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The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence

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I. Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (the Convention)[1] was enacted in response to a pattern of parental abduction across international borders to thwart or preempt custody arrangements in one country and seek a more advantageous setting for litigating custody issues in another. Consequently, the Convention was designed to discourage the abduction of children across international borders and to encourage respect for custody and access arrangements in countries from which children were abducted.[2] To implement the

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1. Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, *available at* http://www.hcch.net/index_en. php?act=text.display&tid=21.

2. Article I of the Convention describes its objects as:

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

For commentary on the Convention *see generally* Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (1982), *available at* www.hcch.net/index_en.php?act=text.display&tid=21; 3 Conférence de la Haye de droit international privé, Actes et Documents de la Quatorzième session, Enlèvement d'enfants 426 (1982) ("Pérez-Vera

Convention, the United States enacted the International Child Abduction Remedies Act (ICARA) on April 29, 1988.[3]

Much has been written in recent years about the conflict between the Convention and laws designed to protect children from parental abuse or domestic violence,[4] in part due to growing evidence that a majority of return cases are brought by men against women,[5] many involving women alleging that they are fleeing with their children from domestic abuse.[6] This article explores ways of correcting an imbalance that favors the policy of preventing child abduction at the expense of exposing children to

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Report"), *available at* www.hcch.net/upload/expl28.pdf, and Department of State Public Notice 957 (Mar. 26, 1986); Hague International Child Abduction Convention; Text and Legal Analysis, Department of State Public Notice 957, 51 Fed. Reg. 10494 (Mar. 26, 1986) (designed to "assist the Senate Committee on Foreign Relations and the full Senate in their consideration of the Convention," in particular Appendix C "Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction"), *available at* http://travel.state.gov/pdf/Legal_Analysis_of_the_Convention.pdf.

3. International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.* (2006); State Department regulations can be found at 22 C.F.R § 9 (1989); 53 Fed. Reg. 23608 (June 23, 1988).

4. *See* TARYN LINDHORST & JEFFREY L. EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW, THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION (2012). This book reports on a study of the cases of twenty-two women who had a petition filed against them for wrongful removal and reported that they were in a situation that could be construed as domestic violence. *See also* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000); Roxanne Hoegger, *What If She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN'S L.J. 181 (2003); Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275 (2002); Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L. J. 1193 (2011); John Caldwell, *Child Abduction Cases: Evaluating Risks to the Child and the Convention*, 23 (2) N.Z. U. L. REV. 161 (2008); Annette Lopez, *Creating Hope for Child Victims of Domestic Violence in Political Asylum Law: Comment*, 35(3) U. MIAMI INTER-AM. L. REV. 603 (2004); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, GP SOLO MAGAZINE (Sept. 2005), *available at* http://www.americanbar.org/content/ newsletter/publiccations/gp_solo_magazine_home/gp_solo_magazine_index/unmetneeds.html. *See also* Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159 (2010).

5. *See* Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (2011) *available at* www.hcch.net; Preliminary Document No. 8A, "Child Abduction Section" under "Special Commissions" (finding that 69% of taking persons were mothers and 28% of the taking persons were fathers).

6. Weiner, *Navigating the Road*, *supra* note 4, (citing Hague Conference on Private International Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 309–19 (Oct. 2006), *available at* http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf.

domestic violence and makes recommendations for standardizing the outcomes of cases in U.S. courts involving allegations of parental abuse or other domestic violence, given a concerning trend of ad hoc and inconsistent results in cases decided under the Convention.

II. Determining "Grave Risk of Harm" Under the Convention

While the objective of the Convention is to secure the prompt return of children wrongfully removed or retained by a parent, the drafters built in certain exceptions.[7] Among these exceptions is the provision in article 13(b) that authorities are not bound to order the return of a child if it is established that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[8] Despite this exception, however, the Convention and ICARA favor returning children to their habitual residences.[9] Contracting States are required to "take all appropriate measures to secure within their territories the implementation of the objects of the Convention," using "the most expeditious procedures available."[10] Moreover, regulators and courts have developed a theory of the narrowness of the exceptions, which is often seized on in ordering return.[11] Numerous

7. *See* Perez-Vera, *Explanatory Report*, *supra* note 2, at para. 25:

> [I]t has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained.

8. Hague Convention, *supra* note 1, art. 13(b); *see also*, Perez-Vera, *Explanatory Report*, *supra* note 2, para. 29:

> Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.

Among other issues that may arise in courts deciding whether or not to return a child include the definition of "custody" and whether custody was being exercised prior to the taking (art. 3), the definition of "habitual residence" (art. 3 and 4) and the weight to be given to the views of the older child (art. 13, para. 2).

9. Note that while under ICARA, the applicant for return of the child need only establish the case by a preponderance of the evidence, the respondent opposing such return on the basis of article 13's risk-of-harm exception must establish his or her case by clear and convincing evidence. ICARA, *supra* note 3, at 11603(e).

10. Hague Convention, *supra* note 1, article 2.

11. *See, e.g.*, Public Notice 957, *supra* note 2, at 10509–10, ("In drafting articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children.") *See also* ICARA *supra* note 3, § 11601(a)(4). ("Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.") Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) ("The logic,

cases have warned that construing an exception to the principle of return too broadly would risk "swallowing the rule."[12]

In the United States under ICARA, the respondent must prove a "grave risk of exposure to physical or psychological harm," or of placing the child in an "intolerable situation" by clear and convincing evidence.[13] There is no guidance as to what sorts of evidence should be provided. Courts, therefore, address each case on an ad hoc basis, using whatever evidence is presented within the timeframe prescribed by the Convention.[14] The result has been that differences in outcomes and remedies are pervasive in these cases.

These differences in outcomes and remedies are not surprising, as courts face several complex issues in weighing whether a grave risk of harm exists. Courts often must determine the level of abuse that presents a grave risk of harm;[15] whether and to what extent domestic abuse in the household (e.g., abuse of spouse) creates psychological harm to the child;[16] whether the grave risk of harm, if established, can be mitigated in some way[17] (*e.g.*, by returning a child with undertakings by the parent to

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purpose, and text of the Convention all mean that such harms are not per se the type of psychological harm contemplated by the narrow exception under article 13(b)."); *see also* Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005); Norinder v. Fuentes, 657 F.3d 526; Vazquez v. Estrada, 2011 WL 196164 (N.D. Tex. Jan. 19, 2011).

12. Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005).

13. *See* ICARA, *supra* note 3, § 11603(e).

14. ICARA, *supra* note 3. *See* Hague Convention, *supra* note 1, art. 11. Article 11 provides:
The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

15. Blondin v. Dubois, 238 F.3d 153, 162 (2d Cir. 2001).
In other words, at one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.

16. *See, e.g., Whallon*, 230 F.3d at 460 (finding that one instance of shoving wife and verbal abuse of wife and older daughter did not entail grave risk, distinguishing *Walsh*, where the court found that a pattern of abuse did constitute grave risk to the child observing the abuse). *See also* Elyashiv v. Elyashiv, 353 F. Supp. 2d 394 (E.D.N.Y. 2005); *In re* Application of Adan, 437 F.3d 381 (3d Cir. 2006); Charalambous v. Charalambous, 627 F.3d 462 (1st Cir. 2010); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045 (E.D. Wash. 2001). The social science on the effect of spousal abuse on a child has evolved substantially in recent decades, *see* LINDHORST & EDLESON, BATTERED WOMEN, *supra,* note 4, *Foreword*, p. x.

17. *See Blondin,* 238 F.3d at 162.
In cases of serious abuse, before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b), it must examine the full range of options that might make

whom he or she is returned[18] or stipulating protections to be provided by local authorities); whether the foreign courts, police, or other authorities are competent or willing to protect the child;[19] and whether it is appropriate for a court to attempt to assess such competence or willingness.[20] One of the more unsettling concerns about domestic violence is the discretion to return a child even if "grave risk of harm" is proved, if return would advance the purposes of the Convention.[21]

Not surprisingly, the difficulties with determining "grave risk of harm" start with the fact that the term is not well defined. In the United States, there is a certain amount of unanimity on what should *not* determine whether "grave risk" exists, including: the best interests of child;[22] the child's happiness;[23] the relative fitness of the parents; the U.S. court's rel-

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possible the safe return of a child to the home country.

See also Maurizio v. L.C., 135 Cal. Rptr. 3d 93 (Ct. App. 2011).

18. Simcox v. Simcox, 511 F.3d at 608 (6th Cir. 2007) (in serious cases undertakings and the like are unlikely to be sufficient, and "Where a grave risk of harm has been established, ordering return with feckless undertakings is worse than not ordering it at all."); *Gaudin*, 415 F.3d at 1028; *Maurizio*, 135 Cal. Rptr. 3d at 93.

19. Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa., 2010) (Cypriot courts not able to protect); *In re* Application of Adan, 437 F.3d 381 (on remand, DC found insufficient evidence that Argentina cannot protect); Stevens v. Stevens, 499 F. Supp. 2d 891 (E.D. Mich. 2007) (court in Scotland was not incapable or unwilling to give child adequate protection).

20. *See* Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008); Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004).

21. Under article 13(b) of the Convention, "the judicial or administrative authority of the requested State *is not bound* [emphasis added] to order the return of the child" in the circumstances enumerated" and under article 18, "The provisions of this Chapter [III, Return of Children] do not limit the power of a judicial or administrative authority to order the return of the child at any time." *See also* Perez-Vera, *Explanatory Report*, *supra* note 2, at para. 113; Public Notice 957, *supra*, note 2, at 10509; Tsai-Yi Ynag v. Fu-Chiang Tsui, 499 F.3d 259 (3d Cir. 2007); Habrzyk v. Habrzyk, 775 F. Supp. 2d 1054 (N.D. Ill. 2011); McManus v. McManus, 354 F. Supp. 2d 62, 69–70 (D. Mass. 2005); Carrasco v. Carrillo-Castro, 862 F. Supp. 2d 1262 (D.N.M. 2012); Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630 (S.D. Tex. Houston Div., 2007); Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D. N.Y. 2010); Maurizio v. L.C., 135 Cal. Rptr. 3d 93, 113 (Ct. App. 2011) (in which grave risk of harm was found but, "Nevertheless, in this case, under the Hague Convention, there is no question that Leo must be returned to Italy for custody proceedings. The only issue is how his return can be accomplished with a minimum amount of harm to the child").

22. Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (stating that this is not the kind of psychological harm that the Convention is talking about, the court added: "To conclude otherwise would risk substituting a best interest of the child analysis to the analysis the Convention requires"); *but see* Lozano v. Alvarez, 697 F.3d 41 (2d Cir. 2012) ("Simply put, the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child's best interests; rather, the Convention embodies the judgment that *in most instances,* a child's welfare is best served by a prompt return to that country"); Perez-Vera, *Explanatory Report*, *supra* note 2 at paras. 23 and 25.

23. Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996).

The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and

ative competence to determine custody vis-à-vis a foreign court;[24] the U.S. court's disapproval of a foreign court's resolution of a custody dispute; the child's economic well-being;[25] and rising violence (short of war) in the home country.[26] Yet, there is an unsettling amount of variation in how courts define or determine that risk. This variation is compounded by the fact that courts are often faced with little objective evidence of the risk of harm to the child and are therefore forced to rely in large part on the credibility of the parties.

Similar difficulties in defining "grave risk of harm" have been seen in Convention cases in other parts of the world,[27] and conferences dealing with the operation of the Convention have sought to address these difficulties. Judicial conferences dealing with Hague Convention cases, for example, have regularly stressed the deterrent purpose of the Convention, the necessity of construing exceptions narrowly[28] and the usefulness of

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reserved to the court in the country of habitual residence.

See also Habrzyk, 775 F. Supp. 2d at 1054.

24. *See* Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004); Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2004); Khan v. Fatima, 680 F.3d 781 (7th Cir. 2012); Stevens v. Stevens, 499 F. Supp. 2d 891 (E.D. Mich. 2007); Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa., 2010) (on remedies available in foreign courts); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995); *Friedrich*, 78 F.3d at 1060.

25. U.S. Dep't of State, Legal Analysis, 51 Fed. Reg. 10510 (Mar. 1986).

A review of deliberations on the Convention reveals that "intolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State.

26. Cuellar v. Joyce, 596 F.3d 505 (9th Cir. 2010) (requiring zone of war, famine, or disease); Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996); Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003) (Israel is not a zone of war.).

27. *See, e.g.*, M.R. and L.R v. Estonia, 13420 Eur. Ct. H.R. 12 (2012); Lipkowsky and McCormack v. Germany, 26755 Eur. Ct. H.R. 10 (2011) (requiring exceptions for not returning a child under the Hague Convention to be interpreted strictly).

28. *See, e.g.*, Hague Conference on Private International Law, Ruwenberg, *Judges' Seminar on International Protection of the Child* (June 3–6, 2000), *available at* www.hcch.net/upload/deruwen_e.pdf (France, Germany, Italy, and the Netherlands).

The "grave risk" defense in Article 13(b) of the Convention has generally been narrowly construed. It is in keeping with the objectives of the Convention, as confirmed in the Explanatory Report by Elisa Pérez-Vera, to interpret this defence in a restrictive fashion.

See also Hague Conference on Private International Law, *The Latin American Judges' Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, Exceptional Nature of Defenses (Dec. 14, 2004), *available at* www.hcch.net/upload/monterrey2.pdf [herinafter *Judges' Seminar.*]

The exceptional nature of the defenses under Articles 13 and 20 of the Convention is emphasized. The "grave risk" defense under Article 13(1)(b) should, in keeping with the Pérez-Vera, *Explanatory Report*, be narrowly interpreted. Any tendency to give a broad interpretation to that article undermines the operation of the Convention.

See also Hague Conference on Private International Law, *Second Meeting of Government Experts, Inter-American Program of Cooperation for the Prevention and Remedy of Cases of International Abduction of Children by One of Their Parents*, Report of Roundtable 3, Model Rules of Procedure for the International Return of Children (Sept. 19–21, 2007), *available at*

conditions, undertakings, and the like in facilitating return.[29]

In 2011 and 2012, the Hague Conference on Private International Law (HCPIL) identified "domestic violence allegations and return proceedings" as one of its themes, noting that domestic violence issues have increasingly been raised as an area of concern in case law and academic literature.[30] The meeting report discusses at length the deliberations on the issue, identifying as one of the difficult challenges, how to achieve a balance "between the need to maintain expeditious procedures and to avoid examination of the merits of the underlying custody dispute while also allowing proper consideration of a defence under Article 13(b)."[31] In addition to examining how to define domestic violence in the context of Article 13(b), HCPIL considered protective measures that could facilitate safe return and ways to promote consistency in judicial outcomes in these cases. HCPIL concluded that numerous jurisdictions were dealing with return cases involving allegations of domestic violence and affirmed its support for promoting consistency in how such cases were handled.[32] It discussed three proposals for promoting consistency in the interpretation and application of article 13(b): (i) drafting guides to good practice for the

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www.hcch.net/upload/iap28_3.pdf (2007).

18.2. Safe return. The court may not refuse the return of the child in reliance on Article 13(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction or Article 11(b) of the Inter-American Convention on the International Return of Children of 1989 if it is shown that appropriate measures have been taken to ensure the protection of the child after the return.

29. *See Judges' Seminar, supra* note 28.

A refusal to return a child on the basis of Article 13(b) should not be contemplated unless all the available alternative methods of protecting the child have been considered by the court and found to be inadequate.

Note, however, another conclusion of this Seminar:

5. Protection of the returning child when considering measures to protect a child who is the subject of a return order (and where appropriate an accompanying parent), a court should have regard to the enforceability of those measures within the country to which the child is to be returned. In this context, attention is drawn to the value of safe-return orders (including "mirror" orders) made in that country before the child's return.

See also, however, Hague Conference on Private International Law, Nov. 28–Dec. 3, 2005, *The Hague Project for International Co-operation and the Protection of Children, Operation of the Hague Children's Conventions and Cross-Border Protection of Children within Latin America*, *available at* www.hcch.net/upload/jud_seminar2005_e.pdf.

2. Particularly, within the 1980 Convention, it was recognized that when deciding on a child abduction case, the requested Judge should trust that the Judicial Authorities of the requesting State will take care of the due protection of the child, and where necessary the accompanying parent, once the child is returned.

30. Hague Conference on Private International Law, *Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, 4–6 JUDGES' NEWSLETTER ON CHILD PROTECTION, Vol. XVIII (2012), *available at* www.hcch.net/upload/newsletter/nl2012tome18e_p02.pdf.

31. *Id.* para. 4.

32. *Id.* part 1, paras. 35–37.

implementation of article 13(b); (ii) establishing a working group of judges "to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception;" and (iii) establishing a group of experts "to develop principles or a practice guide on the management of domestic violence allegations in Hague return proceedings."[33]

III. The Existing Imbalance between the Policies of Preventing Child Abduction and Protecting Children from Domestic Violence

In its implementation of the Convention, the United States has favored and focused on preventing child abduction, possibly at the expense of protecting children from domestic violence. Implementation in the United States involves both executive and judicial functions. The United States Department of State Office of Children's Issues (OCI) is the Central Authority that has the primary executive responsibility for handling incoming cases under the Convention in which a parent abducts a child into the United States.[34] As the Central Authority, OCI's principal charge is to secure the return of the child. Under article 7 of the Convention, the Central Authority is required to cooperate with others in securing the return of children and, *inter alia*:

> f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
> g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
> h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child. . . .

On the judicial side, under section 11603(a) of ICARA, state courts and federal district courts have concurrent original jurisdiction of actions arising under the Convention.

Procedurally, applicants for the return of a child (petitioners) and parties opposing return (respondents) are treated unequally in a number of significant respects. Under the Convention and ICARA, the petitioner need only present his or her case for return by a preponderance of the evidence, whereas the respondent must provide clear and convincing evidence of the grave risk of harm or intolerable situation. Furthermore, The Hague has carefully delineated the information to be included in an application for return[35] and a number of countries, including the United

33. *Id.* para. 38. (same)
34. The Hague Convention, *supra* note 1, art. 6.
35. *Id.* art. 8.

States, explain explicitly what information is required to provide legal or factual justification for an application.[36] The Hague and the United States have promulgated a model form of application for return,[37] whereas this type of assistance is not provided to respondents.

Further betraying the focus on return, ICARA facilitates assistance in obtaining and paying for counsel for petitioners, but not for respondents.[38] Indeed, although States are not permitted to charge any expenses, including legal fees and courts costs to the petitioner, the United States has lodged the following reservation:

> [I]t will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.[39]

Furthermore, although legal fees and court costs are to be borne by the petitioner unless covered by payments from federal, state, or local legal assistance programs, courts ordering the return of a child are directed to charge all of the petitioner's expenses (including court costs and legal fees) to the respondent "unless the respondent establishes that such order would be clearly inappropriate."[40] This means that a respondent who fails to establish a "grave risk" under article 13(b), or one who does establish a "grave risk," but whose child is ordered returned under a court's discretion to do so, may be required to bear all the petitioner's (and, of course, the respondent's own) court costs, legal fees, and other expenses. There is no reciprocal provision for petitioners to pay the expenses of respondents when a grave risk or other exception to the obligation to return a child is established.

The petitioner also is offered assistance by nonprofit organizations, in particular the National Center for Missing and Exploited Children (NCMEC). NCMEC acted as the U.S. Central Authority for incoming

36. *See Revision of the Model Application Form Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Information Document No. 4 (May 2011), *available at* www.hcch.net/upload/wop/abduct2011info04e.pdf.

37. Recommendation adopted by the Fourteenth Session: model form to be used in making applications for the return of wrongfully removed or retained children (2008), *available at* www.hcch.net/index_en.php?act=publications.details&pid=2778&dtid=28; 22 C.F.R. § 94.5 (1989); Application Under the Hague Convention on the Civil Aspects of International Child Abduction, Form of Application, *available at* www.state.gov/documents/organization/80021.pdf.

38. 22 C.F.R. § 94.6(e) (1989).

39. United States Reservations to Hague Convention on the Civil Aspects of International Child Abduction, art. 24, 24 (1988), *available at* www.hcch.net/index_en.php?act=status.comment &csid=652&disp=resdn.

40. 42 U.S.C. § 11607(b) (2006).

cases from 1995 to April 2008, when the OCI took over those functions. At present, NCMEC maintains the International Child Abduction Attorney Network (for Convention and non-Convention cases involving child abduction) and offers a training manual for attorneys representing petitioners in Hague Convention cases,[41] including sample pleadings and filings.[42]

IV. Leveling the Playing Field

Eliminating or limiting some of the bias described above would help level the playing field where the parent who has taken or retained the child alleges domestic violence. Changes might include ensuring that cases are handled, on both sides, by experienced attorneys who are trained in Convention cases. An improved attorney registry specific to Convention cases and made available to both parties would help accomplish this goal. Attorneys and judicial officers should also receive training about issues that are relevant to child abduction, including treatments for domestic violence.

The most difficult problem for parties and their attorneys in these cases is assembling the pertinent evidence, which involves providing enough time, notwithstanding the expediency sought in abduction cases, for respondents to procure and submit evidence, and improving standardization of decision-making by identifying for counsel the sort of evidence that has proved useful in these cases. A review of cases shows that useful information can include:

i. Documentation of legal steps taken or attempted in the other country concerning abuse, including any divorce proceedings in which abuse is alleged;
ii. Any protective order against petitioner in other country;
iii. Police reports of domestic abuse; hospital records and/or medical reports of abuse of taking parent or child;
iv. Social services records;
v. Testimony of taking spouse's attorney in other country;
vi. U.S. embassy records of applications for protection;
vii. Any evidence of attempts to limit the mobility of the taking parent;
viii. Witness testimony concerning occurrences of abuse (including older children's testimony);

41. National Center for Missing and Exploited Children, *Litigating International Child Abduction Cases Under the Hague Convention*, *in* INTERNATIONAL CHILD ABDUCTION TRAINING MANUAL (2012), *available at* www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf.

42. *Id.* Exhibit H.

ix. Testimony of children who are old enough to express their own views of where they should live and why;
x. Affidavit of the taking spouse setting out the events on which the allegation of abuse is based;
xi. Testimony of witnesses to any perceived effect on children of the alleged abuse;
xii. Psychologist and/or child expert reports on the effects on the children of abuse of the child or parent;
xiii. Any evidence or expert advice that the courts, police and other authorities of the other country have failed or are unable or unwilling to protect the taking spouse and the children from abuse;
xiv. Evidence as to access to courts, language barriers, and other impediments for noncitizens.

Another significant step would be to provide free legal counsel to respondents or at least facilitate the finding of legal aid for respondents as well as petitioners. The system is currently structured to facilitate legal aid for petitioners only. The inability of respondents to find and afford legal assistance can result in widely varying results where appropriate evidence of alleged abuse is critical and timing is tight.[43]

Another priority should be to provide adequate time in cases where domestic violence is alleged. A fixed period of delay could be recommended where evidence of abuse must be gathered. Courts should also standardize their approaches to cases where the respondent seeks refugee status.[44] In a recent case, for example, a Canadian court found that in the case of a child who is a refugee (or applying for refugee status), there should be a rebuttable presumption that the child is at risk of persecution if returned home.[45] Although delaying return under the Convention while a refugee determination is being made (usually a lengthy process) would risk thwarting the purposes of the Convention, perhaps refugee cases could be handled on an expedited basis where an application for return has

43. *See* Hague Convention on Private International Law, Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (1–10 June 2011), Conclusions and Recommendations:

> 33. The Special Commission emphasizes that the difficulty in obtaining legal aid at first instance or an appeal, or of finding an experienced lawyer for the parties, may result in delays and may produce adverse effects for the child as well as for the parties. The important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find experienced legal representatives is recognized.

44. On this subject, *see* Norris, *supra* note 4 (arguing that where asylum is granted on domestic violence grounds, such determination should be given considerable weight in the grave risk assessment in a Hague Convention case, and where a claim of asylum has been made on domestic violence grounds, but not yet adjudicated, the Hague Convention proceeding should be stayed until the asylum case has been adjudicated).

45. A.M.R.I. v. K.E.R., No. C52822, 2011 (20110602).

also been made.[46]

A more aggressive way of standardizing decisions in Convention cases where domestic violence is alleged would be to restrict the judicial handling of Convention return cases to federal courts, on the theory that removing state courts from the responsibility for making these decisions would reduce the instance of conflicting theories on how to assess such allegations and would take out of the equation some of the differences in scheduling problems found in different court systems. International judicial and other conferences have stressed the desirability of limiting the number of jurisdictions and courts handling these cases in order to enhance the competence, consistency, and coordination of judges and practitioners.[47] Such a change would require amending ICARA, and the problem of legislative delay makes this a less appealing solution, at least in the short term. Perhaps an initial step could be to follow the lead of HCPIL and set up a working group to consider some of these changes and to establish some guidelines for judges and practitioners for cases where domestic abuse is claimed.

V. Conclusion

The Hague Convention on the Civil Aspects of International Child Abduction was designed to discourage the abduction of children across international borders and to encourage respect for custody and access arrangements in countries from which children were abducted. An analysis of this conflict in the United States and abroad shows that not only are results inconsistent from case to case, but that the policy of preventing child abduction is often favored at the expense of exposing children to domestic violence. In short, the Hague Convention, in practice, has unintended consequences as it often does not account for the severe impact on (typically) women and children who flee abuse. As shown in this article, there are ways of approaching cases under the Hague Convention to strike a better balance between discouraging child abduction and protecting children from domestic violence.

46. This is suggested in Norris, *supra* note 4.

47. *See, e.g., Common Law Judicial Conference on International Parental Child Abduction,* Washington, D.C. (Sept. 2000) (Australia, Canada, Ireland, New Zealand, United Kingdom and the United States); *Judges' Seminar on International Protection of the Child,* De Ruwenberg, (June 2000) (France, Germany, Italy, and the Netherlands); *International Judicial Seminar on The 1980 Hague Convention on The Civil Aspects of International Child Abduction, De Ruwenberg Conference Centre,* Netherlands (Oct. 2001) (attended by thirty-one judges from seven jurisdictions (England and Wales) (2), France (3), Germany (15), Netherlands (2), Scotland (1), Sweden (3), United States of America (5)); *Second Malta Judicial Conference on Cross-frontier Family Law Issues,* Hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law (Mar. 2006), *available at* www.hcch.net.