." Hague Convention, art. 3, 51 F. Reg. at  
7 10,498 (emphasis added); see also Department of State, Hague  
8 International Child Abduction Convention; Text and Legal  
9 Analysis, 51 Fed. Reg. at 10,507 (to invoke a return remedy  
10 applicants must "provide some preliminary evidence that he or  
11 she actually exercised custody of the child, for instance,  
12 took physical care of the child." (emphasis added)); Pérez-  
13 Vera Report ¶ 73, at 448 (same). The right conferred by the  
14 ne exeat clause is not one that Mr. Croll "actually  
15 exercised," and it is circular to say that he would have

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order, the court itself may be taking on rights of custody.  
See post at [15]. That approach would of course require that  
every violation of the home court's decree, including  
expatriation in derogation solely of parental rights of  
access, would be deemed a violation of custody rights (of the  
court) and compel the child's return. Not a bad idea,  
perhaps, but this idea is not found in the Convention, which  
expressly distinguishes between custodial rights and access  
rights, and affords the remedy of mandatory return to enforce  
the former but not the latter.

1 exercised it but for Christina's removal, because the right  
2 itself concerns nothing but removal itself, and would never  
3 have been exercised had Mrs. Croll been content to stay in  
4 Hong Kong during Christina's minority.<sup>6</sup>

5 Therefore, we find the power to determine the child's  
6 place of residence, considered in context as part of a  
7 definition of custody rights, to be an example of the powers,  
8 choices and arrangements entailed by the care of the child. A  
9 ne exeat clause, by contrast, confers only a veto, a power in  
10 reserve, which gives the non-custodial parent no say (except  
11 by leverage) about any child-rearing issue other than the  
12 child's geographical location in the broadest sense.

13 If we were to enforce rights held pursuant to a ne exeat  
14 clause by the remedy of mandatory return, the Convention would  
15 become unworkable. A foundational assumption in the  
16 Convention is that the remedy of return will deliver the child  
17 to a custodial parent who (by definition) will receive and  
18 care for the child. It does not contemplate return of a child  
19 to a parent whose sole right--to visit or veto--imposes no

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<sup>6</sup> We reach this issue--which bears on subject-matter jurisdiction--sua sponte.

1 duty to give care.

2 In this case, for example, the custody order places all  
3 the burdens of care and custody on Mrs. Croll, and none of  
4 them on Mr. Croll. If return were ordered, perhaps Mrs. Croll  
5 (an American citizen) would expatriate herself to the People's  
6 Republic of China in order to care for her daughter; and if  
7 she does not, Mr. Croll probably will arrange for his  
8 daughter's care. But an order of return does not require Mrs.  
9 Croll to return with Christina; the Hong Kong custody decree  
10 does not require Mr. Croll to take care of the child day-to-  
11 day; we lack discretion to withhold return of a child who has  
12 been wrongfully removed; and the Convention does not allow us  
13 to alter the custodial arrangements ordered by the court in  
14 Hong Kong. Given those mandated strictures, we cannot  
15 plausibly read the Convention to compel the removal of a child  
16 from a parent who exercises all rights of care to a country in  
17 which no one has that affirmative power or duty.

18 The dissent points out that the Convention undoubtedly  
19 compels return of a child (accompanied or not by the parent  
20 who took her abroad) even (i) to a parent with joint custody  
21 who may receive the child upon repatriation at a time of year

1 when custody would ordinarily be exercised by the parent who  
2 may remain abroad, or (ii) to a parent who exercises custody  
3 rights by decisional power without day-to-day care. See post  
4 at [10-11]. In the first case, the child is returned to a  
5 parent who gives day-to-day care in season and who can be  
6 expected to have the facilities, resources, fitness, and  
7 inclination to give care out of season as well; in the latter  
8 case, the decision-making parent can decide in what school or  
9 in whose care the child can be placed. The dissent's  
10 analysis, however, would compel the return of the child to a  
11 parent who lacks the right or responsibility to give care or  
12 to decide who should give it, or even to a parent with access  
13 who has been found unfit to have custody.

14 The custodial parent who expatriates the child in  
15 violation of a court order may elect to stay abroad, if only  
16 to avoid contempt proceedings; yet the dissent construes the  
17 Convention to compel return of the child to a country in which  
18 the only parent has no duty to give care and no power except  
19 to compel the return and enjoy occasional access. The dissent  
20 offers the reassurance, however, that such a child would not  
21 be neglected because "a parent's duty to care for a child" may

1 be imposed by "the law of the country of habitual residence."  
2 Post at [11]. No doubt, family courts in the United States  
3 would impose that obligation as a matter of family law--though  
4 of course a court cannot confer competence or fitness--but on  
5 this point the dissent is generalizing from local American  
6 law; and even if we assume that courts anywhere can in a pinch  
7 confer custodial rights and duties on the local parent if the  
8 custodial parent remains abroad, the effect of compelling  
9 return on that assumption would be to alter custody rights  
10 rather than to enforce them.

11 Every textual and structural feature of the Convention  
12 suggests that a parent who furnishes no custodial care cannot  
13 establish "wrongful removal," and therefore cannot prevail on  
14 a petition to a foreign court for an order of return. Mr.  
15 Croll bears the burden of showing that the Hong Kong custody  
16 decree affirmatively granted him shared or partial custody in  
17 some normal sense of the word. That he cannot do on this  
18 record.

19  
20 C. Intent of the Drafters

21 If the stated intent of those who drafted the Convention

1 "suffice[s] to establish that the result the text produces is  
2 not necessarily absurd, and hence cannot be dismissed as  
3 obvious drafting error," our inquiry is at an end. Chan, 490  
4 U.S. at 134; see also id. at 135 n.5 ("Even if the text were  
5 less clear, its most natural meaning could properly be  
6 contradicted only by clear drafting history."). The  
7 Convention's ratification history is entirely consistent with  
8 our interpretation of "rights of custody" as defined in the  
9 Convention.

10 1. The chair of the Hague Conference Commission that  
11 drafted the Convention (while allowing that the issue is not  
12 altogether clear) has written that the sole power to bar exit  
13 does not amount to the custodial bundle of rights:

14 [B]reach of a right simply to give or to withhold  
15 consent to changes in a child's place of residence  
16 is not to be construed as a breach of rights of  
17 custody in the sense of Article 3. A suggestion  
18 that the definition of "abduction" should be widened  
19 to cover this case was not pursued.

20 A. E. Anton, The Hague Convention on International Child  
21 Abduction, 30 Int'l & Comp. L.Q. 537, 546 (1981). It thus  
22 appears that suggestions to broaden the availability of the  
23 return remedy--to give an "access only" parent the right to

1     compel return--were raised when the Convention was in draft,  
2     and were in turn rejected.

3             2. The official reporter of the Hague Conference  
4     recounts that "[a]lthough the problems which can arise from a  
5     breach of access rights, especially where the child is taken  
6     abroad by its custodian, were raised . . . the majority view  
7     was that such situations could not be put in the same category  
8     as the wrongful removals which [the Convention] is sought to  
9     prevent." Pérez-Vera Report ¶ 65, at 444-45.

10            3. In submitting the Convention to President Reagan,  
11     Secretary of State George P. Schultz reported that "[t]he  
12     remedies for breach of the 'access rights' of the non-  
13     custodial parent do not include the return remedy . . . ."  
14     Letter of Submittal of the Hague Convention on the Civil  
15     Aspects of International Child Abduction, by the Secretary of  
16     State to the President, Oct. 4, 1985, in 51 Fed. Reg. at  
17     10,496; see also Letter of Transmittal from the White House to  
18     the Senate, Oct. 30, 1985, in 51 Fed. Reg. at 10,495  
19     (discussing congressional finding that "[p]ersons should not  
20     be able to obtain custody of children by virtue of this  
21     wrongful removal or retention") (emphasis added). The

1 Secretary's view of the matter is entitled to "great weight."  
2 Sumitomo Shoji America, 457 U.S. at 184-85. See generally El  
3 Al Israel Airlines v. Tsui Yuan Tsang, 525 U.S. 155, 168  
4 (1999) ("Respect is ordinarily due the reasonable views of the  
5 Executive Branch concerning the meaning of an international  
6 treaty." (citing Sumitomo Shoji America, 457 U.S. at 184-85)).

7 4. The Convention's official reporter has explained why  
8 the Convention provides separate remedies to secure access  
9 rights versus custodial rights, and limits the return remedy  
10 to the breach of custody:

11 A questionable result would [be] attained had the  
12 application of the Convention, by granting the same  
13 degree of protection to custody and access rights,  
14 led ultimately to the substitution of the holders of  
15 one type of right by those who held the other.

16  
17 Pérez-Vera Report ¶ 65, at 445 (emphasis added).

18

19 \* \* \*

20 Mr. Croll asks us to draw a distinction between: (i) a  
21 bare right of access, recognized as such; and (ii) the same  
22 bare right of access enforced by a ne exeat clause. The  
23 rationale for this distinction is that a parent who removes a  
24 child in violation of access rights and a ne exeat clause

1 would otherwise succeed in frustrating the ne exeat clause  
2 altogether, so that a return remedy is needed to achieve the  
3 Convention's goal of preventing parents from unilaterally  
4 circumventing the home country's courts in search of a more  
5 sympathetic forum. But the frustration of judicial power is  
6 not the touchstone for a return remedy under the Convention.  
7 A court order that confers a right of access (without more) on  
8 a non-custodial parent of a middle-class means is utterly  
9 frustrated if a custodial parent then permanently moves the  
10 child so far away that neither parent can afford to finance  
11 court-ordered access. Yet it is undisputed that the remedy of  
12 return is unavailable in such a case.

13 A ne exeat provision protects parental rights of access  
14 or custody alike; it does not transmute one right into the  
15 other. Thus, to grant the remedy of return where the  
16 petitioning parent has no right but access (whether or not  
17 that right is aided by a ne exeat clause) would effect a  
18 "substitution" of rights, something that the Convention  
19 expressly forbids. See Pérez-Vera Report ¶ 65, at 445.  
20 Overlooking the stated intentions of the drafters and amending  
21 judicially the Convention's explicit textual distinction

1 between rights of custody and rights of access "would be to  
2 make and not construe a treaty." See Chan, 490 U.S. at 135  
3 (internal quotation marks omitted). That is something we  
4 cannot do. See id. ("[t]o alter, amend, or add to any treaty,  
5 by inserting any clause, whether small or great, important or  
6 trivial would be on our part an usurpation of power, and not  
7 an exercise of judicial function." (quoting The Amiable  
8 Isabella, 19 U.S. (6 Wheat) 1, 71 (1821)) (alteration in  
9 original; internal quotation marks omitted)).

10  
11 D. Foreign Caselaw

12 No consensus view emerges from the opinions issued by the  
13 courts of the signatory nations. Though the "opinions of our  
14 sister signatories [are] entitled to considerable weight," Air  
15 France v. Saks, 470 U.S. 392, 404 (1985), we are aware of no  
16 doctrine requiring our deference to a series of conflicting  
17 cases from foreign signatories.

18 Foreign courts are split on the issue presented in this  
19 case. Compare In re Resina, (1991) Appeal No. 52 (Austl.  
20 Fam.) (violations of court orders generally trigger return);  
21 C.A. 5271/92, Foxman v. Foxman (Isrl. H.C. 1992) (finding that

1 both parents hold "rights of custody" where neither parent can  
2 remove the child without the other's consent or without  
3 consulting a rabbi), with D.S. v. V.W. [1996] 134 D.L.R.4th  
4 481, 501-04 (Can.) (finding no jurisdiction to order return  
5 though removal was in violation of an implicit provision in  
6 the custody decree); Thompson v. Thompson [1994] 119 D.L.R.4th  
7 253 (Can.) (noting that a ne exeat clause in a permanent  
8 custody order was intended to ensure access and "was not  
9 intended to be given the same level of protection by the  
10 Convention as custody"); Ministere Public v. Mme Y, T.G.I.  
11 Periguez, Mar. 17, 1992, D.S. Jur. 1992 (Fr.) (holding  
12 violation of a ne exeat provision to be "secondary" and not a  
13 violation of custody rights). Moreover, most of the cases  
14 rest on distinguishable facts, such as (a) orders of temporary  
15 custody awarded in the course of an ongoing custody battle,  
16 see B v. B, [1992] 3 W.L.R. 865, [1993] Fam. 32 (U.K. Ct. App.  
17 1992) (return available where no custody order is in place and  
18 temporary custody is expressly conditioned on non-removal of  
19 the child pending further proceedings), or (b) consent decrees  
20 expressly granting custody rights to both parents, see C v. C,  
21 [1989] 1 W.L.R. 654 (U.K. App. Ct. 1988) (consent order

1 granting "joint guardianship" to both parents).

2         Although the dissent claims "strong support" in caselaw  
3 for its point of view, see post at [17], the dissent itself  
4 confirms that no consensus is available: the cases worldwide  
5 are few, scattered, conflicting, and sometimes conclusory and  
6 unreasoned.<sup>7</sup> One further problem with the cases relied on by  
7 the dissent (and a problem with the dissent itself) is that in  
8 effect the rights of access are vindicated by the same remedy  
9 (compulsory return) as rights of custody; and while that seems  
10 to be a good idea as a matter of child development, it is  
11 incompatible with the terms of the Convention.

12

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<sup>7</sup> The lack of uniform interpretation (or application) of the Convention can be illustrated another way. The rate of return for children wrongfully removed to the United States from other countries is approximately 90 percent. See Mary A. Ryan, Assistant Sec. for Consular Affairs, U.S. Dep't of State, Prepared Statement Before the House Committee on International Relations (Oct. 14, 1999) available in 1999 WL 909860 (F.D.C.H.) at 3. The rate of return for American children wrongfully removed from the United States to a foreign country, however, is less than 30 percent. See Thomas A. Johnson, Prepared Statement Before the House Committee on International relations (Oct. 14, 1999) available in 1999 WL 909869 (F.D.H.C.) at 30. See, e.g., Concurrent Resolution urging compliance with the Hague Convention on the Civil Aspects of International Child Abduction, S. Con. Res. 293, 106th Cong., 146 Cong. Rec. H5089-07 (2000) (enacted).

1 **CONCLUSION**

2 For the reasons stated we hold that a ne exeat clause  
3 does not transmute access rights into rights of custody under  
4 the Convention. Ne exeat or not, Mr. Croll's rights include  
5 none of the powers (or burdens) of a custodial parent, and  
6 therefore are properly classified as rights of access. The  
7 Convention affords him several remedies for trespass on those  
8 rights, but return of the child to Hong Kong is not one of  
9 them. The district court's order returning Christina to Hong  
10 Kong is accordingly reversed and the case is remanded for  
11 dismissal of the petition for an order of return.