CONVENTION ON SAFETY FOR SURVIVORS OF FAMILY VIOLENCE INVOLVED IN INTERNATIONAL CUSTODY DISPUTES

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This Article proposes a new treaty to fix the "domestic violence problem" that plagues the Hague Convention on the Civil Aspects of International Child Abduction. It argues that a new international instrument is legally permissible and would be the most efficient way to solve the problem. It compares the proposed solution to other child abduction instruments that exist in the European Union (EU) and Latin America but that do not address domestic violence. This Article proposes specific treaty provisions and provides commentary on those provisions. This Article is intended to influence state parties to the Hague Abduction Convention who are dissatisfied with the slow pace and direction of reform to date. It is also meant to influence policymakers attending the Forum on Domestic Violence and International Child Abduction, sponsored by the Hague Permanent Bureau and scheduled for the second half of 2025 in Brazil.

TABLE OF CONTENTS

INTRODUCTION 1168

I. THE HAGUE ABDUCTION CONVENTION HAS A DOMESTIC VIOLENCE PROBLEM 1175

A. *Refusing Return Versus Protective Measures Approach*.....1180

B. *The Definition of Domestic Violence* 1184

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† Philip H. Knight Professor of Law, University of Oregon School of Law. I dedicate this Article to all the advocates who are working so hard to change the Hague Convention on the Civil Aspects of International Child Abduction to make its application fair and safe for survivors of domestic violence and their children, and especially those at FiLiA, GlobalARRK, and Revibra, and to the brave mothers who have publicly shared their stories. I appreciate the helpful comments I have received on this Article from Janaína Albuquerque Azevedo Gomes, Miranda Kaye, Ruth Lamont, Jessica Raffal, and Valentina Shaknes. I also appreciate the excellent work by my research assistants, Adelaide Fitzgerald and Sorina Radu.

C. *Other Issues*.....1188
II. THE PROBLEM CAN BEST BE FIXED BILATERALLY OR MULTILATERALLY WITH A COMPLEMENTARY TREATY.....1190
A. *Other Options*.....1193
1. Impact Litigation in International Tribunals.....1193
2. Domestic Solutions.....1197
B. *A Bilateral or Multilateral Solution Is Needed*.....1201
1. Brussels II-ter.....1207
2. The Inter-American Convention on the International Return of Children.....1212
III. THE HAGUE ABDUCTION CONVENTION PERMITS A NEW TREATY.....1218
A. *There Would Be No Derogation for Most Countries*.....1218
B. *Article 36 Is Satisfied by Defining Domestic Abuse*.....1221
IV. THE NEW TREATY (ARTICLES AND COMMENTARY).....1228
CONCLUSION.....1244

INTRODUCTION

From June 18 to June 21, 2024, the Hague Conference on Private International Law (HCCH) sponsored a historic event: the Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention.[1] The Forum represented a concrete step to consider, and potentially improve, the application of the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Abduction Convention") given the reality of who "abducts" children across international boundaries and why.[2]

The Hague Abduction Convention, a private international treaty, affords parents a remedy to obtain the return of their children very quickly after the children have been wrongfully removed to or retained in another country, usually by the other parent.[3] Article 13(1)(b) is the most commonly granted defense to a petition for a child's return.[4] The defense

1 Permanent Bureau, Hague Conf. on Priv. Int'l L. [HCCH], *Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention, June 2024, South Africa*, Council on Gen. Affs. & Pol'y, para. 5, Prel. Doc. No 8A (Mar. 2025) (on file with author).

2 *Id.* paras. 2–3.

3 Nigel Lowe & Victoria Stephens, Hague Conf. on Priv. Int'l L. [HCCH], *Global Report: Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction Convention*, app. I, para. 82, Prel. Doc. No 19A (Oct. 2023), https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf [https://perma.cc/W7DC-WKPG].

4 *Id.* paras. 81–82 (showing that Article 13(1)(b) was the sole or joint basis for nonreturn in 46% of cases resolved by a judge for applications received in 2021).

states that a judge need not return a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[5] Domestic violence survivors who flee transnationally with their children for safety often invoke this defense when their batterers petition for the children's return.[6] The defense is often unsuccessful, however.[7]

The Forum was convened because the grudging application of the Article 13(1)(b) defense has caused the Hague Abduction Convention to have "a domestic violence problem."[8] Academic criticism of the Convention in this context dates back twenty-five years.[9] In October

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5 Hague Convention on the Civil Aspects of International Child Abduction, art. 13(b), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention].

6 *See* Jeffrey Edleson, Sudha Shetty & Mary Fata, *Fleeing for Safety: Helping Battered Mothers and Their Children Using Article 13(1)(b), in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION: THE 1980 HAGUE CONVENTION 96, 97 (Marilyn Freeman & Nicola Taylor eds., 2023).

7 No worldwide data exists about the outcomes for domestic violence survivors who are respondents in proceedings under the Hague Abduction Convention. However, Marilyn Freeman and Nicole Taylor surveyed family justice professionals around the world and found high rates of return. *See* MARILYN FREEMAN & NICOLA TAYLOR, INT'L CTR. FOR FAM. L. POL'Y & PRAC., WHERE INTERNATIONAL CHILD ABDUCTION OCCURS AGAINST A BACKDROP OF VIOLENCE AND/OR ABUSE 47 (2024), https://westminsterresearch.westminster.ac.uk/download/b66cb0f34ec5328e8810b72468cbc8b7bc8f1d18b7b4cbaa6e3077c1055c89f3/2375635/DV%20REPORT%2015.4.24.pdf [https://perma.cc/ZFR2-N37Q] ("Three-quarters (*n*=84, 75.2%) of the 111 respondents to this question reported that abducted children are often (*n*=56, 50.5%) or mostly (*n*=28, 25.2%) returned when the Article 13(1)(b) exception is argued in circumstances of domestic violence and/or abuse."). Some country-specific data exists. *See, e.g.*, Edleson et al., *supra* note 6, at 109 (discussing U.S. cases); Gina Masterton, Zoe Rathus, John Flood & Kieran Tranter, *Dislocated Lives: The Experience of Women Survivors of Family and Domestic Violence After Being 'Hagued,'* 44 J. SOC. WELFARE & FAM. L. 369, 375 (2022) (discussing the experiences of ten women who had connections to Australia, "abducted" their children, and alleged domestic violence, nine of whom returned with their children to the child's habitual residence after they lost a Hague proceeding); Annabelle Gray & Miranda Kaye, *Redressing the Balance: How Australia's Approach Under the Hague Abduction Convention Is Still Endangering Victims of Domestic Violence*, 37 INT'L J.L. POL'Y & FAM. 1, 3 (2023) (discussing Australian cases).

8 Sarrah Singapurwala, *Hague Convention on Child Abduction Has a Domestic Violence Problem*, LEAFLET (Aug. 26, 2023, 7:52 AM), https://theleaflet.in/hague-convention-on-child-abduction-has-a-domestic-violence-problem [https://perma.cc/8YFZ-8QCK].

9 *See, e.g.*, Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 596–601 (2000); Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL'Y & FAM. 191 (1999); *see also* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 537 (2004); Rhona Schuz, *The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency*, 40 BROOK. J. INT'L L. 31, 54–58, 68–69, 76–77 (2014); Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299, 300–01 (2013); Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J. MARSHALL L.J. 39, 63 (2011).

2023, shortly before the Eighth Special Commission to Review Operation of the Hague Abduction Convention, advocates for reform presented the Secretary General of the Hague Conference with a petition, signed by over 38,000 people, saying that the Hague Abduction Convention was unjust when applied to mothers who were fleeing from domestic violence.[10] Countless mothers also inundated the Secretary General and other Permanent Bureau officials with testimonials about how they had been "Hagued" by their abusers.[11] In response, at the Eighth Special Commission, the Secretary General proposed a Forum to consider this criticism.[12] Presumably the call for a Forum was motivated, at least in part, by a desire to bolster the reputation of one of the Hague Conference's most successful private international law treaties.[13]

One hundred people attended the Forum in person—comprised of fleeing mothers, seeking fathers, judges, Central Authorities, academics, psychologists, psychiatrists, social workers, activists, and others—and approximately three hundred people attended online.[14] The Forum was "inclusive"[15] and balanced. After three days of presentations, Forum participants seemed to agree (although no formal polling was conducted) that domestic violence against a taking parent can cause great harm to children and that Article 13(1)(b) is a vehicle to address any concerns about the application of the Hague Abduction Convention in these cases.[16] But agreement beyond these basic points seemed elusive. Attendees disagreed about the number of domestic violence cases that should qualify for the Article 13(1)(b) defense and the proper way to apply the defense.

These disagreements cut to the heart of the Hague Abduction Convention's application. On the one hand, some participants adhered to the view expressed in a document disseminated by the Hague Permanent Bureau in 2020, the *Guide to Good Practice on Article*

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10 *See* GlobalARRK, *Protect Vulnerable Families: Fix the Hague Abduction Convention*, CHANGE.ORG (June 9, 2023), https://chng.it/4v24zN8J7y [https://perma.cc/BZ8T-KFWH].

11 Christophe Bernasconi, Sec'y Gen., Hague Conf. on Priv. Int'l L., Opening Address at the Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention 3 (June 18, 2024) (transcript available at https://assets.hcch.net/docs/1c00fde2-6656-49cb-9f58-d12899a2114b.pdf [https://perma.cc/7XKE-CTU8]).

12 HCCH, *Forum on Domestic Violence*, *supra* note 1, para. 3.

13 *See* KATARINA TRIMMINGS, CHILD ABDUCTION WITHIN THE EUROPEAN UNION 36 (Paul Beaumont & Jonathan Harris eds., 2013) (calling the treaty "a phenomenal success").

14 HCCH, *Forum on Domestic Violence*, *supra* note 1, para. 6.

15 Bernasconi, *supra* note 11, at 2.

16 This agreement led Dr. Bernasconi to conclude, optimistically, that the problem could be addressed within the four corners of the Hague Abduction Convention itself. Christophe Bernasconi, Sec'y Gen., Hague Conf. on Priv. Int'l L., Closing Remarks at the Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention (June 21, 2024) (on file with author).

13(1)(b) ("*Guide to Good Practice*"),[17] that the defense applied to "exceptional" cases,[18] and that judges should address grave risks with protective measures so that children could still be returned.[19] On the other hand, some participants suggested that cases involving domestic violence were common, and that courts should grant the Article 13(1)(b) defense outright without trying to minimize the risks with unenforceable, unenforced, and ineffective protective measures.[20]

The Forum did not produce conclusions and recommendations,[21] a normal practice after state parties attend special commissions every six years.[22] Rather, the Secretary General announced another forum for 2025, to be held in Brazil ("the Brazil Forum").[23] The benefit of more discussion is unclear. Another forum might not advance safety and fairness for survivors and their children in any concrete way. Worse yet, the next forum might produce a bad outcome, such as a misguided report by the Permanent Bureau that doubles down on problematic current practices.[24]

Assuming, however, that positive outcomes would materialize, they might not be implemented expeditiously. For example, the next forum might lead the Permanent Bureau to produce a helpful report for state parties to consider at the Ninth Special Commission to Review Operation of the Hague Abduction Convention in 2029. Then, perhaps, the Ninth Special Commission would produce a set of useful conclusions and

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17 HAGUE CONF. ON PRIV. INT'L L., 1980 CHILD ABDUCTION CONVENTION: GUIDE TO GOOD PRACTICE PART VI ARTICLE 13(1)(B) (2020), https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf [https://perma.cc/Q3PC-JATP] [hereinafter HCCH, GUIDE TO GOOD PRACTICE].

18 *Id.* paras. 28, 33, 60.

19 *Id.* paras. 44–45, 59.

20 *See generally* Adrienne Barnett, Miranda Kaye & Merle Hope Weiner, *The 2024 Forum on Domestic Violence and the Hague Abduction Convention*, 38 INT'L J.L. POL. & FAM. (2024) (characterizing the content of the Forum).

21 In fact, the only document to emerge from the Forum was a summary report of presentations for the Hague Conference's Council on General Affairs and Policy. That report was embargoed by the Permanent Bureau. Attendees who received a copy were told it was confidential and should not be shared with others. It was eventually made nonconfidential but was not posted publicly. *See* Email from Hague Conf. on Priv. Int'l L. to Forum Participants (Nov. 8, 2024, 6:03 AM) (on file with author).

22 *See Special Commission Meetings*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/publications1/?dtid=57&cid=24 [https://perma.cc/KK9W-R546] (navigate to any of the Special Commission meetings; the conclusions and recommendations can be found at the first hyperlink on the webpage associated with each meeting).

23 HCCH, *Forum on Domestic Violence*, *supra* note 1, paras. 152, 158.

24 It would be a setback, for example, if the Permanent Bureau reaffirmed its faith in protective measures, questioned survivors' veracity, suggested that survivors should have diagnosed mental health problems before courts consider whether return would cause an "intolerable situation" for the child, or condoned an examination of whether the victim could relocate to a place of safety within the state of the child's habitual residence.

recommendations, including a recommendation for a revised *Guide to Good Practice on Article 13(1)(b)*. Any change to the Guide might not be complete until 2037, assuming it would take as much time to update the *Guide to Good Practice* as it took to produce it originally.[25]

It is unknown whether the Brazil Forum will lead to real, beneficial, and timely change. Therefore, it is not too early to start planning for a less optimistic outcome. After all, countless Hague mothers and their children have already been, and will continue to be, adversely affected by inadequate change, a slow pace, or both.[26] Most obviously, inadequate reform or delay will affect those survivors who flee for safety and face a Hague petition for their children's return. However, a poor outcome will also affect those survivors who are stuck in unsafe locations, fearful to leave because of the Hague Abduction Convention.[27] Likewise, inadequate or untimely reform will affect survivors who have fled for safety to remote locations where the Hague Abduction Convention is not the law, but who now face isolation and inadequate support and want to return to their homes.[28] Given the importance of reform to so many people, advocates for change should follow the well-known saying: "Hope for the best and plan for the worst."

In that spirit, this Article proposes a concrete solution. This Article lays out a separate, but complementary, treaty to the Hague Abduction Convention for like-minded countries who are committed to protecting domestic violence survivors and their children from the harms attending return pursuant to the Hague Abduction Convention. This proposal is an important option if the Brazil Forum does not prompt necessary change at a reasonable speed. This proposal might also encourage those who oppose it to adopt meaningful and expeditious outcomes at the Brazil Forum itself. Therefore, this proposal could help ensure that participants move beyond information sharing and propose concrete reforms achievable before 2037.

This Article is the first to call for a new treaty that would ensure the correct application of Article 13(1)(b) in the context of family abuse.[29]

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25 *See* Merle H. Weiner, *The Article 13(1)(b) Guide to Good Practice*, 25 DOMESTIC VIOLENCE REP. 7, 7 (2019) (noting that the Guide was commissioned in 2012 and published in 2020).

26 *See, e.g.*, HCCH, *Forum on Domestic Violence*, *supra* note 1, paras. 65–70.

27 Roz Osborne, *Stuck Parents: An Unintended Consequence of the Hague Abduction Convention 1980*, RESOLUTION, Jan.–Feb. 2023, at 9–11.

28 *See* Ed Thomas, *Family Courts: 'We Kidnapped Our Kids from Abusive Dads and Fled the UK,'* BBC (Sept. 4, 2023), https://www.bbc.com/news/uk-66534732 [https://perma.cc/4KS2-RVDR] (citing *Mums on the Run: Failed by the Family Court* (BBC Sept. 4, 2023)).

29 Aude Fiorni thoughtfully canvassed options for improving the operation of the 1980 Hague Abduction Convention more generally, although not in the context of Article 13(1)(b) or domestic violence. *See generally* Aude Fiorini, *Enlèvements Internationaux d'Enfants: Solutions*

The Article elaborates on the potential content for such a treaty, including related issues (such as jurisdiction and substantive rules on relocation). This proposed treaty is provisionally titled the "Convention on Safety for Survivors of Family Violence Involved in International Custody Disputes." The word "abduction" is purposefully omitted from the title because its negative connotation is inapt for parents who flee for reasons of safety and the "abductor" label has negative collateral consequences.[30]

The proposed parallel treaty has sound precedent. There are already multiple treaties that address international child abduction among Contracting States to the Hague Abduction Convention, and at least one multilateral regime specifically addresses the application of Article 13(1)(b) of the Hague Abduction Convention.[31] Most notably, members of the European Union (EU) apply Council Regulation 2019/1111 of June 25, 2019, on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast) ("Brussels II-ter").[32] Brussels II-ter has specific rules that affect the application of Article 13(1)(b) among members of the EU. Unfortunately, Brussels II-ter embodies the wrong approach to Article 13(1)(b).[33] The Inter-American Convention

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Internationales et Responsabilités Étatiques, 51 MCGILL L.J. 279 (2006). Other authors have called for a protocol to address domestic violence, but these authors have typically embraced the "return with protective measures" approach that is so flawed. *See, e.g.*, Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 55 (2003); Lord Justice Matthew Thorpe, *The Hague Child Abduction Convention—25 Years On*, JUDGES' NEWSL. (Hague Conf. on Priv. Int'l L., Hague, Neth.), 2006, at 8–10 (calling for safety measures to protect the returning parent).

30 *See generally* Johanna Niemi & Laura-Maria Poikela, *Protective and Return-Seeking Parents: The Power of Language in Child Abduction Law*, *in* DOMESTIC VIOLENCE AND PARENTAL CHILD ABDUCTION 187, 196–98 (Katarina Trimmings, Anatol Dutta, Costanza Honorati & Mirela Župan eds., 2022) (recommending "protecting parent" or "fleeing parent," among other suggestions).

31 Council Regulation 2019/1111 of June 25, 2019, on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast), 2019 O.J. (L 178) (EU) [hereinafter Brussels II-ter Regulation].

32 *Id.*

33 Scholars have noted that France pushed the regulation in the Commission, along with Belgium, Greece, Italy, Luxembourg, Portugal, and Spain, for a problem that simply did not exist—i.e., the abuse of Article 13(1)(b). *See* Peter McEleavy, *The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?*, 1 J. PRIV. INT'L L. 5, 7–8, 7 n.15 (2005); Peter Ripley, *A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention*, 4 J. PRIV. INT'L L. 443, 469–70 (2008); TRIMMINGS, *supra* note 13, at 34 (noting that the regulation was prompted by a "claim of a frequent abuse of the Article 13(1)(b) exception to return," based upon a misinterpretation of the data provided (citing Nigel Lowe, Sarah Armstrong & Anest Mathias, *A Statistical Analysis of Applications Made in 1999 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prel. Doc. No 3 (2001), https://assets.hcch.net/docs/52547d0a-64a5-4cb5-91a4-

on the International Return of Children is also a precedent.[34] The Inter-American Convention's provisions overlap with Article 13(1)(b), although the Inter-American Convention does not specifically change the application of Article 13(1)(b).[35] Together, these instruments suggest the possibility of a parallel treaty that would embody the best approach to Article 13(1)(b) for domestic violence victims and their children.

This Article will unfold as follows. Part I quickly describes the Hague Abduction Convention's domestic violence problem. This Article's treatment is brief because this problem has been well-explored previously, by this author and others.[36] Assuming inadequate or untimely progress by the Hague Conference to improve the Hague Abduction Convention's application in the context of domestic violence, Part II then explains why state parties' further response should be bilateral, or multilateral, but outside the Hague Conference's structure. While reform proponents may seek change through impact litigation in human rights tribunals, new domestic law, or both, such initiatives should occur simultaneously and do not negate the need for comprehensive and wide-reaching multilateral reform. Part III argues that a new treaty would be consistent with the Hague Abduction Convention itself. The new treaty would not derogate from the Hague Abduction Convention. But even if it did, Article 36 of the Hague Abduction Convention specifically allows for derogation and this proposal fits within its terms. Part IV then sketches the provisions that might comprise this new treaty. It describes the key substantive provisions and provides brief clarifying commentary. Part V concludes the discussion.

88e91297a992.pdf [https://perma.cc/47QH-88KR]); *id.* at 36 (finding that "no empirical research whatsoever was conducted by either the Commission or the Member States to support th[e] assertion" that the Convention was not working efficiently). Katarina Trimmings has persuasively criticized the adoption of the regulation for other reasons as well. Not only was there "flagrant disregard for the reservations of a number of Member States against the proposed scheme, and a lack of expert involvement in the drafting procedure" but its adoption also violated "principles of subsidiarity and proportionality, and the rule of mandatory consultation." *Id.* at 26. Trimmings has explained that the regulation's enactment was entirely political, not legal, and that the European Court of Justice is deferential in this context. *Id.* at 37–38. Peter McEleavy explores some of the political forces that may have prompted the initiative, but unfortunately there is no mention of father's rights groups who, this author suspects, may have had a role. McEleavy, *supra*, at 16.

34 Inter-American Convention on the International Return of Children, July 15, 1989, O.A.S.T.S. No. 70, http://www.oas.org/juridico/english/treaties/b-53.html [https://perma.cc/G3XB-JARG] [hereinafter Inter-American Convention].

35 *Id.* art. 11(b).

36 *See* sources cited *supra* note 9.

I. THE HAGUE ABDUCTION CONVENTION HAS A DOMESTIC VIOLENCE PROBLEM

The Hague Abduction Convention has a domestic violence problem from the perspective of survivors and their children.[37] This problem arose because the Hague Abduction Convention was designed to address a problem that differs from today's prototypical "abduction."

When the Hague Abduction Convention was promulgated, policymakers assumed that most international abductions were committed by fathers.[38] At the time, fathers usually did not receive de jure custody; consequently, they had an incentive to flee with their children to obtain de facto custody.[39] When these fathers abducted, they typically took the children away from their primary caregivers, thereby interrupting the children's critical attachment to their caregivers and causing the children long-term trauma.[40] The Hague Abduction Convention responded to this problem by giving left-behind parents who have "rights of custody" that are "actually exercised" a remedy that returns the child expeditiously to the child's habitual residence, thereby

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37 Relatedly, the Hague Abduction Convention has a domestic violence problem in terms of bad press. *See, e.g.*, Singapurwala, *supra* note 8. Of course, fixing the underlying problem should fix the public relations problem.

38 *See* Weiner, *supra* note 9, at 608–10; *see also* Patrícia Álvares, *Relatora de la Convención de La Haya sobre sustracción de menores propone "reinterpretar" el tratado teniendo en cuenta la violencia de género*, DIARIA (Feb. 10, 2024), https://ladiaria.com.uy/mundo/articulo/2024/2/relatora-de-la-convencion-de-la-haya-sobre-sustraccion-de-menores-propone-reinterpretar-el-tratado-teniendo-en-cuenta-la-violencia-de-genero [https://perma.cc/5M76-2ULM], *translated in The 1980 Hague Convention's Rapporteur Proposes "to Reinterpret" 13b and Take GBV into Account*, HAGUE PAPERS (Feb. 10, 2024), https://haguepapers.net/rapporteur-of-the-1980-hague-convention-proposes-reinterpreting-the-treaty-to-take-gbv-into-account [https://perma.cc/9R2Q-4XF5].

39 *See* Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471, 479–80, 483–84 (1979) (discussing the United States); SUSAN ATKINS & BRENDA HOGGETT, WOMEN AND THE LAW 116 (Inst. of Advanced Legal Stud. 2018) (1984), https://sas-space.sas.ac.uk/9188/1/Women_and_the_Law.pdf [https://perma.cc/CHX6-W98B] (discussing the United Kingdom); Paul Millar & Sheldon Goldenberg, *Explaining Child Custody Determinations in Canada*, 13 CAN. J.L. & SOC'Y 209, 215 (1998) (discussing Canada); Ryoko Yamaguchi, *Recent Developments in Parent-Child Relationships, Parental Rights, and Child Custody in Japan*, 2008 INT'L SURV. FAM. L. 221, 230–31 (discussing Japan); Colin James, *Winners and Losers: The Father Factor in Australian Child Custody Laws in the 20th Century*, 10 LEGAL HIST. 207, 222 (2006) (discussing Australia).

40 *See* Stephanie Brandt, *The Impact of Domestic Violence and Coercive Control on Children: Applying Evidence-Based Assessments of Children to 'the Grave Risk Exception,'* HAGUE MOTHERS 1, 6 (June 17, 2024), https://www.hague-mothers.org.uk/wp-content/uploads/2024/06/Expert-paper-3-1.pdf [https://perma.cc/9QNA-MLCX] ("[A] forced separation from a primary and presumably protective parent is one of the most traumatic and dangerous experiences any child could endure.").

quickly reestablishing the status quo ante. Consistent with the drafters' understanding of the problem,[41] left-behind parents who only have "rights of access" could not invoke the Hague Abduction Convention's remedy of return.[42] Those parents were only assured that access rights could be established or enforced in the place to which their children were taken.

Today, the typical "abduction" scenario is entirely different from what the drafters imagined. First, mothers are usually the taking parent, and the overwhelming majority of them are primary or joint caregivers.[43] Second, many of these mothers allege that they are fleeing to escape domestic violence, i.e., for reasons of safety. Specific numbers are not available, but anecdotal and other evidence suggests that mothers commonly cite this reason for removal.[44] Third, fathers, who are usually the left-behind (or "seeking") parent, can often invoke the remedy of return because "rights of custody" have expanded over time.[45] Apart from

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41 *See* Elisa Pérez-Vera, *Explanatory Report*, *in* III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 426, para 11 (Permanent Bureau trans., 1980), https://assets.hcch.net/docs/05998e0c-af56-4977-839a-e7db3f0ea6a9.pdf [https://perma.cc/N5GR-X3UB].

42 *See* Hague Abduction Convention, *supra* note 5, arts. 3, 5.

43 Lowe & Stephens, *supra* note 3, paras. 14–15 (reporting that 75% of taking parents were mothers and 94% of those mothers were primary or joint caregivers).

44 *See* Barnett et al., *supra* note 20, at 5–6; *see also* Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Special Session to Review Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 1 UTAH L. REV. 221, 223 n.5 (2008). For the United States' response, see Permanent Bureau, Hague Conf. on Priv. Int'l L. [HCCH], *Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children*, § 5.1, Prel. Doc. No 1 (Nov. 2010), http://www.hcch.net/index_en.php?act=publications.details&pid=5291&dtid=33 [https://perma.cc/SU6Z-NT7U] ("Many taking parents raise the issue of domestic violence as an Article 13(b) affirmative defense."); FREEMAN & TAYLOR, *supra* note 7, at 15 (noting that professionals suggest a range of cases involving domestic violence, from "several cases" to "nearly all cases").

45 *See* Directorate-General for Internal Policies Pol'y Dept. C: Citizens' Rts. and Const. Affs. C.L., Just. and Home Affs., *Cross-Border Parental Child Abduction in the European Union* § 3.2.4.2, at 73 (2015), https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf [https://perma.cc/SUB8-UEVD] ("The evolution . . . involving the explicit attribution to both parents jointly of a 'right to determine a child's residence', unless a judgement deprives one of them of such 'right', is visible in all countries considered in this report."). In the United States, joint legal custody is now quite common. *See* Daniel R. Meyer, Marcia J. Carlson & Md Moshi Ul Alam, *Increases in Shared Custody After Divorce in the United States*, 46 DEMOGRAPHIC RSCH. 1137, 1139 (2022) ("[B]y the late 1990s joint legal custody was granted in nearly half of all US divorces . . . ."); *cf.* José Félix Muñoz Soro & Carlos Serrano-Cinca, *A Model for Predicting Court Decisions on Child Custody*, PLOS, Oct. 21, 2021, at 1, 4 ("After separation or divorce, joint physical custody is increasingly common in many Western societies.").

the rise of joint custody, case law has transmuted "rights of access" into "rights of custody" if a *ne exeat* clause exists.[46]

Domestic violence survivors faced with a petition for a child's return have very few defenses available under the Hague Abduction Convention. While the taking parent should be able to defend on the basis of their own and their children's human rights,[47] something expressly permitted by Article 20,[48] judges rarely recognize the merit of the Article 20 defense.[49]

Instead, the taking parent typically invokes the Article 13(1)(b) defense, sometimes referred to as the Article 13(1)(b) "exception." It says that "the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes 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."[50] This defense has two discrete parts, each of which independently provides a defense to return. A taking parent can defend by proving a grave risk that return would *either* expose the child to physical or psychological harm *or* place the child in an intolerable situation.[51] In addition, the defense only requires that a child would face a grave risk of *exposure* to danger or an intolerable situation on return, not that the child would actually face a grave harm or even a grave risk of harm. In essence, the word "expose" means that the child would face a grave risk of a risk of harm or an intolerable situation.[52] As the United States Supreme Court has emphasized, the Convention's goal of deterring

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46 A *ne exeat* clause prohibits the removal of the child from the jurisdiction without the approval of the other parent or a court. *See* Abbott v. Abbott, 560 U.S. 1, 15 (2010); Permanent Bureau, Hague Conf. on Priv. Int'l L. [HCCH], *Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Comm'n on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Abduction* Convention, at 40, Prel. Doc. No 14 (Nov. 2011), https://www.hcch.net/upload/wop/abduct2012pd14e.pdf [https://perma.cc/5HWC-5FXX].

47 Women and children have the right to be protected from family violence. *See* Merle H. Weiner, *Using Article 20*, 38 FAM. L.Q. 583, 607–22 (2004) [hereinafter Weiner, *Using Article 20*]. *See generally* Merle H. Weiner, *Strengthening Article 20*, 38 U. S.F. L. REV. 701, 703–04, 732–39 (2004) [hereinafter Weiner, *Strengthening Article 20*].

48 Hague Abduction Convention, *supra* note 5, art. 20.

49 Hazbun Escaf v. Rodriquez, 200 F. Supp. 2d 603, 614 (E.D. Va. 2002) (noting, in a case that involved no allegations of domestic violence, the infrequent success of the defense); Mene v. Sokola, No. 22-cv-10333, 2023 WL 9181500, at *3 (S.D.N.Y. Oct. 20, 2023).

50 *See* Hague Abduction Convention, *supra* note 5, art. 13(b).

51 *See* Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 341–43 (2008) (discussing the history of the "intolerable situation" language in Article 13).

52 *See* Merle H. Weiner, *You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence*, 28 UCLA J. GENDER & L. 223, 316–21 (2021).

child abduction is not "pursue[d] . . . at any cost."[53] Rather, the Convention recognizes that "children should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide."[54]

The Article 13(1)(b) defense should be meritorious when a parent has fled for safety because of domestic violence. Consequently, domestic violence victims argue that returning the child would create a grave risk of exposure to physical or psychological harm or an intolerable situation. This argument rests on the now well-established fact that domestic violence adversely impacts children.[55] In fact, some countries today recognize that children's exposure makes them direct victims in their own right.[56] It also rests on a recognition that children are, or can become, targets themselves.[57] Additionally, the most important way to protect children against the profoundly negative effects of past domestic violence is to keep the protective parent and child together in safety.[58]

The precise relevance of domestic violence to the Article 13(1)(b) defense depends upon the facts of the particular case. For example, if the taking parent returns with the child, the parent's return increases the likelihood the child would be exposed to renewed violence or the child would be physically injured by the renewed violence. Mothers typically do return with their children.[59] Sometimes, the renewed violence, or even fear of renewed violence, can cause the mother to be understandably preoccupied, thereby impacting her parenting and creating an intolerable situation for the child.[60] The hardship that the mother and child often face on return is itself a grave risk of exposure to an intolerable situation for

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53 Lozano v. Montoya Alvarez, 572 U.S. 1, 16 (2014).

54 *Id.* at 16–17 (quoting Re M [2008] 1 AC 1288, 1310 (Baroness Hale of Richmond) (appeal taken from Eng.) (discussing the Article 12(2) exception)).

55 *See, e.g.*, Nicole Vu, Ernest N. Jouriles, Renee McDonald & David Rosenfield, *Children's Exposure to Intimate Partner Violence: A Meta-Analysis of Longitudinal Associations with Child Adjustment Problems*, 46 CLINICAL PSYCH. REV. 25, 26, 31–32 (2016) (citing research showing that domestic violence harms children who are exposed, and finding that "the link between [intimate partner violence ('IPV')] exposure and child externalizing and internalizing problems strengthens over time" and that "that conceptualizing IPV more broadly (i.e., accounting for physical IPV and other forms of IPV) yields a stronger association between IPV exposure and child adjustment, compared to conceptualizing IPV to only include physical acts of violence").

56 Domestic Abuse Act 2021, c. 17, § 3 (Eng. & Wales); *see also* Family Violence Act 2018, pt. 11(2)(a) (N.Z.).

57 *See* Weiner, *supra* note 52, at 255, 267–69 (citing studies).

58 Brandt, *supra* note 40, at 7; *cf.* Martin H. Teicher, *Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border*, 16 BMC MED. 1, 2 (2018).

59 Weiner, *supra* note 9, at 629–30.

60 *See, e.g.*, Pollastro v. Pollastro, (1999), 171 D.L.R. 4th 32, 45 (Can. Ont. C.A.).

the child.[61] Alternatively, if the mother does not return with the child for safety or other reasons (such as to avoid prosecution for child abduction), the child can also experience physical harm or trauma. Battered mothers often protect their children from physical violence.[62] In addition, separation from the mother can itself cause the child harm because interrupting the child's security with a safe parent causes trauma.[63]

Despite the fact that the *Guide to Good Practice* expressly acknowledges the appropriateness of Article 13(1)(b) for the context of domestic violence, and although judges could grant the defense and refuse return,[64] judges often do not. One scholar said, "In most cases, in fact, Hague courts tend to overlook the effects of domestic and intimate violence on mothers and rarely recognise the psychological harm suffered by the child(ren)."[65] While courts are more receptive to the defense in this context today than in the past,[66] plenty of courts still reject it. The reasons are varied.[67]

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61 *See* Re D (Abduction: Rights of Custody) [2007] 1 AC (HL) 619 [52] (appeal taken from Eng.) ("'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate.'"); *see also* Weiner, *supra* note 51, at 351 (citing Re O (Child Abduction: Undertakings) [1994] EWHC (Fam) 349, 362 (UK)); *see also* Re S (Abductions: Rights of Custody) [2012] UKSC 10, [34] (appeal taken from Eng.); *LRR v. COL*, [2020] NZCA 209 at [140]–[142].

62 *See, e.g.*, Fiona Buchanan, Sarah Wendt & Nicole Moulding, *Growing Up in Domestic Violence: What Does Maternal Protectiveness Mean?*, 14 QUALITATIVE SOC. WORK 399, 405–06 (2015); Sarah Wendt, Fiona Buchanan & Nicole Moulding, *Mothering and Domestic Violence: Situating Maternal Protectiveness in Gender*, 30 AFFILIA: J. WOMEN & SOC. WORK 533, 534–35, 542 (2015) (literature review); Wendy L. Haight, Woochan S. Shim, Linda M. Linn & Laura Swinford, *Mothers' Strategies for Protecting Children from Batterers: The Perspectives of Battered Women Involved in Child Protective Services*, 86 CHILD WELFARE 41, 56 (2007).

63 Brandt, *supra* note 40, at 7; Weiner, *supra* note 9, at 677. The separation can exacerbate any trauma the child experienced from exposure to violence. *See* Jeanne M. Kaiser & Caroline M. Foley, *Family Law—The Revictimization of Survivors of Domestic Violence and Their Children: The Heartbreaking Unintended Consequence of Separating Children from Their Abused Parent*, 43 W. NEW ENG. L. REV. 167, 185 (2021) (citing studies); Nicholson v. Scoppetta, 344 F.3d 154, 163, 174 (2d Cir. 2003).

64 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, paras. 57–59.

65 Costanza Honorati, *Protecting Mothers Against Domestic Violence in the Context of International Child Abduction: Between* Golan v. Saada *and Brussels II-ter EU Regulation*, 12 LAWS 79, 17 (2023).

66 *See* Weiner, *supra* note 52, at 225; *In re* M.V.U., 178 N.E.3d 754, 762 ¶ 40 (Ill. App. Ct. 2020) ("Since the adoption of the Hague Convention, there has been a shift toward recognizing domestic violence as posing a grave risk toward the child.").

67 *See generally* Weiner, *supra* note 52, at 250 ("Case law reveals that the most prominent obstacles to granting the article 13(b) defense include the following: (1) a requirement that the child has been directly abused; (2) a requirement of severe and frequent physical violence; (3) a requirement that the violence is likely to recur in the future; (4) disregard of the harm a child experiences when separated from the taking parent; (5) disregard of the 'intolerable situation' language in article 13(b) as a separate category of the defense; (6) faith in protective measures; (7) a

A. *Refusing Return Versus Protective Measures Approach*

One of the more important obstacles to a successful Article 13(1)(b) defense is the myth that protective measures can protect children and their taking parents. Courts often return the child despite finding a grave risk because they think protective measures will reduce the grave risk to an acceptable level.[68] This approach is recommended by the *Guide to Good Practice* and is also incorporated in Brussels II-ter.[69] The U.S. Supreme Court, however, has told courts in the United States that they can disregard protective measures in Hague Abduction Convention cases, especially in cases of domestic violence, for several reasons.[70] Nonetheless, some courts in the United States rely on them.[71]

A "return with protective measures" approach is not found in the Hague Abduction Convention itself, as the U.S. Supreme Court mentioned in its *Golan* decision.[72] There is a good reason for its absence—the approach is highly problematic. In fact, most domestic

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reluctance to find the taking parent credible; (8) the clear and convincing evidence burden of proof; and (9) a misarticulation of the article 13(b) legal test that ignores 'a grave risk of exposure to' harm."). In many cases, the court disbelieves the mother's testimony about the violence. *See, e.g.*, Keen v. Bowley, No. 23-cv-2333, 2024 WL 3259040, at *15–18 (C.D. Cal. July 1, 2024); Saavedra v. Montoya, No. 21-cv-5418, 2023 WL 2910654, at *20 (E.D.N.Y. Apr. 12, 2023) (refusing to find domestic violence affected the child without expert evidence).

68 *See, e.g.*, Re O (Child Abduction: Undertakings) [1994] EWCA (Fam) 349 (UK); *H v. C* FC Lower Hutt 368/00, 9 March 2001 at [32] (N.Z.); ZA v. BY [2020] NI (Fam) [9], [25], [33] (N. Ir.); Tribunal de Familia de la Provincia de Formosa [Family Court of the Province of Formosa], 3/11/2020, "Defensoría de Pobres y Ausentes NRO. 1 s/ Restitución-Restitución Internacional de Menor," No. 1.627 (Arg.); DW v. MB [2020] JMSC (Civ) 230 [60], [89] (Jam.); *see also* cases cited *infra* note 71; *cf.* Civ. [Tribunal of First Instance] Brussels, June 21, 2006, No. 06/4518/A); Achakzad v. Zemaryalai, [2010] O.J. No. 3259, paras. 12, 17–21, 102 (Can. Ont. Gen. Div.) (QL) (finding protective orders inadequate).

69 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, para. 31; Brussels II-ter Regulation, *supra* note 31, art. 27.

70 Golan v. Saada, 596 U.S. 666, 679–82 (2022) (noting, inter alia, that courts need not consider protective measures in some cases because "any consideration of ameliorative measures must prioritize the child's physical and psychological safety," courts must "not usurp the role of the court that will adjudicate the underlying custody dispute," and courts must "act expeditiously in proceedings for the return of children").

71 *See, e.g.*, Radu v. Shon, 11 F.4th 1080, 1087, 1091 (9th Cir. 2021), *vacated*, 142 S. Ct. 2861 (2022) (mem.), *aff'd on other grounds*, 62 F.4th 1165, 1176 (9th Cir. 2023); Saada v. Golan, No. 18-cv-5292, 2022 WL 4115032 (E.D.N.Y. Aug. 31) (finding that protective measures were appropriate and adequate to protect the child's safety and ordering return to Italy), *vacated and remanded sub nom. In re* B.A.S, No. 22-1966, 2022 WL 16936205 (2d Cir. Nov. 10, 2022). For more on the *Golan* case, including its subsequent history, see *infra* note 112.

72 *Golan*, 596 U.S. at 677–78.

violence survivors and their advocates oppose it.[73] Not only does this approach add an additional barrier to the survivor's ability to invoke Article 13(1)(b) successfully, but it does so at the expense of the child's and mother's safety.

The "return with protective measures" approach is less safe than simply rejecting return. While proponents of the "return with protective measures" approach recognize the importance of ensuring that any protective measures are enforceable,[74] proponents give insufficient attention to whether victims can access the authorities for purposes of enforcement or whether the measures will actually be enforced.[75] Unfortunately, there is often a huge disconnect between the laws-on-the-books and the laws-as-applied in this context.[76] No judge can know how downstream enforcement officers, such as police officers or prosecutors, will act. Also, proponents give insufficient attention to whether the measures will actually deter violence.[77] Because no judge can know whether a perpetrator will obey an order,[78] the approach is subject to miscalculation. Moreover, the availability of an enforceable order, even if

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73 *See* Weiner, *supra* note 52, at 282–90; Weiner, *supra* note 25, at 7. *See generally* Merle Weiner, *Briefing on Protective Measures*, HAGUE MOTHERS 1, 5–6 (June 17, 2024), https://www.hague-mothers.org.uk/wp-content/uploads/2024/06/Expert-paper-6.pdf [https://perma.cc/E4EH-LL75].

74 Honorati, *supra* note 65, at 19 ("[A] key consideration is that such measures must be effective and enforceable in the State of habitual residence.").

75 The *Guide to Good Practice* only speaks to parties demonstrating a measure's "enforceability." HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, paras. 45, 47. It does not encourage judges to assess a measure's likely enforcement if violated. For example, there is no assessment of the victim's ability to obtain legal counsel for purposes of enforcement or the local police force's responsiveness to domestic violence calls. If anything, the *Guide* suggests that effectiveness is a very low bar. It suggests voluntary undertakings might be appropriate even if they are not enforceable, although they should be used with "caution." *See id.* paras. 46–47. It also notes a protective measure may be ineffective if the left-behind parent "has *repeatedly* violated protection orders," as if one violation is insufficient. *Id.* para. 44 (emphasis added).

76 Van de Sande v. Van de Sande, 431 F.3d 567, 570–71 (7th Cir. 2005); *see also* Katarina Trimmings, Onyoja Momoh & Konstantina Kalaitsoglou, *The Interplay Between the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Domestic Violence*, LAWS, Sept. 12, 2023, at 9 ("[P]rotection orders are often breached, and [] satisfactory follow-up measures by relevant authorities in the State of habitual residence may be lacking.").

77 Weiner, *supra* note 73, at 5–6.

78 Empirical evidence suggests perpetrators regularly violate protective orders. *Id.* at 4–5. TK LOGAN, ROBERT WALKER, WILLIAM HOYT & TERI FARAGHER, THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS 16, 116 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf [https://perma.cc/9YBH-8W9Y] (finding that approximately half of restraining orders were violated); Christopher T. Benitez, Dale E. McNiel & Renée L. Binder, *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY & L. 376, 384 (2010) ("[A]vailable research supports the conclusion that there is a substantial chance that a protection order will be violated.").

it would be effective, might not prevent the child from experiencing a grave risk of exposure to psychological harm or an intolerable situation from either fear of future violations or abusive acts short of physical violence. Similarly, an enforceable order might not stop an intolerable situation created by the taking parent's debilitating fear or financial and other hardship upon return.

Many other problems have become evident from the implementation of the "return with protective measures" approach in the context of domestic violence. For example, the approach entails a tremendous waste of resources for both the respondent and the courts, all for the benefit of a domestic violence perpetrator who has often caused reprehensible harm to a partner and child and then lied to the court about it.[79] Petitioners propose numerous measures although the measures often inadequately address coercive control in all of its forms.[80] Petitioners sometimes even suggest ridiculous options that respondents must still take time to counter, and courts must take time to reject. In one case, for example, a petitioner-murderer who was institutionalized suggested the children be returned to a hypothetical live-in nanny so that he might visit them.[81] The court responded to that suggestion by noting, among other

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79 *See, e.g.*, Davies v. Davies, 717 F. App'x 43, 49 (2d Cir. 2017) (finding that ameliorative measures were insufficient, in part because of the petitioner's untruthfulness and refusal to take responsibility while testifying); *see also Walpole & Secretary, Dep't of Comms. & Just.* [2020] 60 Fam CAFC 65, ¶ 75 (Austl.) (noting that the father has no respect for the rule of law); Mohácsi v. Rippa, 346 F. Supp. 3d 295, 323 (E.D.N.Y. 2018) (finding ameliorative measures insufficient because, inter alia, petitioner demonstrated resistance to authority); *In re* Marriage of Emilie D.L.M. & Carlos C., 279 Cal. Rptr. 3d 330, 334–35 (App. 2d Dist. 2021) (finding no adequate ameliorative measures because petitioner failed to acknowledge his domestic violence or drinking problem); Morales v. Sarmiento, No. 23-cv-281, 2023 WL 3886075, at *14 (S.D. Tex. June 8, 2023) (noting that while it had no obligation to address protective measures, it should ordinarily do so if "obviously suggested by the circumstances of the case," and finding there were no adequate measures of protection because of the perpetrator's previous circumvention of the law and the failure of the Ecuadorian justice system to provide safety in the past (citing Golan v. Saada, 596 U.S. 656, 679 (2022)). There are other extremely common impediments to the success of protective measures. *See, e.g.*, Jacquety v. Baptista, 538 F. Supp. 3d 325, 379–81 (S.D.N.Y. 2021) (finding that no ameliorative measures could address the harm to the child from the triggering of PTSD upon return); Oliver A. v. Diana Pina B., 56 N.Y.S.3d 311, 314 (App. Div. 2017) (finding that the mother's noncitizen status impacted her ability to rely on domestic violence resources); *LRR v. COL* [2020] NZCA 209, [138]–[43] (finding that the mother's mental health would be at risk despite protective measures because of fear and stress and citing an expert who said that mental health and parental stress "can have a negative impact on parenting and healthy child development" and that the result for the child would be intolerable); Re TKJ (Abduction: Hague Convention (Italy)) [2024] EWHC (Fam) 198 [54.3], [57.3] (UK) (noting the mother's subjective fear regardless of protective measures).

80 *See, e.g.*, Braude v. Zierler, 22-cv-3586, 2022 WL 3018175, at *2 (S.D.N.Y. July 29, 2022).

81 Nisbet v. Bridger, No. 23-cv-850, 2023 WL 6998081, at *12 (D. Or. Oct. 24, 2023) (finding the suggested measures unworkable).

things, that it had no jurisdiction over any such a person and that it was "highly questionable that [the p]etitioner can afford a nanny at all."[82]

Another problem is that some courts abbreviate the inquiry into the domestic violence itself and thereby undermine their ability to assess the adequacy of protective measures. For example, judges in the United Kingdom routinely implement the "return with protective measures" approach and, as part of doing so, try to determine whether the protective measures will be adequate. However, the petitioner usually denies being abusive, at least to the extent asserted by the respondent. Courts in the United Kingdom often do not resolve the factual disagreement,[83] but take the allegations at their worst and then consider whether protective measures are adequate.[84] It is bewildering how judges can conclude protective measures will be sufficient if they never determine whether the petitioner is lying to the court about perpetrating violence or its extent. Lying to the court and failing to accept responsibility are two huge red flags that signal likely noncompliance with the court's order.[85]

Proponents of a "return with protective measures" approach ignore the toll that it places on the taking parent, and, derivatively, the child. As one author noted, "Ordering the return of the minor with the understanding that the State of habitual residence will guarantee sufficient protection can sometimes be ironic for those women who have fled precisely because the competent authorities have not . . . protected them."[86] The order for return can be experienced as betrayal trauma, itself causing harm.[87]

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82 *Id.* at *12.

83 *See, e.g.*, Re A (Article 13(b): Mental Ill-Health) [2023] EWHC (Fam) 2081 [33]–[34] (Eng.). In that case, Justice Stephen Cobb ultimately decided against return because of the mother's mental health; even if protective measures would have been effective, the mother would have had trouble coping, thereby impacting the child. *Id.* [102].

84 This approach is attributable to Re E (Children) [2011] UKSC 27, [2012] 1 AC 144 (appeal taken from Eng.).

85 *See* Weiner, *supra* note 52, at 266 ("Many judges mention that when a perpetrator denies or minimizes the violence, he is less trustworthy and more likely to be dangerous."); *see also* AD v. SD [2023] CSIH 17 [37], [40] (Scot.) (discussing a "drawn out process" of three hearings that were ultimately for naught because, inter alia, the court had no confidence the petitioner would comply with protective measures in light of his "lack of self-control" and lack of insight).

86 Mercedes Soto Moya, *Retorno de menores sustraídos por sus madres víctimas de violencia de género: algunos apuntes de Derecho comparado*, *in* RETOS DE LAS MIGRACIONES DE MENORES, JÓVENES Y OTRAS PERSONAS VULNERABLES EN LA UE Y ESPAÑA: RESPUESTAS JURÍDICAS DESDE LA PERSPECTIVA DE GÉNERO 313, 319 (Francisco Javier Durán Ruiz ed., 2021) (translated by author).

87 *See* Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 578 (2014) ("Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution."); Carly P. Smith, Jennifer M. Gómez & Jennifer J. Freyd, *The Psychology of Judicial Betrayal*, 19 ROGER WILLIAMS U. L. REV. 451, 455 (2014) (describing the effects of such betrayal, including "poorer physical health, anxiety, depression, dissociation,

Nor do proponents acknowledge the costs of this approach, both moral and financial, to countries. Rhona Schuz has explained how countries might actually be best served when the court in the requested state simply grants the Article 13(1)(b) defense outright, because "returning the victims to an abusive situation is inconsistent with the policy of combatting domestic violence."[88] Both countries would uphold their own policies against domestic violence better if a child is not returned. Moreover, countries as a whole would be advantaged economically if they recognized the net benefit from keeping parents and children in a safe location. Returning children can renew the violence and tax the requesting state's resources, including the police and courts.[89]

For these and other reasons, it is bad policy to rely on protective measures in these cases. A new treaty should expressly reject this practice and direct courts to grant the Article 13(1)(b) defense outright when there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

B. *The Definition of Domestic Violence*

The Hague Abduction Convention also has a domestic violence problem because it lacks a definition of domestic violence for purposes of the Article 13(1)(b) defense. This can cause courts both to overestimate and underestimate when the defense applies.

For those who care about domestic violence survivors, an overly broad definition of domestic violence is just as problematic as an overly narrow one. An overly broad definition can be used by batterers to their advantage. It can allow them to invoke the Article 13(1)(b) defense when they are abductors—pointing, for example, to acts by the seeking parent that were in self-defense.[90] An overly broad definition can also allow them to negate the respondent's Article 13(1)(b) defense by claiming the violence was mutual, including because the taking parent "abducted" the

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borderline personality disorder characteristics, shame, hallucinations, self-harm, [] revictimization," and PTSD).

88 Schuz, *supra* note 9, at 63.

89 *Id.* at 64–65.

90 *Cf.* Ciampa v. Nichols, No. 24-cv-2556, 2025 WL 521009, at *3 (C.D. Cal. Feb. 18, 2025) (noting, in response to the father-respondent's allegation that he was a domestic violence victim, that "the video does not demonstrate abuse by Mother—instead it captures Father antagonizing her, withholding her child from her, aggressively recording her while close to her face as she attempts to push the phone away"). To be clear, the court did not determine that the respondent was a perpetrator of domestic violence, but rather that he provoked the mother. In a different case, however, a batterer could make a similar claim of being a victim.

child and "abduction" is domestic violence.[91] Finally, an overly broad definition raises questions about the potential expansiveness of the Article 13(1)(b) defense, generating resistance to change that might make its invocation more successful.

The *Guide to Good Practice* contains a definition of domestic violence that is too broad and ambiguous. The *Guide* recognizes that there are "a range of abusive behaviours," among them "physical, emotional, psychological, sexual and financial abuse."[92] While that statement is undeniably true, the *Guide* does not tell a court when the threshold for serious abuse is reached. Consequently, a court could treat financial abuse—without coercive control or a risk of physical or psychological harm—as qualifying domestic violence and hold that return would be intolerable for the child. Arguably, that application of Article 13(1)(b) would be too broad.

The Istanbul Convention is a good example of an international treaty that has a broad definition of domestic violence that is also narrowed for purposes of application. It defines domestic violence as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."[93] When it later says that countries must criminalize psychological violence, it defines psychological violence for that purpose as "intentional conduct . . . seriously impairing a person's psychological integrity through coercion or threats."[94] The *Explanatory Report* further clarifies that psychological violence is "a course of conduct rather than a single event," necessitating "an abusive pattern of behaviour occurring over time."[95] Similarly, while categorizing financial abuse as a type of domestic violence,[96] the Istanbul Convention treats it differently than physical or psychological violence. The Istanbul Convention requires states to criminalize psychological and physical violence,[97] but it

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91 *See* Barnett et al., *supra* note 20, at 7 (discussing comments by Justice Victoria Bennett).

92 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, at 9.

93 Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 3(b), May 11, 2011, C.E.T.S. No. 210, https://rm.coe.int/168008482e [https://perma.cc/4SAY-RA26] [hereinafter Istanbul Convention].

94 *Id.* art. 33.

95 *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, C.E.T.S. No. 210, para. 181 (May 11, 2011), https://rm.coe.int/1680a48903 [https://perma.cc/472F-LRTQ] [hereinafter *Istanbul Convention Explanatory Report*].

96 *Id.* para. 41 ("Article 3 (b) provides a definition of domestic violence that covers acts of physical, sexual, psychological or economic violence between members of the family or domestic unit, irrespective of biological or legal family ties.").

97 Istanbul Convention, *supra* note 93, arts. 33, 35.

does not require them to criminalize financial abuse unless it qualifies as psychological violence.[98]

The definition of domestic violence in the *Guide to Good Practice* is also inadequate because it does not discuss coercive control.[99] Consequently, courts adjudicating the Article 13(1)(b) defense frequently downplay serious behavior that should permit the defense. They instead rely on "vague tests that tend to discount the seriousness of the violence, such as holding that 'sporadic,' 'isolated,' or 'not severe' violence is insufficient to establish an [A]rticle 13(b) defense."[100] Yet neither the severity nor the frequency of violence are indicia of the risks involved.[101] The American Psychological Association emphasized that "acts do not necessarily have to be frequent or continuing; in specific instances, a single act or threat of abuse may be enough to establish unreasonable dominance and control over the victim."[102]

Judges should ask whether the perpetrator exercises or is trying to exercise coercive control over the victim. Coercive control refers to

> a chronic pattern of intimidation and control in an intimate relationship which can include but is not limited to physical and sexual violence and threats of physical or sexual violence. It can also be characterized primarily by other vehicles of abuse such as emotional abuse, exercised by a current or former intimate partner.[103]

Coercively controlling behavior is extremely problematic for survivors and their children. An expert paper for the Permanent Bureau's Forum on Domestic Violence in Sandton, South Africa noted:

> It is now recognised that the most prevalent and harmful form of domestic violence is coercive and controlling abuse, which can

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98 The Explanatory Report mentions that economic harm "can be related to psychological violence." *See Istanbul Convention Explanatory Report*, *supra* note 95, para. 40. In such a case, it would presumably be criminalized.

99 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, at 9. The case summaries in the *Guide* also do not use the term coercive control. *See id.*

100 Weiner, *supra* note 52, at 257–58 (footnotes omitted). *But see* Re A-M (A Child: 1980 Hague Convention) [2021] EWCA (Civ) 998 [49], [56] (directing trial courts to be "astute to recognise" conduct that forms "part of a pattern of controlling and coercive behaviour").

101 *See* Weiner, *supra* note 52, at 261.

102 AM. PSYCH. ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 11 (1996).

103 Isabella Mueller & Ed Tronick, *The Long Shadow of Violence: The Impact of Exposure to Intimate Partner Violence in Infancy and Early Childhood*, 17 INT'L J. APPLIED PSYCHOANALYTIC STUD. 232, 233 (2020) (citations omitted); EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 5 (2007) (defining coercive control as "a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

> include physical violence as well as intimidation, isolation and control. The dangers of coercive control cannot be underestimated. Coercive control is one of the strongest indicators of female homicides. Coercive controlling abuse has a more severe impact on victims compared with physical violence alone and can be experienced by women as more frightening and debilitating than physical violence.[104]

A determination of whether the perpetrator exercises or is trying to exercise coercive control requires an examination of the full range of abuse, including sexual, psychological, emotional, reproductive, spiritual, and financial. Psychologist Evan Stark noted that the vast majority of relationships with a history of physical or sexual assault also involve "tactics to intimidate, humiliate, exploit, isolate, and control a partner," and he characterized "nonviolent forms of coercion and control [as] at least as harmful as violence."[105]

Australia is an example of a country that uses a good definition of family violence for the adjudication of international child abduction disputes, importing the definition from its law governing other domestic relations matters.[106] The Family Law Act 1975 defines family violence as follows: "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful."[107] The Act then lists examples of "other behavior" that can qualify, recognizing that its list is not exhaustive.[108]

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104 Miranda Kaye, Adrienne Barnett & Merle Weiner, *The 'Grave Risk' Exception and Domestic Violence*, HAGUE MOTHERS 3 (June 2024), https://www.hague-mothers.org.uk/wp-content/uploads/2024/06/Expert-paper-2.pdf [https://perma.cc/6UW7-MQL6] (citations omitted) (citing STARK, *supra* note 103; Danielle McLeod, *Coercive Control: Impacts on Children and Young People in the Family Environment*, RSCH. IN PRAC., 2018; LAUREN SMITH, CHILDREN EXPERIENCING INTERPARENTAL COERCIVE CONTROL (2018)).

105 Evan Stark, *Reframing Child Custody Decisions in the Context of Coercive Control*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES § 11–11 (Mo Therese Hannah & Barry Goldstein eds., 2010). There is now recognition that coercive control can exist without any physical violence and it can be just as harmful for victims' mental health. *See, e.g.*, Kimberly A. Crossman, Jennifer L. Hardesty & Marcela Raffaelli, "*He Could Scare Me Without Laying a Hand on Me": Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation*, 22 VIOLENCE AGAINST WOMEN 454, 456–57 (2016).

106 *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* (Cth) n.2 (Austl.).

107 *Family Law Act 1975* (Cth) s 4AB (Austl.).

108 *Id.* Brazil's Maria Da Penha law has a similar focus in the context of psychological violence. *See* Lei No. 11.340, de 7 de agosto de 2006, ch. II art. 7, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 08.08.2006 (Braz.) ("The forms of domestic and family violence against women, are, among others: I - physical violence, understood as any behavior that offends the woman's bodily integrity or health; II - psychological violence, understood as any behavior that causes emotional damage and

The *Guide to Good Practice* exacerbates the problems associated with its definition of domestic violence by stating that the success of the 13(1)(b) defense for victims of domestic violence will be "exceptional."[109] Because there are no statistics on how many Hague Abduction cases involve coercive control, the *Guide* should not have used the term "exceptional."[110] That language encourages courts to downplay violence and deny the Article 13(1)(b) defense even when it is appropriate.[111]

C. *Other Issues*

A variety of other problems exist with the application of Article 13(1)(b) from the perspective of survivors and their children. Too often it takes an incredible amount of time, effort, and expense on the part of the taking parent to establish the defense. The case of *Golan v. Saada* in the United States is a good example. That case was litigated for five years

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reduction of self-esteem or that harms and disturbs full development *or that aims at degrading or controlling the woman's actions, behaviors, beliefs and decisions, by means of threat, embarrassment, humiliation, manipulation, isolation, constant surveillance, constant pursuit, insult, blackmail, ridiculing, exploitation and limitation of the right to come and go or any another means that causes damage to the woman's psychological health and self-determination*; III - sexual violence, understood as any behavior that forces the woman to witness, maintain or participate in unwanted sexual intercourse, by means of intimidation, threat, coercion or the use of force; that induces the woman to commercialize or to use, in any way, her sexuality, that prevents her from using any contraceptive method or that forces her to marriage, pregnancy, abortion or prostitution, by means of coercion, blackmail, bribe or manipulation; or that limits or annuls the exercise of her sexual and reproductive rights; IV - patrimonial violence, understood as any behavior that constitutes retention, subtraction, partial or total destruction of the woman's objects, working instruments, personal documents, property, assets and economic rights or resources, including those intended to satisfy her needs; V - moral violence, understood as any behavior that constitutes slander, defamation or insult." (emphasis added)).

109 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, para. 28.

110 Various sources report a large number of cases involving domestic violence, and these cases often have facts that suggest coercive control. *See* Barnett et al., *supra* note 20 (citing statements at the Forum by Judge Martina Erb-Klünemann (Germany), Jessica Raffal, Managing Lawyer of International Social Service (Australia), Judge Guilherme Calmon Nogueira Da Gama (Brazil), Ruth Dineen of Hague Mothers (England, but citing research of appellate cases in the United States), and Roz Osborne of GlobalARRK (England) revealing high numbers of cases with allegations or actual domestic violence).

111 Thuringia Oberlandesgericht [OLG] [Thuringia Higher Regional Court] Dec. 9, 2019, 2UF 485/19 1, 5–6 (Ger.); Secretary for Justice v. Parker, (1999) 2 ZLR, 400, 400–01 (Zim.); *cf.* De Paula Vieira v. De Souza, 22 F.4th 304, 309 (1st Cir. 2022); Saavedra v. Montoya, No. 21-cv-5418, 2023 WL 2910654, at *14 (E.D.N.Y. Apr. 12, 2023) ("In every case, however, '[t]he potential harm *to the child* must be severe, and the level of risk and danger required to trigger this exception has consistently been held to be very high.'" (alteration in original) (quoting Souratgar v. Lee, 720 F.3d 96, 103 (2d Cir. 2013))).

before the trial judge finally granted the Article 13(1)(b) defense. There were multiple appeals and remands.[112]

Other problems include the following: (1) the petitioner often has legal counsel provided by the government whereas the respondent has to find and pay for her own counsel, assuming she can;[113] (2) the decisionmaker may have no training on domestic violence and the myths

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112 *See* Saada v. Golan, No. 18-cv-5292, 2019 WL 1317868 (E.D.N.Y. Mar. 22, 2019) (granting return with protective measures initially because otherwise the child would be subjected to grave risk); Saada v. Golan, 930 F.3d 533, 537 (2d Cir. 2019) (vacating the protective measures and remanding to the district court for consideration of the effectiveness of the protective measures); Saada v. Golan, No. 18-cv-5292, 2020 WL 2128867, at *6 (E.D.N.Y. May 5, 2020) (finding that the protective measures were enforceable and ordering the child to be returned to Italy once more); Saada v. Golan, 833 F. App'x 829, 830 (2d Cir. 2020) (affirming the district court's order); Saada v. Golan, No. 18-cv-5292 , 2021 WL 1176372, at *3–8 (E.D.N.Y. Mar. 29, 2021) (denying a motion to vacate the district court's judgment due to alleged harassment from Mr. Saada and his associates); Saada v. Golan, No. 21-cv-876, 2021 WL 4824129, at *1 (2d Cir. Oct. 18, 2021) (upholding the denial of the motion to vacate); Golan v. Saada, 596 U.S. 666, 677–78 (2022) (vacating and remanding because all ameliorative measures need not be considered before denying return under Article 13(1)(b), and instructing the district court to reconsider its order for protective measures); Saada v. Golan, No. 118-cv-5292, 2022 WL 4115032, at *9 (E.D.N.Y. Aug. 31, 2022) (finding that the protective measures were appropriate and adequate to protect the child and ordering the child's return to Italy); *In re* B.A.S., No. 22-1966, 2022 WL 16936205, at *1 (2d Cir. Nov. 10, 2022) (dismissing the appeal as moot because Ms. Golan died); Saada v. Golan, No. 18-cv-5292, 2023 WL 2184601, at *1 (E.D.N.Y. Jan. 23, 2023) (recommending that the district court do the following: deny motions to intervene on behalf of the child by Narkis Golan's sister, Morin, who was granted temporary custody by the King's County Family Court and the Children's Law Center; refer Mr. Saada's motion to transfer the child to his custody to the Italian courts; grant Mr. Saada's motion to amend the petition to add Morin Golan as a respondent; and vacate the King's County Family Court orders); Saada v. Golan, No. 18-cv-5292, 2023 WL 1993538, at *5 (E.D.N.Y. Feb. 13, 2023) (adopting the magistrate judge's recommendation in full but deferring ruling on the King's County Family Court's orders and Mr. Saada's request for temporary custody while the proceedings were still pending); Saada v. Golan, 712 F. Supp. 3d 361, 363 (E.D.N.Y. 2024) (denying Mr. Saada's 2019 petition to return his child to Italy); Saada v. Golan, No. 24-468, 2024 WL 2716485, at *1 (2d Cir. Mar. 20, 2024) (dismissing the case with prejudice after Mr. Saada withdrew the appeal).

113 Many authors have noted the inequality of arms. *See, e.g.*, GINA MASTERTON, THE 1980 CONVENTION INEQUALITY OF ARMS: MOTHERS' EXPERIENCES (Oct. 2022) https://www.hague-mothers.org.uk/wp-content/uploads/2023/07/Inequality-of-arms-Briefing-paper-June-23.pdf [https://perma.cc/HA9X-VMN3] (discussing Australia); JEFFREY L. EDLESON & TARYN LINDHORST, MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES, FINAL REPORT: HAGUE CONVENTION AND DOMESTIC VIOLENCE, NIJ No. 2006-WG-BX-0006, at 229–33 (2010), https://www.ojp.gov/pdffiles1/nij/grants/232624.pdf [https://perma.cc/2B5L-XJCV] (discussing the United States); *Two Important Points to Consider in International Child Abduction Cases Following Dorian Day and Sarah Tierney's Success in the CoA*, 3PB BARRISTERS (Mar. 9, 2021), https://www.3pb.co.uk/international-child-abduction-cases [https://perma.cc/64HQ-JS6R] (discussing England); *see also* HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, para. 85 (noting that legal representation is "always helpful," but that states differ on their obligation to provide legal counsel).

surrounding it,[114] the respondent may not be able to hire an expert to educate the judge because she lacks counsel or funds,[115] or the judge may exclude such evidence even if offered;[116] and, (3) the requested state may not have jurisdiction to decide the underlying custody issue even if the respondent prevails on the Article 13(1)(b) defense.[117] These problems, as well as others, can be addressed through a supplemental treaty that ensures the Hague Abduction Convention prioritizes the best interests of children in these cases.

II. THE PROBLEM CAN BEST BE FIXED BILATERALLY OR MULTILATERALLY WITH A COMPLEMENTARY TREATY

The Hague Conference and state parties could address the "domestic violence problem" within the context of the Hague Abduction Convention itself. Appropriate changes might emerge in a treaty amendment or a protocol. More likely, however, they would emerge in a new *Guide to Good Practice* or a Permanent Bureau report that state parties discuss at a Special Commission meeting, with appropriate conclusions and recommendations following.

In fact, it would be difficult to amend the Hague Abduction Convention to fix the problems identified in this Article. As I wrote in 2000,

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114 *See, e.g.*, Khan v. Fatima, 680 F.3d 781, 786–88 (7th Cir. 2012) (criticizing the district court for failing to recognize that the abuse of the mother presents a grave risk of psychological harm to the child); Neumann v. Neumann, 684 F. App'x 471, 490 (6th Cir. 2017) (Daughtrey, J., concurring in part and dissenting in part) (criticizing the district court's "apparent lack of familiarity with the nature and significance of . . . domestic violence and [its] harmful effect on children"); Van De Sande v. Van De Sande, 431 F.3d 567, 570 (7th Cir. 2005) (calling the trial judge's decision "irresponsible" and noting that "[t]he judge inexplicably gave no weight to Davy's threat to kill the children" in light of petitioner's "propensity for violence, and the grotesque disregard for the children's welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence"). Anecdotal reports, as well as news reports, suggest that in *In re* Adan, 544 F.3d 542 (3d Cir. 2008), the Third Circuit was disgusted with the trial court's ruling in light of the evidence that was offered at trial on child sexual abuse and domestic violence. *See* Bob Braun, *Court Spares Girl, 8, from Deportation*, NJ.COM (Sept. 23, 2008) https://www.nj.com/njv_bob_braun/2008/09/court_spares_girl_8_from_depor.html [https://perma.cc/3EJU-V5P2]. The Third Circuit immediately issued a judgment reversing the district court's orders and remanded with instructions that the petition for the child's return be immediately dismissed.

115 *See supra* note 110.

116 *See, e.g.*, Noergaard v. Noergaard, 197 Cal. Rptr. 3d 546, 560–63 (Ct. App. 2015) (criticizing the district court for failing to allow the mother to present evidence of domestic violence).

117 *See, e.g.*, *In re* T.L.B., 272 P.3d 1148 (Colo. Ct. App. 2012); Katz v. Katz, 986 N.Y.S.2d 611 (App. Div. 2014). *But see* Interest of S.L., 503 P.3d 244 (Kan. App. 2021).

> [R]evising the Hague Convention is not procedurally easy. While the statute of the Hague Conference has an explicit and straightforward mechanism for amending the statute, no such procedure exists within the Hague Convention on Child Abduction. Authors have criticized the lack of a reasonable procedure for the amendment of Hague Conventions. An entirely new convention would need to be authored and ratified, accepted, approved or acceded to in order to amend the Hague Convention on Child Abduction. The logistics of this process are more cumbersome than a simple amendment procedure.[118]

The process would be impracticable and likely ineffective, in large part, because it would involve the participation of all the state parties to the Convention, including those who were opposed to the idea.[119]

A protocol is a more limited solution and could function as an amendment for only those state parties who adopt it.[120] Yet all state parties to the Convention would be involved in the drafting and approval of a protocol, providing a substantial obstacle to its creation and appropriate content.[121] Importantly, the Permanent Bureau floated the idea of a protocol to the Hague Abduction Convention in 2012, but it failed to garner sufficient support from state parties.[122] There is little reason to think things have changed.

A new *Guide to Good Practice* or relevant conclusions and recommendations following a Special Commission meeting are more likely avenues for change. Yet, even if one or both of these materialized, they would take a long time to achieve.[123] In addition, they might not alter case outcomes. Judges might be unaware of these obscure sources. Moreover, because these sources are not law but only persuasive

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118 Weiner, *supra* note 9, at 675–76 (footnotes omitted).

119 Vienna Convention on the Law of Treaties art. 40(2), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

120 *Id.* art. 40(4).

121 Regardless of whether participation is a legal entitlement under the *Vienna Convention on the Law of Treaties* (because, inter alia, the protocol could be fashioned as a modification under Article 41 of the *Vienna Convention* instead of an amendment under Article 40, and Article 41(2) only requires notification of the other parties, not participation), the Hague Conference's rules would allow all state delegations at the Diplomatic Session to have a vote to approve or reject any such proposal. *See* Hague Conf. on Priv. Int'l L. [HCCH], Rules of Procedure § II.H.4 (Mar. 6, 2020), https://www.hcch.net/en/governance/rules-of-procedure [https://perma.cc/5UA9-ZKHX].

122 Hague Conf. on Priv. Int'l L. [HCCH], *Conclusions and Recommendations of Part I and Part II of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention and a Report of Part II of the Meeting*, paras. 3–4, 41 (2012), https://www.hcch.net/upload/wop/concl28-34sc6_en.pdf [https://perma.cc/2TBC-ZZB2]. There have been other proposals to amend that have failed. *See, e.g.*, Weiner, *supra* note 44, at 290–92, 299 (discussing Switzerland's proposal to make the best interests of the child a defense in certain situations and to ensure that the Swiss Central Authorities (and other public authorities) cooperate to ensure direct access to pertinent documents, witnesses, and experts).

123 *See supra* text accompanying note 25.

authority, judges can disregard them. The current *Guide to Good Practice* disclaims its own weight, expressly saying that it is not binding on judges.[124] Since 1988, when the United States enacted the International Child Abduction Remedies Act (ICARA), only seven reported decisions in the United States include a citation to any *Guide to Good Practice* and only three decisions cite to the *Guide to Good Practice* addressing Article 13(1)(b).[125] Only two cases cite to any conclusions and recommendations from Special Commission meetings.[126] While judges may be influenced by these sources even if their published opinions do not cite them, the absence of citations raises serious questions about the influence of these materials.

It is also a real possibility that no treaty reform or soft law instruments would be forthcoming. The biggest obstacle is the ingrained orientation among many decisionmakers, at the Permanent Bureau and within state parties, that a child's return is almost always the right outcome.[127] That belief undergirds the "return plus protective measures"

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124 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, paras. 7–8.

125 Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 22 U.S.C. §§ 9001–9011 and 42 U.S.C. §§ 11601–11610). The seven resulting cases were found through a Westlaw search on July 18, 2024, for "adv: Hague /s Abduction and Guide /s Good." They are as follows: Abbott v. Abbott, 560 U.S. 1, 18 (2010) (citing the *Guide to Good Practice* regarding case law supporting *ne exeat* rights of custody (IV Enforcement)); Chafin v. Chafin, 568 U.S. 165, 180 (2013) (Ginsburg, J., concurring) (citing the *Guide to Good Practice* regarding challenging return orders and expeditious proceedings (IV Enforcement)); Madrigal v. Tellez, 848 F.3d 669, 674 n.3 (5th Cir. 2017) (citing the *Guide to Good Practice* regarding courts' ability to order the return of an abducted child to the state of habitual residence (IV Enforcement)); Chafin v. Chafin, 742 F.3d 934, 936 n.4 (11th Cir. 2013) (citing the *Guide to Good Practice* regarding the adjudication timetable for abduction cases (IV Enforcement)); Gil-Leyva v. Leslie, 780 F. App'x 580, 598 (10th Cir. 2019) (Briscoe, C.J., concurring in part) (citing the *Guide to Good Practice* regarding the inability of some parents to return to the child's state of habitual residence due to financial constraints (VI Article 13(1)(b))); Colchester v. Lazaro, No. C20-1571, 2022 WL 1078573, at *3 (W.D. Wash. Apr. 11, 2022) (citing the *Guide to Good Practice* regarding types of protective measures (VI Article 13(1)(b))); Golan v. Saada, 596 U.S. 666, 678 n.7 (2022) (citing the *Guide to Good Practice* regarding the use of protective measures (VI Article 13(1)(b))). *See generally* HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17.

126 The two resulting cases were found through a Westlaw search on July 18, 2024, for "adv: Hague /s Abduction and Conclusions /s Recommendations." *See* Danaipour v. McLarey, 286 F.3d 1, 13–14 (1st Cir. 2002); Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1222 n.5 (D.C. Cir. 2019).

127 HAGUE CONF. ON PRIV. INT'L L., CONCLUSIONS & RECOMMENDATIONS (C&R), EIGHTH SPECIAL COMMISSION MEETING TO REVIEW OPERATION OF THE 1980 CHILD ABDUCTION AND 1996 CHILD PROTECTION CONVENTIONS, para. 14 (2023), https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf [https://perma.cc/SEE4-MS9W] ("The SC underlined that in the case of a wrongful removal or retention, it is in principle in the best interests of the child to be returned to their State of habitual residence, as expeditiously as possible, save for the limited exceptions provided for in Articles 12, 13 and 20 of the 1980 Child Abduction Convention. These exceptions, however, must be applied restrictively."); *id.* para. 15 ("The SC recognised that as a rule, the courts of the child's State of habitual residence are best placed to determine the merits of a custody dispute (which typically involves a comprehensive 'best interests assessment') as, inter alia, they generally

approach,[128] despite the fact that nonreturn is the safer option and the Convention says nothing about protective measures. This attitude is so pervasive that it was not at all surprising to hear the Secretary General tout "return with protective measures" as the appropriate approach in his concluding remarks at the Forum, despite acknowledging that the Convention's success should not be judged merely on the number of returns.[129]

This unjustified faith in the "return with protective measures" approach could hamper efforts to improve the application of the Hague Abduction Convention. If so, what should those who seek to eliminate the injustices do? There are three options that deserve attention: litigation before human rights tribunals, domestic law reform, and a new international treaty. These avenues certainly are not mutually exclusive and can be pursued simultaneously. However, a consideration of the first two options reveals why the last option should definitively be pursued.

A. *Other Options*

1. Impact Litigation in International Tribunals

Some people might pin their hope on impact litigation before a public international law tribunal. Human rights bodies are increasingly considering cases involving the Hague Abduction Convention.[130] While no human rights tribunal has yet evaluated the Hague Abduction Convention's limited defenses against the rights of mothers and children to be protected from domestic violence, litigation is currently pending.[131]

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will have fuller and easier access to the information and evidence relevant to the making of such determinations. Therefore, the return of the wrongfully removed or retained child to their State of habitual residence not only restores the status quo ante, but it allows for the resolution of any issues related to the custody of, or access to, the child, including the possible relocation of the child to another State, by the court that is best placed to assess effectively the child's best interests."). Even when a "limited" exception is established, courts still have discretion to return a child. *See* HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, para. 42.

128 *See, e.g.*, F v. M (Abduction: Grave Risk of Harm) [2008] EWHC (Fam) 1263 [13]–[14], [17].

129 *See* Hague Conf. on Priv. Int'l L., *supra* note 1, para. 156 (expressing a realization that the success of the Convention should not be assessed merely by the number of returns when there is substantiated domestic violence *and* protective measures will not be effective).

130 *See, e.g.*, Committee on the Rights of the Child, Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Comm. No. 121/2020, U.N. Doc. CRC/C/90/D/121/2020 (June 20, 2022).

131 A pro se litigant recently filed a petition with the Inter-American Commission of Human Rights against the United States. *See* Petition Alleging Violations of the Human Rights of Tammy Noergaard and Other Similar Cases by the United States of America and the State of California,

Undeniably, multiple human rights treaties require countries to protect domestic violence victims.[132]

Despite the hope that human rights offer for change, litigation before international human rights tribunals takes a long time. It currently can take more than five years to get a judgment from the European Court of Human Rights,[133] more than two years to get a judgment from the Committee on the Elimination of Discrimination Against Women under its Optional Protocol,[134] and many more years to get a decision from the Inter-American Commission on Human Rights.[135] Of course, the actual

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with Request for an Investigation and Hearing on the Merits, No. P-838-2 (May 21, 2021) (on file with author). The Commission told the petitioner on May 28, 2024, that her application is now procedurally complete. Letter from Jorge Meza, Assistant Exec. Sec'y, Inter-Am. Comm'n on H.R., to Tammy Noergaard and Daughters (May 28, 2024) (on file with author).

132 *See, e.g.*, Opuz v. Turkey, App. No. 33401/02, ¶¶ 159, 161, 171, 176 (June 9, 2009), https://hudoc.echr.coe.int/fre [https://perma.cc/9PUR-9HMW] (confirming that domestic violence was degrading and inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights); Re TKJ (Abduction: Hague Convention (Italy)) [2024] EWHC (Fam) 198 [30] (UK) (noting that Article 13(1)(b) should be used to avoid a breach of Article 3 of the European Convention on Human Rights); Committee on the Elimination of Discrimination Against Women, Views Adopted by the Committee Under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Comm. No. 20/2008, U.N. Doc. CEDAW/C/49/D/20/2008 (Sept. 27, 2011) (finding a violation of a state party's obligation under Article 2(c) and (e) of the Convention on the Elimination of All Forms of Violence Against Women to provide for the immediate protection of women from violence, including domestic violence, by the state's refusal to issue a permanent protection order, in part because of the unreasonably high burden of proof and preconceived and overly narrow understanding of what constitutes domestic violence); Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01 OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 55–58, 60 (2001) (holding that the state had failed in its obligations under the Convention of Belém do Pará to protect women from violence by, inter alia, not prosecuting and condemning the victim's abuser in a timely manner); *see also* Weiner, *Strengthening Article 20*, *supra* note 47; Weiner, *Using Article 20*, *supra* note 47. Human rights obligations should discourage courts from placing unjustified trust in protective measures instead of granting nonreturn outright. They should also encourage courts to grant the Article 20 defense more, assuming it is raised. Article 20 states that "[t]he return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Abduction Convention, *supra* note 5, art. 20. Unfortunately, neither result is yet evident.

133 *See European Court of Human Rights*, CONSCIENTIOUS OBJECTOR'S GUIDE TO INT'L HUM. RTS. SYS., https://co-guide.info/mechanism/european-court-human-rights [https://perma.cc/6WLC-CDXB].

134 *See* United Nations Office of the High Commissioner, *Note on the Different Procedures Within the UN System Dealing with Women's Human Rights Violations*, UNITED NATIONS, https://www.ohchr.org/en/special-procedures/wg-women-and-girls/note-different-procedures-within-un-system-dealing-womens-human-rights-violations [https://perma.cc/VP9X-SRHR].

135 *See* Bruno de Oliveira Biazatti, *Overcoming the Backlog in the Initial Review of Petitions in the Inter-American Commission on Human Rights*, EJIL:TALK! (Oct. 27, 2023), https://www.ejiltalk.org/overcoming-the-backlog-in-the-initial-review-of-petitions-in-the-inter-american-commission-on-human-rights [https://perma.cc/3H5K-WRSC] (noting that despite

time is much longer if one counts time from the start of a Hague case before a domestic tribunal. It took seventeen years to get the decision in *Córdoba v. Paraguay* when one counts from the date of the initial Hague hearing.[136] *Córdoba* was the first Hague Abduction case to be decided by the Inter-American Court on Human Rights.

Apart from obstacles to successful human rights litigation such as exhaustion of domestic remedies and time limits for bringing a case, there is no guarantee that an international tribunal will find in the applicant's favor. For example, various public international law instruments, such as the Convention on the Rights of the Child[137] and the European Charter of Fundamental Rights,[138] emphasize that the child's best interests are to be a primary consideration in actions related to them. Despite some advocates' efforts to use this language to modify the way in which courts apply the Hague Abduction Convention, the international tribunals responsible for interpreting those instruments have held that countries satisfy their obligations under these human rights treaties by applying the defenses in the Hague Abduction Convention faithfully, even though an inquiry pursuant to Article 13(1)(b) is much more limited than a best interests inquiry.[139] While recently, in *Re J.M.*,[140] the Committee on the

improvements in the backlog of cases awaiting an Initial Review, there is now a backlog in Commission proceedings at the "notification of the initiation of the proceedings" stage). *See generally* Ariel Dulitzky, *Too Little, Too Late: The Pace of Adjudication of the Inter-American Commission on Human Rights*, 35 LOY. L.A. INT'L & COMPAR. L. REV. 131, 134–36, 149–51 (2013) (discussing delays).

136 *See* Córdoba v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 505 (Sept. 4, 2023).

137 *See* G.A. Res. 44/25, Convention on the Rights of the Child, art. 3(1) (Nov. 20, 1989) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.").

138 Charter of Fundamental Rights of the European Union, art. 24(2), 2012 O.J. (C 326) 391, 400.

139 While *Neulinger v. Switzerland* looked promising, *X v. Latvia* was a retreat. *Compare* Neulinger v. Switzerland, App. No. 41615/07, ¶¶ 76–77 (July 6, 2010), https://hudoc.echr.coe.int/eng?i=001-99817 [https://perma.cc/Z462-S9H7], *with* X v. Latvia, App. No. 27853/09, ¶¶ 103–07 (Nov. 26, 2013), https://hudoc.echr.coe.int/eng?i=001-138992 [https://perma.cc/5YS7-3ZR8], *and* G v. G [2021] UKSC 9, [2022] AC 544, [155] (appeal taken from Eng.) (explaining that "[t]he application of article 13(b) ensures that the court is not acting in a way which is incompatible with the ECHR," in a case in which a mother sought asylum based on her alleged persecution by her family for her sexual orientation). *See generally* Paul Beaumont, Katarina Trimmings, Lara Walker & Jayne Holliday, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, 64 INT'L & COMP. L.Q. 39 (2015).

140 *See* U.N. Comm. on the Rts. of the Child, Re J.M., Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 121/2020, ¶ 8.4, U.N. Doc. CRC/C/90/D/121 (June 20, 2022) ("[S]ince the right of the child to have his or her best interests be a primary consideration entails the application of procedural safeguards and interpretative standards, it cannot simply be stated that all domestic court decisions made solely on the basis of the Hague Convention will

Rights to the Child rightfully pushed back against equating the Hague Abduction Convention's exceptions to return as coextensive with a country's obligations under the Convention on the Rights of the Child (CRC), the Committee still treaded lightly and showed considerable deference to the Hague Abduction Convention framework.[141] Consequently, an international tribunal might similarly say that a country meets its international law obligations to domestic violence survivors by applying Article 13(1)(b) and Article 20 in ways that recognize the harm from domestic violence and the potential limits of protective measures.

Moreover, sometimes international tribunals seem oblivious to the reality of domestic violence, and that does not portend well for survivors. For example, in 2023, in *Córdoba v. Paraguay*, the Inter-American Court held that Paraguay violated the left-behind parent's rights when it failed to enforce a return order and obstructed his efforts to obtain access to the child.[142] Government officials could not locate the child for nine years despite the fact that the child was receiving state services.[143] When the child was found, the father's access rights were thwarted.[144] The Inter-American Court's decision largely ignored the fact that the case involved a father who was alleged to be a perpetrator of domestic violence.[145] The mother fled Argentina with her two-year-old child and went to Paraguay allegedly because of domestic violence. Article 11(b) of the Inter-American Convention (parallel to Article 13(1)(b) of the Hague

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inevitably result in compliance with article 3 of the Convention on the Rights of the Child."); *id.* ¶ 8.6 ("[T]he judge ruling on the return must assess, in light of the narrow exceptions established in the Hague Convention, and as required under article 3 of the Convention on the Rights of the Child, the extent to which the return would expose him or her to physical or psychological harm *or otherwise be clearly against his or her best interests*." (emphasis added)).

141 *Id.* ¶ 8.6 ("[I]n line with the principle of the best interests of the child, the exceptions to the duty to return the child established in the Hague Convention must be interpreted strictly."); *id.* ¶ 8.5 ("[G]iven that the Hague Convention is designed to strike a fair balance between the standard establishing a presumption in favour of the international return of the child and the factors that may make such a return contrary to the child's best interests in certain cases, it seems unlikely that adequate respect for the procedural safeguards mentioned above would result in a substantive violation of article 3 of the Convention."). The deferential aspects of the decision were stressed in the Conclusions and Recommendations at the Eighth Special Commission meeting. *See, e.g.*, HAGUE CONF. ON PRIV. INT'L L., *supra* note 127, at 6.

142 The Inter-American Court's judgment is in Spanish. *See* Córdoba v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 505 (Sept. 4, 2023). However, the Commission's decision is in English, and it is from there that many facts are drawn. *See* Córdoba v. Paraguay, Case 13.399, Inter-Am. Comm'n H.R., Report No. 377/20, OEA/Ser.L./V/II, doc. 394 (2020) (report on the merits), Original: Spanish, https://www.oas.org/en/iachr/decisions/court/2022/PY_13.399_EN.PDF [https://perma.cc/4U65-PFA3].

143 *Córdoba*, Report No. 377/20 ¶ 18.

144 *Id.* ¶ 19.

145 *See* Córdoba v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 505 (Sept. 4, 2023).

Abduction Convention) was rejected in the domestic litigation, and this was affirmed in two appeals, although apparently "the court had not ordered an evidentiary hearing, despite having requested the submission of evidence."[146] Janaína Albuquerque wrote about the case,[147] noting that the Commission decision did not mention the domestic violence, nor did the Court address it.

In short, impact litigation in an international tribunal is not guaranteed to produce a favorable result. Therefore, there is reason to pursue other avenues of reform as cases proceed through the various human rights systems.

2. Domestic Solutions

Some reformers might advocate for national governments to implement change. In fact, a few countries have already passed domestic legislation to address when domestic violence survivors flee transnationally with their children for safety and then face petitions for the children's return pursuant to the Hague Abduction Convention. A good example is Japan. Japan's national legislation states: "The court must not order the return of the child when it finds that . . . [there exists] a grave risk that his/her return to the State of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[148] By using the word "must" instead of "may," this provision eliminates the discretion that normally exists under Article 13(1)(b) after the grave risk defense is made out.[149] In addition, the law expressly mentions domestic violence and requires the court to consider it in evaluating the grave risk defense:

> The court, when judging whether or not the grounds listed in item (iv) of the preceding paragraph exist, shall consider all circumstances such as those listed below: (i) whether or not there is a risk that the child would be subject to physical violence or any other words and deeds which would cause physical or psychological harm (referred to as "violence, etc." in the

146 *Córdoba*, Report No. 377/20 ¶ 36.

147 Janaína Albuquerque, *The Inter-American Court of Human Rights: First Judgment on International Child Abduction*, CONFLICT L. (Dec. 28, 2023), https://conflictoflaws.net/2023/the-inter-american-court-of-human-rights-first-judgment-on-international-child-abduction [https://perma.cc/27ZV-PVLU].

148 The Act for Implementation of the Convention on the Civil Aspect of International Child Abduction, Law No. 48 of 2013, art. 28(1) (Japan), *reproduced in* Mari Nagata, Protective Measures and DV—Regarding the 1980 Convention in Japan (slides shown at the Forum), June 2024 (on file with author).

149 Hague Abduction Convention, *supra* note 5, art. 13.

> following item) by the petitioner, in the State of habitual residence; (ii) whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological trauma to the child, if the respondent and the child entered into the state of habitual residence; (iii) whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide custody for the child in the State of habitual residence.[150]

Other countries have also changed domestic law or are in the process of doing so.[151] For example, Australia changed its regulations in 2022,[152] albeit in a very modest way that may have actually achieved nothing positive for survivors.[153] Prior to the changes, courts in Australia could already consider family violence and protective measures. Now courts "may" consider family violence and protective measures,[154] but "must" consider the appropriateness of protective measures if a party or the child's lawyer raises their availability.[155] In addition, protective measures can be entered "regardless of whether the court is satisfied that: (a) the risk will eventuate, or is likely to eventuate; or (b) the risk has eventuated in the past."[156] In evaluating protective measures, the court "may" consider whether compliance is "reasonably practicable," whether the measure is "proportionate," whether the measure usurps the role of the court in the habitual residence, and whether the measure would be

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150 Law No. 48, art. 28(2).

151 *See, e.g.*, Lei No. 565, de 2022 (Braz.), https://www25.senado.leg.br/web/atividade/materias/-/materia/155624 [https://perma.cc/54R2-9B3H] (indicating that exposure of children to domestic violence can constitute a serious risk of a physical or psychological harm, specifying what evidence may help establish the child's exposure to domestic violence, providing assistance to respondents who make such allegations, requiring temporary guardianship for respondents pending translation of documents, and noting that a lack of effective measures to protect the parent and the children qualifies the respondent for the Article 13(1)(b) defense).

152 *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* (Cth) n.1 (Austl.). The 2022 amending regulations have now been repealed because the language has been incorporated into the original 1986 regulations.

153 Rosa Saladino & Ben Kremer, *Secretary, Department of Communities and Justice & Mercado: A Case Study of the 8 December 2022 Changes to the Family Law (Hague Convention) Regulations 1986*, 33 AUSTL. FAM. L. 67, 71 (2024) (noting that the regulation "did not alter the existing substantive law and at most confirmed (in confusing language) what had already been stated to be the case"). The Family Law Council recently recommended a number of excellent additional changes to Australian law, finding that "a re-negotiation of the *Hague Convention*'s text is neither realistic nor practical." AUS. GOV'T FAM. L. COUNCIL, PROTECTING VICTIMS OF FAMILY VIOLENCE, INCLUDING CHILDREN, IN THE FAMILY LAW SYSTEM: INTERNATIONAL CHILD ABDUCTION: FAMILY LAW COUNCIL REPORT 1C, 2024, at 4 (2024).

154 *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* (Cth) sch. 1, pt. 2 n.1 (Austl.).

155 *Id.* sch. 1, pt. 3 (amending the end of regulation 16).

156 *Id.* sch. 1, pt. 1 (amending the end of regulation 15).

enforceable in the habitual residence.[157] More meaningfully, a concurrent treasury budget measure creates a fund to help taking parents obtain legal counsel.[158]

Even when changes to national law are helpful, such changes are a limited solution. First, most countries' national law does not deal specifically with domestic violence in the context of international child abduction. To achieve meaningful worldwide change, it would take an immense amount of political will across numerous countries. None of it would be coordinated. It is discouraging that some countries—including the United States—already have refused to adopt any reasonable reforms. In 2011, Kristin Wells, former counsel to the House Foreign Affairs Committee and partner at Patton Boggs, called on the United States Department of Justice to "issu[e] guidelines to the federal courts on what standards and tests should be used to interpret [Article 13(1)(b)]," and that "[t]he Office of Violence Against Women could participate in developing that guidance."[159] That never happened. Then, in 2015, Representative Ileana Ros-Lehtinen crafted comprehensive legislation to amend the U.S. implementing legislation, the International Child Abduction Remedies Act, so that taking parents who were fleeing for safety would have a fair shot of satisfying the Article 13(1)(b) defense.[160] That proposed legislation never became law.

Second, some domestic provisions purportedly responsive to the domestic violence problem are suboptimal. As mentioned, Australia now requires courts to consider protective measures when raised by a party even if the grave risk defense has been made out, nonreturn is an appropriate outcome, and the proposed protective measures are

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157 *Id.* sch. 1, pt. 1, ¶ 6. Some have criticized these modest changes by saying that they undermine the effectiveness of the Convention. *See Bring Abducted Child. Home: Hearing Before the Subcomm. on Glob. Health, Glob. Hum. Rts. & Int'l Orgs. of Comm. on Foreign Affs.*, 108th Cong. 65, 67–68 (2023) (statement of Patricia E. Apy, Fellow, Int'l Acad. Fam. Laws.).

158 In 2023, the Australian government announced $18.4 million to improve the safety of women and children in international child abduction cases under the Convention. It included $5.7 million for the Central Authority (i.e., Attorney General) to obtain evidence about family violence that could be presented to the courts in Hague matters, and $5.3 million for alternative dispute resolution to divert families from the Hague process to improve safety outcomes. The budget package also included $7.4 million to introduce a financial assistance scheme to enable eligible respondent parents to have equivalent access to legal representation as applicant parents. *See Australian Budget 2023–24*, WOMEN'S BUDGET STATEMENT 53 (May 9, 2023), https://archive.budget.gov.au/2023-24/womens-statement/download/womens_budget_statement_2023-24.pdf [https://perma.cc/7XHF-9K3D].

159 *See International Child Abduction Subject of House Hearing*, WOMEN'S CONG. POL'Y INST., https://www.wcpinst.org/source/international-child-abduction-subject-of-house-hearing [https://perma.cc/ZSL2-P3F3] (summarizing Kristin Wells' testimony from May 24, 2011).

160 ICARA Improvement for Victims of Domestic Violence Act of 2015 (on file with author). For a description of the proposed law, see Weiner, *supra* note 52, at 243–44.

obviously part of the petitioner's strategy to harass the victim.[161] In the United States, one legislator proposed addressing the domestic violence problem in Hague Abduction cases by merely giving judges and survivors information about protective measures, thereby embracing the flawed "return with protective measures" approach as the solution.[162] A proponent of that legislation argued against more effective change, and refused to differentiate between "abductions" by domestic violence perpetrators and domestic violence victims. She said, "There is danger to be found in distinguishing different forms of child abduction, or excusing abduction of child by a parent or relative as less damaging."[163] Fortunately, the United States never adopted this proposal either.

Third, most importantly, incoming cases are only half the problem. Domestic solutions do not affect outgoing cases, i.e., cases in which a survivor flees to another country. Rather, to the extent that beneficial domestic reforms are adopted, those reforms only improve the resolution of cases before the domestic court. In addition, bi-national solutions are necessary for some tangential issues that are critical for justice and safety. For example, ideally custody jurisdiction would shift between countries once a respondent established a meritorious Article 13(1)(b) defense. Otherwise, a court in the requested state may not have jurisdiction to adjudicate the underlying custody case even after granting the Article 13(1)(b) defense and denying return, and may instead have to enforce a custody order from the requesting state that awards custody to the domestic violence perpetrator.[164] To avoid that result and the possibility

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161 *See supra* notes 152–158. The reforms recently recommended by the Family Law Council would not change regulation 16(6). *See supra* text accompanying note 155; *see also* AUS. GOV'T FAM. L. COUNCIL, *supra* note 153, at 5-6.

162 These ideas were proposed by Representative Smith as amendments to the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, H.R. 3212, 113th Cong. (2014) (enacted). *See* Bring Abducted Children Home Amendments Act, H.R. 9669, 117th Cong. § 3(7) (2022). The legislation would have required a State Department report to Congress to include information about legal protections for domestic violence victims, how domestic violence victims could obtain legal counsel, and whether a foreign court or foreign law enforcement officer would enforce a U.S. protection order.

163 *Bring Abducted Child. Home: Hearing Before the Subcomm. on Glob. Health, Glob. Hum. Rts. & Int'l Orgs. of Comm. on Foreign Affs.*, 108th Cong. 72 (2023) (statement of Patricia E. Apy, Fellow, Int'l Acad. Fam. Laws.); *see also id.* at 70 ("This legislation focuses on providing objective information and practical assistance, with which Judges can quickly and effectively evaluate the protections genuinely available for victims of domestic violence, in their considerations and deliberations. The amendment will better facilitate the ability of a court to refer to objective information and evidence in quickly deliberating in addressing a request for return, or in fashioning orders for the organization for the rights of access.").

164 *See In re* Yaman, 105 A.3d 600, 606, 610–11 (N.H. 2014); *see also In re* T.L.B., 272 P.3d 1148, 1156–57 (Colo. App. 2012). *But see In re* S.L., 503 P.3d 244, 265–69 (Kan. Ct. App. 2021) (giving comity to the Netherlands's judgment refusing return of a child to the United States pursuant to

of conflicting decrees, countries need to coordinate so that jurisdiction to decide child custody shifts from the requesting state to the requested state after a successful Article 13(1)(b) defense.

Although a multilateral solution is essential, countries should also ensure their domestic laws do not unfairly and unnecessarily hamper the success of the Article 13(1)(b) defense. This, in fact, is arguably an obligation of countries. Article 2 of the Hague Abduction Convention requires state parties to "take all appropriate measures to secure within their territories the implementation of the objects of the Convention."[165] The defenses are an essential part of the Convention's framework, meant to ensure that its application is in the interest of children. Yet in the United States, for example, federal law requires that the respondent establish the Article 13(1)(b) defense by "clear and convincing" evidence, a very difficult standard to meet.[166] Countries interested in leveling the playing field for domestic violence victims should eliminate the higher burden of proof for Article 13(1)(b).[167] Similarly, Central Authorities should treat petitioners and respondents equally in many aspects of their work, including when offering a party legal assistance.

B. *A Bilateral or Multilateral Solution Is Needed*

A necessary solution, and one that should be pursued simultaneously with human rights litigation and domestic law reform, is a multilateral treaty. After all, when a parent flees transnationally with children for safety reasons, two or more countries are automatically involved. The best way to address the topic—i.e., to address the "grave

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the Hague Abduction Convention and then holding child custody jurisdiction shifted to the Netherlands because the child's habitual residence shifted; also holding that there was no basis for jurisdiction under the UCCJEA on the facts). *See generally* Robert G. Spector, *International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy than the Abduction Convention*, 49 FAM. L.Q. 385, 391 (2015) (explaining that defenses in the UCCJEA and Hague Abduction Convention differ because "the UCCJEA [is] concerned with the enforcement of a custody determination which, presumably, took the 1980 Abduction Convention defenses into account as part of a best interest of the child analysis," while "[t]he 1980 Abduction Convention, on the other hand, merely concerns a remedy preliminary to placing the proceeding in the proper location"). Brussels II-ter requires enforcement of the habitual residence's custody order even after a successful Article 13(1)(b) defense. *See* Brussels II-ter Regulation, *supra* note 32, art. 29(6).

165 Hague Abduction Convention, *supra* note 5, art. 2.

166 22 U.S.C. § 9003(e)(2)(A).

167 *See* Weiner, *supra* note 52, at 312–16. Importantly, not all courts require that the facts undergirding the Article 13(1)(b) defense be proven by the higher burden of proof. *See, e.g.*, Yaman v. Yaman, 730 F.3d 1, 11 (1st Cir. 2013); Souratgar v. Lee, 720 F.3d 96, 103 (2d Cir. 2013); Danaipour v. McLarey, 183 F. Supp. 2d 311, 315 (D. Mass.), *rev'd on other grounds*, 286 F.3d 1, 14–16 (1st Cir. 2002); Didur v. Viger, No. 05-2188, 2005 WL 8160585, at *9 (D. Kan. Aug. 12, 2005), *rev'd on other grounds*, 197 F. App'x 749, 753 (10th Cir. 2006).

risk" and provide a "wrap around"[168] solution for domestic violence victims and their children—is by agreement between the involved countries. This allows the countries to address incoming and outgoing cases, as well as other legal issues that are implicated by the situation, including jurisdiction, enforcement of protective measures, and even substantive rules on relocation. A multilateral approach also promotes a higher level of uniformity than unilateral reform, and that uniformity increases over time as more nations join the initiative.[169]

International law arguably even requires countries to adopt a multilateral solution in this context. Article 35 of the CRC says, "States Parties shall take all *appropriate* national, bilateral and *multilateral* measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[170] The word "appropriate" in this provision must be interpreted in light of countries' other international obligations, including from the CRC itself.[171] Article 19 of the CRC says, in part: "States Parties shall take all appropriate legislative . . . measures to protect the child from all forms of physical or mental violence, injury or abuse . . . while in the care of parent(s)."[172] The Committee on the Rights of the Child said this provision applies to children who are, or may be, exposed to domestic violence.[173] Therefore, although countries' obligations to prevent child abduction under Article 35 are partly met by being party to the Hague Abduction Convention, countries must also ensure that the Hague Abduction Convention is "appropriate," as Article 35 requires, in light of their Article 19 obligations to protect children from domestic violence. Because the "return plus protective measures"

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168 A wrap around solution is one that would address more than the specific legal issue triggered by the Hague Abduction Convention, but also the other transnational legal issues involving custody of the child. "Wrap around" is a term commonly used by domestic violence service providers in the United States and abroad to signify the provision of holistic services, sometimes legal and sometimes nonlegal. *See, e.g.*, Jacqueline G. Lee & Bethany L. Backes, *Civil Legal Aid and Domestic Violence: A Review of the Literature and Promising Directions*, 33 J. FAM. VIOLENCE 421, 429, 431 (2018); Lanyan Chen, Jennifer McCarthy & Miao Chen, *Canadian Strategy Against Gender-Based Violence and Gaps*, 14 SOCIETIES 237 (2024).

169 *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects on International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 281–82, 291–92 (2002).

170 U.N. Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S 3 (emphasis added). While the United States is not party to the Convention on the Rights of the Child, almost all other nations are parties. *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://indicators.ohchr.org [https://perma.cc/5SN4-7WLP] (under "Select a Treaty," scroll to and select "Convention on the Rights of the Child"—a color-coded map indicates the United States is merely a signatory to the Convention).

171 *See* U.N. Convention on the Rights of the Child, *supra* note 170, art. 35.

172 *See id.* art. 19.

173 *See* Committee on the Rights of the Child, General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence, U.N. Doc. CRC/C/GC/13, ¶ 4 (Apr. 18, 2011).

approach under the Hague Abduction Convention fails to protect children from domestic violence adequately, countries should adopt multilateral measures to ensure the application of the Hague Abduction Convention is "appropriate." Other international legal instruments may also require the same.[174]

Similarly, regional human rights instruments arguably also require state parties to adopt a multilateral solution to the problem identified in this Article. The Convention of Belém do Pará, which binds many members of the Organization of American States,[175] recognizes the right of "every woman," including women who "abduct" their children, to be "free from violence in the . . . private sphere[]."[176] This Convention recognizes that violence against women is a human rights issue because women have a right to be free from violence,[177] and also that domestic violence nullifies women's other human rights, including the right to have the "inherent dignity of her person respected and her family protected."[178] Article 7(h) requires state parties to "condemn all forms of violence against women and agree to pursue, *by all appropriate means* and without delay, policies to prevent, punish and eradicate such violence and undertake to . . . adopt such legislative or other measures as may be necessary to give effect to this Convention."[179] In addition, Article 7(e) requires state parties to "take *all appropriate measures*, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women."[180] State parties should work together to modify the legal instruments that permit, and at times promote, the "return with protective measures" approach because the approach exposes women and children to more risk of violence than the alternative of nonreturn, rewards the perpetrator for committing the violence, and punishes women for being victims of violence.

Some countries' domestic law may also require such a solution. For example, the Maria da Pehna Law in Brazil requires the government to "develop policies aimed at guaranteeing the human rights of women in the scope of the domestic and family relations, with a view to protecting

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174 *See* Weiner, *Using Article 20*, *supra* note 47, at 608–13 (arguing that requiring a mother to choose between her safety and her child violates, inter alia, the International Covenant on Civil and Political Rights); *see also* Weiner, *Strengthening Article 20*, *supra* note 47, at 743 (discussing the International Covenant on Civil and Political Rights).

175 *See* Weiner, *Strengthening Article 20*, *supra* note 47, app. at 745.

176 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," art. 3, June 9, 1994, 33 I.L.M. 1534.

177 *Id.* art. 6.

178 *Id.* arts. 4–6.

179 *Id.* art. 7(h).

180 *Id.* art. 7(e) (emphasis added).

them against all forms of negligence, discrimination, exploitation, violence, cruelty and oppression."[181] The law puts a clear emphasis on effectiveness,[182] as well as fairness for survivors.[183] Brazil's constitution also imposes obligations on the government,[184] and cases are currently pending before the Brazilian Supreme Court regarding judges' obligations to consider evidence of domestic violence in cases arising under the Hague Abduction Convention.[185] These same domestic laws may require the government to take multilateral action to protect women and children even more in these types of cases.

The best solution would be a new bilateral or multilateral agreement that is not a protocol to the Hague Abduction Convention. Creating a new treaty would be a much nimbler and faster process than amending the Hague Abduction Convention itself or creating a protocol.[186] For one thing, the process need not involve the 103 countries that are currently

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181 Lei No. 11.340, de 7 de Agosto de 2006, Diário Oficial da União [D.O.U.] de 8.8.2006, art. 3 (¶ 1), *translated in* INSTITUTO MARIA DA PENHA, MARIA DA PENHA LAW, LAW NO 11.340 OF AUGUST 7, 2006 (2006), https://www.institutomariadapenha.org.br/assets/downloads/maria-da-penha-law.pdf [https://perma.cc/K7JA-M2QQ]; *see also id.* art. 8 (VI) ("The public policy aimed at restraining domestic and family violence against women will be implemented by means of an integrated set of actions by the Federal Union, the States, the Federal District and the Municipalities and nongovernment actions, according to the following guidelines: . . . establishment of accords, protocols, adjustments, terms or other instruments of promotion of partnership between government bodies or between them and non-government entities, with a view to the implementation of programs to eradicate domestic and family violence against women."); *id.* art. 36 ("The Federal Union, the States, the Federal District and the Municipalities shall promote the adaptation of their agencies and programs to the guidelines and principles of this Law.").

182 *See, e.g.*, *id.* art. 19, ¶¶ 2–3 (authorizing a judge to review and replace urgent protective measures with others that are more effective); *see also id.* art. 22, ¶ 1 (noting that the availability of designated urgent protective measures does not rule out others available under legislation in force if the safety of the victim or circumstances require it).

183 *See id.* arts. 27–28. For example, in many contexts, lawyers are made available for women who allege violence. *See id.*

184 Constituição Federal [C.F.] [Constitution] art. 226, ¶ 8 (Braz.) ("The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family.").

185 *See Supreme Federal Court Begins Judging Rules of Convention on International Child Abduction*, SUPREMO TRIBUNAL FEDERAL (June 3, 2024, 12:21 PM), https://portal.stf.jus.br/internacional/content.asp?id=540517&ori=1&idioma=en_us [https://perma.cc/7Z9Q-AV3B] (discussing Direct Action for the Declaration of Unconstitutionality 4245); *see also Partido pede que STF impeça repatriação de crianças quando houver suspeita de violência doméstica* [*Party Asks STF to Prevent Repatriation of Children When There Is Suspicion of Domestic Violence*], SUPREMO TRIBUNAL FEDERAL (July 24, 2024, 8:29 PM), https://noticias.stf.jus.br/postsnoticias/partido-pede-que-stf-impeca-repatriacao-de-criancas-quando-houver-suspeita-de-violencia-domestica [https://perma.cc/XM7U-375F] (discussing Direct Action for the Declaration of Unconstitutionality 7686).

186 *See supra* text accompanying notes 118–122.

party to the Hague Abduction Convention.[187] As Nigel Lowe has commented, "the enormity of getting Member States to agree, and for Contracting States to sign up to a Protocol, cannot be underestimated."[188] Importantly, countries that prefer the status quo would not be involved and therefore could not stymie or delay reform.[189] A new treaty could, although it need not, also have a regional focus—a benefit that prompted the drafting of the Inter-American Convention on the International Return of Children.[190]

Some people will be bothered by the call for a parallel treaty because uniformity is an important purpose of private international law conventions.[191] While uniformity is important,[192] it has its limits. Those limits have been reached because the existing application of the Hague Abduction Convention is unjust to a large number of people whose

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187 *Status Table 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIV. INT'L L. (Nov. 14, 2022), https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 [https://perma.cc/B2UL-8XP2].

188 Nigel Lowe, *Whither the 1980 Hague Abduction Convention?*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION, *supra* note 6, at 387, 402.

189 As Marilyn Freeman and Nicola Taylor point out, "The fact that practice is moving the justice pendulum in some jurisdictions, but not others, means there may be no, or little, consensus on critical issues like ameliorative measures providing for the safe return of abducted children." Marilyn Freeman & Nicola Taylor, *Nurturing the 1980 Hague Abduction Convention*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION, *supra* note 6, at 403, 407. In addition, it is likely that the EU would claim that member states cannot enter into such a treaty, even with nonmember states, without the permission of the EU. *Cf.* McEleavy, *supra* note 33, at 17–18. In contrast, consider that the process of developing the Inter-American Convention on the International Return of Children only took five years from the beginning of drafting to it entering into force. Jiménez, *supra* note 190, at 63.

190 Heidi V. Jiménez, *Inter-American Convention on the International Return of Children*, INT'L LEGAL MATERIALS, Jan. 1990, at 63 (1990); *see also* Nicolás Forero Villarreal, International Child Abduction, Domestic Violence and the Future of The Hague Convention Of 1980: A Preliminary Analysis of the Colombian Constitutional Court's Review of the Losice Case 12 (2018) (M.A. dissertation, Universidad de los Andes, Colombia) (on file with Séneca Institutional Repository), https://repositorio.uniandes.edu.co/server/api/core/bitstreams/5c24a493-a07d-4790-ab5d-84af17b9389f/content [https://perma.cc/YGU6-DZ5X]. State actors' geographic proximity can promote trust among nations. *Cf.* Magnus Nilsson, *Proximity and the Trust Formation Process*, 27 EUR. PLAN. STRATEGIES 841, 852–53 (2019) (discussing geographical proximity's indirect effect on gradual trust formation for organizations through "repeated and frequent exchange with a high social and relational content").

191 *See* Jürgen Basedow, *Uniform Interpretation of Uniform Private Law Conventions: On Treaty Law, Global Jurisprudence and Procedural Safeguards*, 56 N.Y.U. J. INT'L L. & POL. 1, 14–16, 26–28 (2023) ("Legal unification is not finished with the adoption of a common text; it is a permanent, ongoing task. The mission to promote law-making treaties is in itself incomplete if it is not accompanied by the responsibility for maintaining the uniformity at the stage of the implementation of the agreed text in the national jurisdictions and its application in legal practice.").

192 *See* Weiner, *supra* note 169, at 281–93; *see also* 22 U.S.C. § 9001(b)(3)(B) (recognizing "the need for uniform international interpretation of the Convention").

situation was not sufficiently considered by the drafters and reform is consistent with the Convention's object and purpose.[193] Consequently, there is no good reason to forego reform even if it results in different approaches to Article 13(1)(b). Moreover, as Marilyn Freeman and Nicola Taylor point out, if different approaches are "considered to be improvements, they have the potential to set an example for, and encourage positive change in, other Contracting States."[194] Finally, the call for uniformity falsely asserts that there is currently uniformity. There really is no uniformity at present.

The legal landscape is currently diverse because of national differences,[195] as well as multiple bilateral and multilateral agreements addressing international child abduction. International agreements other than the Hague Abduction Convention are common when one country is not a party to the Hague Abduction Convention,[196] as well as when parties to the Hague Abduction Convention seek to extend its application to cases arising before a country's accession.[197]

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193 *See id.* at 281 (suggesting that the goal of uniformity should not hamper a country's rejection of the prevailing approach when "1) the prevailing approach is unjust to a large number of individuals whose situation was not sufficiently addressed by the Hague Conference at the time of the Convention's adoption; and 2) the change can be justified as consistent with the Convention's object and purpose"). Presumably, uniformity would eventually be reestablished, but in line with a just interpretation of the Convention.

194 Freeman & Taylor, *supra* note 189, at 409.

195 *See* Mark Henaghan, Christian Poland & Clement Kong, *International Child Abduction in Aotearoa New Zealand, Australia and the Pacific: Similarities and Differences*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION, *supra* note 6, at 179, 189–90 ("The law on international child abduction in the Australasia/Pacific region is constantly evolving, and each jurisdiction has implemented the Convention differently. . . . The approaches are likely to be even more diverse between countries of different histories or cultures.").

196 For instance, the United States has memorandums of understanding (MOUs) with Egypt, Lebanon, Jordan, Saudi Arabia, and Taiwan. *See* KATARINA C. O'REGAN, CONG. RSCH. SERV., R46553, INTERNATIONAL PARENTAL CHILD ABDUCTION (IPCA): FOREIGN POLICY RESPONSES AND IMPLICATIONS 16 (2020). *See generally* JEREMY MORLEY, *International Child Abduction and Non-Hague Convention Countries*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION, *supra* note 6, at 244. The Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 directs the Secretary of State to enter into bilateral agreements and MOU with non-Hague countries. 22 U.S.C. § 9113. Other countries also have similar MOUs. *See, e.g.*, *Non-Hague Convention Child Abductions*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/publications-and-studies/details4/?pid=5215 [https://perma.cc/B3UL-4LGV]; Agreement between the Government of Canada and the Government of the Lebanese Republic Regarding Cooperation on Consular Matters of a Humanitarian Nature, Can.-Leb., Apr. 13, 2000, 3094 U.N.T.S. 49.

197 *See* 22 U.S.C. § 9113 (authorizing the United States to enter such agreements); *see also* Agreement Between the Government of Australia and the Government of the Arab Republic of Egypt Regarding Cooperation on Protecting the Welfare of Children, Austl.-Egypt, Oct. 22, 2000, 2208 U.N.T.S. 327, https://www.hcch.net/upload/2au-eg.pdf [https://perma.cc/24CZ-BWZP]; Judicial Agreement Between the Kingdom of Sweden and the Arab Republic of Egypt Regarding Co-Operation in Civil and Personal Status Matters, Swed.-Egypt, Aug. 23, 1996, 1254 U.N.T.S. 234

But for purposes here, a more significant source of diversity is countries' participation in the Hague Abduction Convention *and* other overlapping treaties. For example, some government officials use the Vienna Convention on Consular Affairs in abduction cases to get access to the abducted child for a welfare check.[198] Some countries are party to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children ("1996 Hague Protection Convention").[199] It makes protective measures ordered in a Hague Abduction proceeding enforceable in the child's habitual residence.[200] In short, many other treaties directly or indirectly address the topic of child abduction and this reality creates a diverse legal landscape.[201]

Two particular legal measures—Brussels II-ter and the Inter-American Convention on the International Return of Children[202]—create especially large differences in state approaches to the Hague Abduction Convention, as discussed next.

1. Brussels II-ter

Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child

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https://assets.hcch.net/docs/8d56477d-3d1b-45c3-bf82-fe2c70acd57b.pdf [https://perma.cc/F8Z3-J7MM].

198 *See, e.g.*, U.S. Dep't of State, Foreign Affs. Manual §§ 1716.3-1 to -2 (citing Vienna Convention, *supra* note 119, arts. 5(h), 37(b)) ("You should stress that you are not representing the LBP in their efforts to locate the child, but that you have an independent authority under the VCCR and/or the Hague Abduction Convention to find the child and determine their health and safety as a part of your official responsibilities.").

199 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391 (entered into force Jan. 1, 2002) [hereinafter 1996 Hague Protection Convention].

200 *Id.*; *Arthur & Sec'y, Dep't of Fam. & Cmty. Servs. & Anor* [2017] Fam CAFC 111, ¶ 104 (Austl.); *see also* Q v. R [2022] EWHC (Fam) 2961 [19].

201 In addition to the two treaties mentioned in this paragraph and the two treaties mentioned *infra* in Sections II.B.1 and II.B.2, other treaties also address international child abduction both directly and indirectly. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, art. 24(1), Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, arts. 11, 35, Nov. 20, 1989; 1577 U.N.T.S. 3; Org. of African Unity [OAU] African Charter on the Rights and Welfare of the Child, arts. 19, 29, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999).

202 Brussels II-ter Regulation, *supra* note 32; Inter-American Convention, *supra* note 34.

Abduction (Recast),[203] also known as Brussels II-ter,[204] specifically addresses Article 13(1)(b) of the Hague Abduction Convention. This EU regulation is the most recent iteration of Council Regulation (EC) No. 2201/2003 concerning similar matters, adopted by the EU in 2003.[205] Brussels II-ter is designed, in part, to enhance the "return mechanism" prescribed by the 1980 Hague Convention.[206] Brussels II-ter applies when courts decide child abduction cases involving two member states of the EU.[207]

The primary approach in the regulation is "return with protective measures." The most relevant provision is Article 27(3)–(6), which governs the procedure for the return of a child. It states:

> 3. Where a court considers refusing to return a child solely on the basis of point (b) of Article 13(1) of the 1980 Hague Convention, it shall not refuse to return the child if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return.
>
> 4. For the purposes of paragraph 3 of this Article, the court may communicate with the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly in accordance with Article 86 or with the assistance of Central Authorities.
>
> 5. Where the court orders the return of the child, the court may, where appropriate, take provisional, including protective, measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings.
>
> 6. A decision ordering the return of the child may be declared provisionally enforceable, notwithstanding any appeal, where the return of the child before the decision on the appeal is required by the best interests of the child.[208]

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203 Brussels II-ter Regulation, *supra* note 32, ch. III.

204 *See generally* NIGEL LOWE, COSTANZA HONORATI & MICHAEL HELLNER, BRUSSELS II-TER: CROSS-BORDER MARRIAGE DISSOLUTION, PARENTAL RESPONSIBILITY DISPUTES AND CHILD ABDUCTION IN THE EU 220–67 (2024).

205 *See* Council Regulation 2201/2003, 2003 O.J. (L 338) 1 (EC).

206 EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, CROSS-BORDER PARENTAL CHILD ABDUCTION IN THE EUROPEAN UNION 16 (2015).

207 Brussels II-ter Regulation, *supra* note 32, art. 1(3).

208 *Id.* arts. 26–27. Article 15(1) states:

The protective measures that could facilitate return, mentioned in Article 27(5), are potentially very broad.[209] The regulation's recitals includes examples of basic measures, such as "a court order . . . prohibiting the applicant to come close to the child, [and] a . . . protective measure . . . allowing the child to stay with the abducting parent who is the primary carer until a decision on the substance of rights of custody has been made in that Member State following the return."[210] The *Practice Guide for the Application of the Brussels IIb Regulation*, however, indicates that protective measures can also include, "the provision of secure accommodation for the parent and the child, the termination of criminal proceedings against the abducting parent, or covering the costs for living of the abducting parent, involving childcare authority for supervision."[211] The 1996 Hague Protection Convention expands the options further.[212] All EU states are now party to the 1996 Hague Protection Convention, after the EU authorized them to join.[213]

Article 29(6) in Brussels II-ter is also an important provision that modifies the operation of the Hague Abduction Convention when Article 13(1)(b) results in nonreturn.[214] It is often referred to as the "overriding mechanism."[215] It says that the requesting state retains jurisdiction to determine custody and its decision will trump the nonreturn order.[216] In

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> In urgent cases, even if the court of another Member State has jurisdiction as to the substance of the matter, the courts of a Member State shall have jurisdiction to take provisional, including protective, measures which may be available under the law of that Member State in respect of: (a) a child who is present in that Member State; or (b) property belonging to a child which is located in that Member State.

Id. art. 15(1).

209 *Id.* art. 27(5).

210 Brussels II-ter Regulation, *supra* note 32, recital 45; *see also id.* recital 46.

211 BORIANA MUSSEVA, PRACTICE GUIDE FOR THE APPLICATION OF THE BRUSSELS IIB REGULATION 102 (2022); *see also* HAGUE CONF. ON PRIV. INT'L L., PRACTICAL HANDBOOK ON THE OPERATION OF THE 1996 HAGUE CHILD PROTECTION CONVENTION 70 (2014).

212 *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 211, at 70 (discussing "urgent" measures under Article 11).

213 *See* Council Decision 2003/93 of 19 December 2002 Authorising the Member States, in the Interest of the Community, to Sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 2003 O.J. (L 48) 1–2 (EC); *Parental Responsibility & Protection of Children (Hague Convention)*, EUR-LEX (July 26, 2016), https://eur-lex.europa.eu/EN/legal-content/summary/parental-responsibility-protection-of-children-hague-convention.html [https://perma.cc/P6H5-R7GZ].

214 Brussels II-ter Regulation, *supra* note 32, art. 29(6).

215 Thalia Kruger et al., *Current-Day International Child Abduction: Does Brussels IIb Live Up to the Challenges?*, 18 J. PRIV. INT'L L. 159, 176–77, 177 n.108 (2022).

216 Brussels II-ter Regulation, *supra* note 32, art. 29(6) ("Notwithstanding a decision on non-return as referred to in paragraph 1, any decision on the substance of rights of custody resulting

the case of *Povse v. Alpago*, the Court of Justice of the European Union held, inter alia, that jurisdiction in the requesting state is fairly sticky,[217] and that other member states have to enforce its custody judgment even if subsequent events make enforcement contrary to the child's best interests.[218] The requesting state's custody decision is a "privileged" decision,[219] which means it is immediately enforceable without further procedure. Enforcement, however, may be refused if it "would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances . . . [and] the grave risk[] is of a lasting nature."[220]

Brussels II-ter is an example of a parallel multilateral law that is very proscriptive about how courts should apply Article 13(1)(b).[221] It technically is not a treaty, but it derives from one: the Treaty on the Functioning of the European Union.[222] It would be form over function to say that Brussels II-ter did not need to conform to Article 36 of the Hague Abduction Convention. Article 36 allows state parties to derogate from the defenses in the Hague Abduction Convention by agreeing among themselves to limit the defenses further.[223]

At first glance, Brussels II-ter seems to tighten the Article 13(1)(b) defense and would thus increase the number of children returned.[224] In actuality, nothing guarantees that result and, in fact, Article 27 could make returns less likely. Under Article 13(1)(b) on its own, courts always had discretion to return a child even after that defense was established,[225] and this discretion was never predicated on there being adequate

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from proceedings referred to in paragraphs 3 and 5 which entails the return of the child shall be enforceable in another Member State in accordance with Chapter IV.").

217 Case C-211/10, Povse v. Alpago, 2010 E.C.R. I-6673, paras. 45, 58.

218 *Id.* paras. 45, 83. The proper way to get out from a judgment would be to petition the court who issued it. *See id.* paras. 74, 77.

219 Brussels II-ter Regulation, *supra* note 32, art. 42(1)(b).

220 *Id.* art. 56(4)–(6).

221 Brussels II-ter helps with a more uniform view of the Hague Abduction Convention among member states. Because the EU is party to the Hague Abduction Convention, "national courts of the member States that deal with [it] may or, in the case of courts of final resort, shall submit preliminary questions concerning [its] interpretation to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (TFEU)." Basedow, *supra* note 191, at 25.

222 *See id.* at recitals (citing Consolidated Version of the Treaty on the Functioning of the European Union art. 81(3), 2012 O.J. (C 326) 47).

223 *See infra* text accompanying notes 301–302.

224 *See* Case C-638/22, Rzecznik Praw Dziecka, ECLI:EU:C:2023:21, ¶ 31 (Jan. 12, 2023) (noting that the regulation places "tighter restrictions than those laid down in the Convention on the use of the grounds for retention provided for in Article 13 of the Convention").

225 This was implicit in the word "may" in Article 13(1)(b) itself. *See* Hague Abduction Convention, *supra* note 5, art. 13(b).

measures of protection. Article 27, however, says courts should not return the child unless there are "adequate arrangements."[226] There is no definition of "adequate arrangements," and adequacy is a very subjective concept. Consequently, this language could promote fewer returns. In addition, if a court cites two reasons for nonreturn, then Article 27(3) is not applicable at all.[227] Often it is within the court's discretion whether to base its decision for nonreturn on multiple grounds. In short, Brussels II-ter does not really tighten the application of Article 13(1)(b) and may loosen it.

The decisions of courts applying Brussels II-ter look very similar to the decisions of courts who are not bound by the regulation, but who consider protective measures nonetheless. Courts that consider protective measures, both within and outside the EU's regime, typically do one of the following: grant return and emphasize the other nation's ability to protect the taking parent and child;[228] reject return, and find that the protective measures are inadequate;[229] or, reject return, and cite multiple reasons, and thereby circumvent the need to consider protective measures at all.

In fact, Brussels II-ter has not resulted in more returns. According to research by Nigel Lowe and Victoria Stephens, the EU's regulation did not lead to a higher rate of judicial return or more settlement.[230] In 2021, the percentage of judicial nonreturn was exactly the same in countries governed and not governed by the regulation.[231] Contrary to what one might expect, Article 13(1)(b) was the sole reason for nonreturn in equal measure in countries that applied the regulation and those that did not,[232]

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226 Brussels II-ter Regulation, *supra* note 32, art. 27(3).

227 *See* Kruger et al., *supra* note 215, at 177–78.

228 *See, e.g.*, *Case Law Search*, INCADAT, https://www.incadat.com/en/case/1393 [https://perma.cc/XT4F-ZZV4] (summarizing a Croatian case finding Article 13(1)(b) established "based on evidence of physical violence and unstable circumstances due to the long-term psychiatric hospitalization of the father," but the appellate court ordered a new trial because Article 11(4) of the Brussels IIa Regulation had not been considered (citing Županijski sud u Zagrebu [County Court of Zagreb] Oct. 11, 2016, No. 15 Gž Ob-1264 / 16-2 (Croat.)).

229 *See, e.g.*, *Case Law Search*, INCADAT, https://www.incadat.com/en/case/1009 [https://perma.cc/D7N3-7E8Y] (summarizing a French case finding Article 13(1)(b) satisfied because "the father was a violent man and . . . had threatened to kill the child (and the mother) on several occasions," but denying return under Article 11(4) of the Brussels IIa regulation because "adequate concrete steps" had not been taken to protect the child despite Hungary's constitutional and legal protection for the child (citing Cour d'appel [CA] [regional court of appeal] Paris, Oct. 5, 2005, 2005/16526)).

230 Nigel Lowe & Victoria Stephens, Hague Conf. on Priv. Int'l L. [HCCH], *Regional Report: Statistical Study of Applications Made in 2021 Under the 1980 Child Abduction Convention*, paras. 22–23, 25, Prel. Doc. No 19B (Oct. 2023), https://assets.hcch.net/docs/fcb00f53-ba49-4f62-ae79-0f0724b59093.pdf [https://perma.cc/9RJ5-B336].

231 *Id.* para. 20.

232 *Id.* para. 28.

although twenty percent of all regulation cases had more than one reason given for nonreturn.[233]

Arguably, the override provision in Article 29(6) of Brussels II-ter does not tighten the Article 13(1)(b) defense either.[234] First, it does not change the way a court is to analyze Article 13(1)(b) itself. Article 29(6) is about jurisdiction and the effect of a merits decision from a court in the child's habitual residence after the Article 13(1)(b) defense is established. Second, Paul Beaumont, Lara Walker, and Jayne Holliday conducted a study of the previous version of Article 29(6), i.e., Article 11 in Brussels IIa,[235] and noted "how infrequently used and largely ineffective the Article 11(6)–(8) system is."[236]

2. The Inter-American Convention on the International Return of Children

The Inter-American Convention on the International Return of Children ("Inter-American Convention") was adopted at Montevideo, Uruguay, in 1989 and entered into force in 1994. Fourteen countries are party to the Inter-American Convention.[237] Article 34 expressly says that the Inter-American Convention prevails over the Hague Abduction Convention for countries who are party to both treaties, although "States Parties may enter into bilateral agreements to give priority to the application of the Hague Convention."[238] Of the fourteen contracting countries, only Venezuela entered a reservation to this article, and no bilateral agreements exist that postdate the 1994 Inter-American Convention.[239] Consequently, for most countries that are party to the Inter-American Convention, the Inter-American Convention trumps the Hague Abduction Convention when there is a conflict.

In many ways, the Inter-American Convention is almost identical to the Hague Abduction Convention. But a few critical differences are relevant here. First, the Inter-American Convention uses the term

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233 *Id.*

234 *See* Brussels II-ter Regulation, *supra* note 32, art. 29(6).

235 Council Regulation 2201/2003, art. 11, 2003 O.J. (L 338) 1 (EC).

236 Paul Beaumont, Lara Walker & Jayne Holliday, *Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)–(8) Brussels IIa Proceedings Across the EU*, 12 J. PRIV. INT'L L. 211, 211 (2016).

237 *Signatories and Ratifications*, ORG. AM. STATES, https://www.oas.org/juridico/english/sigs/b-53.html [https://perma.cc/7BKK-H5C2].

238 Inter-American Convention, *supra* note 34, art. 34.

239 *See* ORG. AM. STATES, *supra* note 237; *see also Latin and Caribbean Section*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/latin-america [https://perma.cc/3MRN-GYMD].

"danger" instead of "harm" in Article 11, its provision that is akin to Article 13(1)(b).[240] This difference is not substantive, as Professor Elisa Pérez-Vera's Explanatory Report to the Hague Abduction Convention also talks in terms of danger,[241] although, in practice, courts often require more than a grave risk of exposure to danger.[242] Second, the Inter-American Convention omits the words "or otherwise expose the child to an intolerable situation" in Article 11.[243] Courts applying the Inter-American Convention, however, have read back in that language because they interpret the Inter-American Convention with reference to the Hague Abduction Convention.[244] Third, the grave risk defense must be raised "within a period of eight working days from the time the authorities meet with the child and brine [sic] such period to the attention of the person retaining the child."[245] Fourth, the Inter-American Convention allows the return petition to be heard by a court in the child's habitual residence, although a request can be made to a court in the state to which the child was taken in "urgent cases."[246] In fact, cases under the Inter-American Convention often occur in a court in the state to which the child was taken.[247]

The Inter-American Convention does not embody the "return plus protective measures" approach evident in Brussels II-ter, nor does it appear to restrict the Article 13(1)(b) defense as a whole. Some of its provisions restrict the defense (e.g., the requirement that the defense be raised within a short time period), but others arguably widen it (e.g., the

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240 Inter-American Convention, *supra* note 34, art. 11(b); *see* Att'y Gen. of Ant. & Barb. v. Michael Gerard Moore (2012) No. ANUHCV 2012/0124 paras. 82–84, 92 (ECSC), https://www.eccourts.org/judgment/the-attorney-general-of-antigua-and-barbuda-v-michael-moore [https://perma.cc/SLH6-UHYU].

241 Pérez-Vera, *supra* note 41, paras. 29–30.

242 Weiner, *supra* note 52, at 316–21.

243 Inter-American Convention, *supra* note 34, art. 11(b).

244 *See* Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice of the Nation], 24 May 2022, "P. S., M. c/ S. M., M. V. s/ restitución internacional de menores de edad – expte," No. 9193105, Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2022-1 ¶ 7) (Arg.); *cf. Att'y Gen. of Ant. & Barb.*, No. ANUHCV 2012/0124, para. 84 (using the Hague Abduction Convention to interpret Article 11(b) but not being clear whether the "intolerable situation" language is read back in).

245 Inter-American Convention, *supra* note 34, art. 12.

246 *Id.* art. 6.

247 *See, e.g.*, X v. Y, de las 12:30 p.m., 11 July 2024, Cámara Especializada de la Niñez y Adolescencia [Specialized Chamber of Children and Adolescents] (El. Sal.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/5/2022, "P. S., M. c/ S. M., M. V. s/ restitución internacional de menores de edad," No. 9193105 (Arg.). Sometimes the case will be heard in both countries if the taking parent does not agree to return the child after an adverse determination by the court in the child's habitual residence. *See* Villarreal, *supra* note 190, at 21–24 (describing the *Losice* case). The procedural regulations for a number of Latin American countries can be found on the HCCH website. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 239.

use of the term danger instead of harm).[248] Moreover, some restrictions on the scope of the defense, such as the omission of the "intolerable situation" language, have been ignored by courts.[249]

Perhaps, then, it is no surprise that courts in countries that are party to both the Hague Abduction Convention and the Inter-American Convention have diverse approaches to the grave risk defense. Despite the fact that the Inter-American Convention is supposed to have priority over the Hague Abduction Convention, courts that give Article 11 a restrictive interpretation typically draw on restrictive interpretations of Article 13(1)(b) of the Hague Abduction Convention.[250] A good example is the 2022 case of *P.S.* decided by the Supreme Court of Argentina.[251] In that case, the Supreme Court of Argentina ordered the child returned to Mexico, with protective measures, after the mother wrongfully retained the child.[252] The mother claimed she was a victim of domestic violence, and defended, in part, by citing Article 11 of the Inter-American Convention and Article 13(1)(b) of the Hague Abduction Convention.[253] She prevailed before the trial court and the appellate court in the Province of Córdoba,[254] but lost before the Supreme Court of Argentina. The Supreme Court of Argentina held that the mother had failed to prove the

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248 *See supra* text accompanying note 240. *But see* Weiner, *supra* note 52, at 318 (arguing that, when read in context, Article 13(1)(b) only requires a grave risk of danger not harm).

249 *See supra* note 244 and accompanying text.

250 *See, e.g.*, Att'y Gen. of Ant. & Barb. v. Michael Gerard Moore (2012) No. ANUHCV 2012/0124 paras. 85, 92 (ECSC) (quoting Ward, L. Re C (Abduction; Grave Risk of Psychological Harm) for the proposition that there is "an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence"); *id.* para. 86 (calling the test "stringent"); *see also* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/12/2005, "S.A.G. s/restitucion internacional solicita restitucion de la menor," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-4511) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 21/05/2013, "F. C. del C. F. c/ T. R. G. s/ Reintegro de hija," La Ley [L.L.] (2013-e-17505). The relative unimportance of the Inter-American Convention is evident in an article by Lalisa Froeder Dittrich, Ministry of Justice and Public Security in Brasília. She mentions the Inter-American Convention only once, suggesting that it is the Hague Abduction Convention that really governs. Lalisa Froeder Dittrich, *Brazil's Experience with Recognition and Enforcement of Family Agreements in International Child Disputes*, LAWS, Sept. 4, 2023, at 1, 3 n.4.

251 *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/5/2022, "P. S., M. c/ S. M., M. V. s/ restitución internacional de menores de edad – expte," No. 9193105 (Arg.).

252 *Id.* ¶ 19.

253 *Id.* ¶¶ 1, 6.

254 *Id.* ¶ 1.

exception with the "rigor required" in light of protective measures that could be implemented in Mexico.[255]

The Supreme Court of Argentina mentioned that the case was governed by the Inter-American Convention,[256] but its analysis relied heavily on interpretations of the Hague Abduction Convention. The court had previously noted "the identity of purposes and basic remedies of both instruments,"[257] and again stated the exceptions for grave risk were "substantially similar."[258] It declared that the grave risk defense "must be interpreted restrictively in order not to distort its purpose,"[259] observing that the language in Article 13(1)(b) suggests "the rigorous nature with which the factual material of the case must be weighed."[260] Even in cases dealing with family or "gender violence," the respondent must demonstrate "through concrete, clear and conclusive evidence" that restitution would produce an effect that "reaches a high threshold of serious risk."[261] This forward-looking analysis requires "the absence of adequate and effective protection measures to eliminate, alleviate, or neutralize it."[262]

The Supreme Court of Argentina acknowledged that the mother had experienced domestic violence and the child had been exposed to it,[263] but put its faith in protective measures. It noted Mexico's general disapproval of domestic violence. It mentioned the "set of norms and institutions that exist in Mexico related to the recognition and protection of the rights of children and adolescents, and women, who are victims of gender and family violence."[264] It listed the laws that applied to family violence, as well as institutes that addressed the situation in all thirty-two states in Mexico.[265] It expressed its faith in Central Authorities, liaison judges, and direct judicial communications.[266] In terms of specifics, it told the lower court to ensure the following: that the applicant would not take legal

255 *Id.* ¶ 10 (translated by author).

256 *See, e.g.*, *id.* ¶¶ 7–8, 10.

257 *Id.* ¶ 1.

258 *Id.* ¶ 7.

259 *Id.*

260 *Id.*

261 *Id.* ¶¶ 7–8.

262 *Id.*

263 *Id.* ¶ 10. While the Supreme Court of Argentina's decision did not detail the allegations of family violence, an agency that did a risk assessment based on the mother's statements found "a high risk of femicide and/or of new episodes of violence occurring" and suggested the child should not be returned. *Id.* ¶ 9(c). Apparently, the child witnessed violence against the mother and suffered directly. *Id.* ¶¶ 6, 9. The father was "impulsive" and showed a "loss of control." *Id.* ¶ 9.

264 *Id.* ¶ 14.

265 *Id.*

266 *Id.* ¶ 16.

action against the mother to prevent her entry into the country; that the child would stay with her mother until the Mexican court ruled on the matter; and that the applicant would provide, on a provisional basis, a home for the mother and child "near the domicile" of the father to facilitate contact, as well as money for food and health care.[267] The court gave a nod to the "best interests" of the child,[268] and then ordered the child's return.

Yet cases also exist involving countries that are parties to both the Inter-American Convention and Hague Abduction Convention that take a very different approach. For example, the Constitutional Court of Colombia decided the *Losice* case in 2018.[269] The court ultimately refused to return the child to Argentina because the five-year-old child, who had lived in Colombia for the past three years, would experience a grave risk of exposure to harm by being returned.[270] The mother's allegations of domestic violence were not relevant on their own to the grave risk defense because the majority thought the violence was not proven.[271] However, the court noted the mutual allegations and concluded that the discord would heighten the problems for the child upon return.[272]

While the court rested its finding of grave risk on the child's separation from a place where she lived with her mother, sister, and extended family, the court clearly expressed a more liberal view about the relevance of domestic violence.[273] It declared that domestic violence was relevant to the grave risk defense under both Conventions,[274] and noted return would not be in the child's best interests in such a case. It cited lengthy excerpts from a publication by the United Nations International Children's Emergency Fund that detailed the harm to children from domestic violence.[275] It mentioned Article 19 of the Convention on the Rights of the Child and said domestic violence is a form of "child

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267 *Id.* ¶ 17.

268 *Id.* ¶ 15.

269 Corte Constitucional [C.C.] [Constitutional Court], enero 26, 2018, Sentencia T-006/18 (Colom.), https://www.corteconstitucional.gov.co/relatoria/2018/T-006-18.htm [https://perma.cc/9S4H-YQPE]; *see also* Villarreal, *supra* note 190.

270 C.C., enero 26, 2018, Sentencia T-006/18 (Colom.), at 3.7.1.1, 3.7.2.

271 *Id.* at 3.7.1.3 ("[I]t can be concluded that the evidence submitted to the file does not demonstrate, *prima facie*, that the abuse inflicted by Mr. Antonio Lozano alleged by the plaintiff actually took place."). Magistrado Carlos Bernal Pulido disagreed. *See* Clarification of the Judge's Vote, Sentencia T-006/18 (Colom.) ("[T]he hostilities experienced within the Losice Nieto home in Argentine territory were found to be proven.").

272 C.C., enero 26, 2018, Sentencia T-006/18 (Colom.), at 3.7.1.2–3.7.1.3.

273 *Id.* at 3.7.1.2.

274 *Id.*

275 *Id.*

abuse."[276] In some ways, its decision reflected a more relaxed view of the grave risk defense. Even the "notorious animosity between her parents and the prolongation of the disputes regarding the alleged violence they have inflicted on each other" would "highly expose[]" the child to "negative consequences."[277]

In summary, the Inter-American Convention is a treaty that overlaps with the Hague Abduction Convention. It does not necessarily restrict the application of Article 13(1)(b) as Article 36 seems to require. In fact, a loose interpretation of available data suggests that the Inter-American Convention has not promoted return more than the Hague Abduction Convention itself. Lowe and Stephens's data found that the rate of judicial return for Latin American and Caribbean countries was much lower when the application came from another Latin American or Caribbean country (7% compared to 14% for other countries).[278] Moreover, judicial refusals to return were similar for courts in this region and elsewhere.[279] Most tellingly, a slightly higher percentage of nonreturn was based on Article 13(1)(b) than globally (50% compared to 46%).[280] Yet definitive conclusions cannot be drawn because Lowe and Stephens's analysis groups together all Latin American and Caribbean countries that are party to the Hague Abduction Convention, and only approximately half are also parties to the Inter-American Convention.[281]

The EU and Latin American examples suggest geographic proximity promotes parallel agreements on the topic of international child abduction. This makes sense as many abductions occur between countries in close proximity.[282] In addition, often these countries share "close economic, social, and legal ties . . . which go far beyond abduction

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276 *Id.*

277 *Id.* Other countries in the region, albeit not parties to the Inter-American Convention, also demonstrate a more liberal understanding of Article 13(1)(b) in the context of domestic violence. In fact, the analysis of an El Salvadorian appellate court in *X v. Y* has many similarities to the Colombian court's decision. *See* X v. Y, de las 12:30 p.m., 11 July 2024, Cámara Especializada de la Niñez y Adolescencia [Specialized Chamber of Children and Adolescents] (El Sal.).

278 Lowe & Stephens, *supra* note 230, app. I, paras. 81, 83.

279 *Id.* para. 87.

280 *Id.* para. 88.

281 *See id.* paras. 62–63, 63 & n.16.

282 *Cf.* U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 71, 146 (2024) (showing that the United States has the most abduction cases with Mexico and Canada); Nigel Lowe, Hague Conf. on Priv. Int'l L. [HCCH], *Part III—National Reports: A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 5, Prel. Doc. No 8C (May 2011), https://assets.hcch.net/docs/2f1a7b99-f6ec-4678-83dd-23cb24a6fb0d.pdf [https://perma.cc/7MUF-QFGY] (showing that New Zealand was the requesting state for 55% of return cases in Australia); *id.* at 21 (showing that France and the Netherlands were the requesting states for 40% of return cases in Belgium).

cases," magnifying their mutual respect and trust.[283] While such ties have sometimes led countries to interpret the Article 13(1)(b) defense narrowly,[284] such ties could also lead countries to recognize the appropriateness of a new treaty that allows a taking parent and child to remain in a nearby country where they are safer. Of course, a new treaty need not be limited to countries in geographic proximity, but could also include any country that agrees with the need for it and wants to be bound by it.

III. THE HAGUE ABDUCTION CONVENTION PERMITS A NEW TREATY

To the extent some countries want to craft a new treaty to address the proper interpretation of Article 13(1)(b) in cases of domestic violence, can they legally do so? The answer is yes, at least for countries outside the EU.[285] It would not violate the Hague Abduction Convention, the Inter-American Convention, or international law generally for most countries to enter a new treaty that (1) defines domestic violence as a form of coercive control, (2) directs courts to presume domestic violence creates a grave risk sufficient for the defenses in the Hague Abduction Convention's Article 13(1)(b) and the Inter-American Convention's Article 11, and, (3) tells courts to apply Article 13(1)(b) of the Hague Abduction Convention and Article 11 of the Inter-American Convention without reference to protective measures.

A. *There Would Be No Derogation for Most Countries*

A country has no legal impediment to entering a new treaty with such provisions so long as the new treaty does not derogate from the country's existing treaty obligations. A general principle of international law is that treaty parties cannot derogate from the terms of a treaty unless the treaty itself permits such derogation.[286] This Section argues that a new

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283 Schuz, *supra* note 9, at 49.

284 *Id.* at 49–50.

285 If a new treaty came into existence, that new treaty would govern the relationship between those countries that are parties to it. Vienna Convention on the Law of Treaties, *supra* note 119, art. 30(1) (addressing the application of successive treaties relating to the same subject matter). As to other countries, the Hague Abduction Convention would still apply. *Id.* art. 30(4). The Vienna Convention on the Law of Treaties applies even to private international law treaties that govern private parties' rights and obligations. Basedow, *supra* note 191, at 6.

286 Vienna Convention on the Law of Treaties, *supra* note 119, art. 41(1) ("Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between

treaty would not derogate at all from the Hague Abduction Convention or the Inter-American Convention, both of which are substantially similar on the grave risk defense. However, this new treaty would directly conflict with Brussels II-ter.

The new treaty would not derogate from the express terms of the Hague Abduction Convention or Inter-American Convention but rather would merely clarify the application of the respective grave risk exceptions in the domestic violence context. Neither treaty defines domestic violence, so adding a definition is not a derogation. In fact, some courts applying Article 13(1)(b) already embrace the idea that coercive control is the operative concept for assessing whether domestic violence triggers the Article 13(1)(b) defense.[287] Such state practices are relevant to the interpretation of the Hague Abduction Convention;[288] consequently, those practices—to the extent they mirror what the new treaty would require—support the argument that the new treaty's provisions are not derogations. Similarly, the Conventions say nothing about what might constitute a grave risk. Therefore, adding a presumption that domestic violence is a grave risk does not derogate from any provisions. In fact, courts that embrace the "return with protective measures" approach often treat domestic violence as raising a presumption of grave risk, to be negated by the petitioner upon a showing of adequate protective measures.[289] Again this practice suggests a presumption is not a derogation. Finally, neither treaty requires, nor even mentions, insufficient protective measures as a prerequisite to granting the defense,[290] and some courts already grant the grave risk defense without consideration of protective measures in cases of domestic violence.[291] In

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themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.").

287 *See, e.g.*, Re TKJ (Abduction: Hague Convention (Italy)) [2024] EWHC (Fam) 198 [35], [53] (Eng.); Re A-M (A Child) (1980 Hague Convention) [2021] EWCA (Civ) 998 [49], [56] (Eng.).

288 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(2) (AM. L. INST. 1987); Vienna Convention on the Law of Treaties, *supra* note 119, art. 31(3)(b). Alternatively, these state practices could be conceived of as permissible "implied derogation via subsequent agreement of states parties." Alice Edwards, *Temporary Protection, Derogation and the 1951 Refugee Convention*, 13 MELB. J. INT'L L. 595, 627–28 (explaining that the EU Temporary Protection Directive is not a violation of the 1951 Refugee Convention under this theory).

289 *See supra* text accompanying notes 83–84.

290 *See* Hague Abduction Convention, *supra* note 5, art. 13(b); *see also* Golan v. Saada, 596 U.S. 666, 676 (2022) ("The Convention itself nowhere mentions ameliorative measures.").

291 *See, e.g.*, *Golan*, 596 U.S. at 677–78 ("The fact that a court may consider ameliorative measures concurrent with the grave-risk determination, however, does not mean that the

contrast to the proposed provisions, a true derogation would exist if the new treaty eliminated the word "grave" before the word "risk." No such change is suggested. As Rhona Schuz has pointed out, granting a defense when it is warranted is compliant with the Convention.[292]

The contrary argument would take one of three forms. The first two iterations are framed here with reference to Article 13(1)(b) of the Hague Abduction Convention, but they could similarly be made with respect to Article 11 of the Inter-American Convention. First, opponents of a new treaty might say that the exceptions to return in the Hague Abduction Convention are meant to be narrow,[293] and the new treaty would liberalize Article 13(1)(b). Assuming a liberalization, would that qualify as a derogation? *Black's Law Dictionary* defines "derogation" as "[t]he partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force."[294] Rhona Schuz's point is again relevant here: if a new treaty clarifies the proper application of the Article 13(1)(b) exception, then the new treaty is not impairing the Hague Abduction Convention's utility but enhancing it.[295] Moreover, the definition of family violence proposed for the new treaty would simultaneously decrease and increase the number of cases covered by the exception. This fact raises questions about how derogation is understood in practice.[296]

Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists."); *see also In re* M.V.U., 178 N.E.3d 754, 765 (Ill. App. Ct. 2020); Delgado v. Marquez, No. 23-cv-5141, 2024 WL 517874, at *12 (N.D. Cal. Feb. 9, 2024) (declining to consider additional ameliorative measures when parties did not propose any that addressed the court's concern); Cruvinel v. Cruvinel, No. 19-cv-4237, 2022 WL 757955, at *6–7 (E.D.N.Y. Jan. 10, 2022); Re B (A Child) (Abduction Article 13(b)) [2020] EWCA (Civ) 1057 (UK); CARMEN GARCÍA REVUELTA, PRACTICAL APPLICATION OF THE HAGUE CONVENTION AND REGULATION 2201/2003 1, 18, https://www5.poderjudicial.es/CVsm/Ponencia_6_EN.pdf [https://perma.cc/V752-FTML] (describing consolidated cases *H 28* (1827) (Germany–Spain)); Tribunal de Segunda Instancia [Second Instance Court] 14/A/SA1/14–1, 11 julio 2014, "Restitutión Internacional" (El Sal.) (on appeal from Juzgado Especializado de la Niñez y Adolescencia de Santa Ana [Specialized Chamber of Children and Adolescents, Santa Ana] 89-J1-(230)-14-5 (El Sal.) (translated by author)); Juzgado de Familia Antofagasta [J.F.] [Fam. Ct.], 17 mayo 2016, "Azcona c. Consentino Romero" (Chile) (translated by author); Juzgado de Primera Instancia de Libertad [Court of First Instance in Libertad], 8 junio 2020, "G. L. S. L C/C. V. L. J. Restitutión Internacional de Menores" (Uru.) (translated by author).

292 *See* Schuz, *supra* note 9, at 68–69.

293 Public Notice 957 Hague International Child Abduction Convention, 51 Fed. Reg. 10494, 10509–10 (Mar. 26, 1986); 22 U.S.C. § 9001(a)(4).

294 *Derogation*, BLACK'S LAW DICTIONARY (12th ed. 2024).

295 *See* THE OXFORD GUIDE TO TREATIES 732–33 (Duncan B. Hollis ed., 2d ed. 2020) ("[I]t may be difficult to differentiate derogations from provisions that simply outline the contours of the obligation itself. That distinction may not matter much, since determining an obligation's original scope and the availability of any exceptions to it are both interpretative exercises that will be governed by the same (VCLT) rules on treaty interpretation.").

296 *See id.* at 732 ("The law surrounding derogations is complex and underdeveloped.").

Second, opponents might say that the application of Article 13(1)(b) is meant to be discretionary,[297] and the new treaty would make granting the defense mandatory. The specifics of the proposed new treaty negate this argument. As explained below, the new treaty would create a presumption of nonreturn in the context of domestic violence, with guidelines for the exercise of judicial discretion.[298] Judicial discretion would still exist.

Third, opponents might say that countries can only enter a new treaty addressing Article 13(1)(b) if the treaty meets the precise terms of Article 36 of the Hague Abduction Convention, and this proposal does not. Article 36 does impose requirements for new treaties that would derogate from the defenses in the Hague Abduction Convention. The Inter-American Convention has nothing comparable; that Convention expressly allows other international agreements on Article 13(1)(b) with no limitations.[299]

But Article 36 of the Hague Abduction Convention is arguably not relevant because it only applies when countries derogate from the exceptions, and, as just argued, the new treaty would not constitute a derogation. The next Section addresses Article 36 further, explaining that the proposal meets the requirements of Article 36 even if one assumes it applies.

The legal analysis differs regarding the compatibility of the proposed treaty and the Brussels II-ter regulation. The proposed treaty is directly contrary to the approach embedded in Brussels II-ter. Regulations have direct effect and primacy for EU member states. Consequently, countries in the EU subject to Brussels II-ter would not presently be able to enter this new treaty for cases involving another EU member state, although nothing would stop an EU member state from entering the new treaty with a non-EU member state. Moreover, Brussels II-ter could be changed, as it has been before, to be consistent with the new treaty.

B. *Article 36 Is Satisfied by Defining Domestic Abuse*

Assuming the new treaty implicates Article 36 of the Hague Abduction Convention (a debatable proposition, at best), would the new

297 Pérez-Vera, *supra* note 41, para. 113; *see also* Public Notice 957 Hague International Child Abduction Convention, 51 Fed. Reg. at 10510.

298 *See infra* proposed Article 5 and text accompanying notes 333–335.

299 *See* Inter-American Convention, *supra* note 34, art. 35 ("This Convention shall limit neither the provisions of existing or future bilateral or multilateral conventions on this subject entered into by the States Parties, nor the more favorable practices that those States may observe in this area.").

treaty be permissible? Derogation is permitted if the treaty permits it.[300] Article 36 of the Hague Abduction Convention sets forth the requirements for derogation from Article 13(1)(b): "Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction."[301]

The Pérez-Vera Explanatory Report makes clear that "the restrictions" is a reference to Articles 13 and 20.[302] So nothing in Article 36 or elsewhere in the Hague Abduction Convention prevents state parties from entering a new treaty that addresses issues tangential to the defenses, such as jurisdiction or choice of law.[303] Nor would the 1996 Hague Protection Convention stop countries who are party to it from entering a new treaty addressing such tangential provisions either, as it expressly allows parallel legal agreements.[304]

Does Article 36 permit state parties to the Hague Abduction Convention to enter a new treaty that would include a new definition of domestic violence, a presumption that a grave risk exists when there is evidence of domestic violence, and a provision that prohibits judicial reliance on protective measures to defeat the successful application of Article 13(1)(b)?[305] The answer is yes. For several reasons, Article 36 would permit such a treaty.

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300 Derogation is also permitted under various provisions of international law. *See* Vienna Convention on the Law of Treaties, *supra* note 119, arts. 61–62. Although, invocation of these provisions ends the treaty relationship. *See* Christina Binder, *Does the Difference Make a Difference? A Comparison Between the Mechanisms of the Law of Treaties and of State Responsibility as Means to Derogate from Treaty Obligations in Cases of Subsequent Changes of Circumstances*, *in* STATE RESPONSIBILITY AND THE LAW OF TREATIES 1, 24 (Marcel Szabó ed., 2010). It is assumed, for purposes of analysis, that these narrow provisions would not apply or would be preempted by Article 36. *See id.* §§ 2.1.1, 2.1.2, 4.2.2.1. It is beyond the scope of this Article to analyze whether a state could argue that an unpermitted derogation was a necessity under Article 25 of the law of State Responsibility, although scholars note that this is a narrow concept that refers to temporary situations and is rarely accepted. *See id.* § 2.2.2 (citing *Articles on Responsibility of States for Internationally Wrongful Acts*, *in* Int'l Law Comm., Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001)).

301 Hague Abduction Convention, *supra* note 5, art. 36.

302 Pérez-Vera, *supra* note 41, at 471.

303 *See id.* ("[T]he Convention is not to be regarded as in any way exclusive in its scope.").

304 *See* 1996 Hague Protection Convention, *supra* note 199, art. 52(2) ("This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.").

305 Interpreting a treaty in "good faith" is a primary mandate of the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties, *supra* note 119, art. 31(1). The

First, Article 36 merely requires that the Contracting States *intend* to limit a restriction, such as Article 13(1)(b), by their agreement to derogate. Article 36 addresses the time period during which the Contracting States are agreeing to derogate. It says that the Hague Abduction Convention does not prevent Contracting States from "agreeing among themselves to derogate" from a restriction "in order to limit the restrictions."[306] Consequently, the new provisions would be valid so long as the Contracting States intended it to limit the Article 13(1)(b) defense, even if the new provision did not actually limit the defense. That explains why both Brussels II-ter and the Inter-American Convention are not breaches of Article 36 even though neither one necessarily restricts the application of Article 13(1)(b), in fact.[307] Because the new treaty would be designed to limit Article 13(1)(b)'s application in the wrong type of cases, and to clarify its application in the right type of cases, the new treaty would comply with Article 36.

Second, the new treaty would comply with Article 36 by including a definition of family violence that restricts the application of Article 13(1)(b). Currently, nothing stops a judge from using the most expansive understanding of domestic violence when applying Article 13(1)(b). Advocacy groups and judges have, in fact, called for a broad interpretation of domestic violence.[308] Yet in some situations a broad definition of domestic violence would be unwarranted, as explained at the beginning of this Article.[309] For example, defining domestic violence as any physical battery is too broad, as it would encompass acts that are in self-defense. That definition of domestic violence would allow a batterer who abducts his child to argue that the mother, acting in self-defense,

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United States has not ratified the Vienna Convention on the Law of Treaties, although its principles are embodied in the *Restatement (Third) of Foreign Relations Law*, which states:

> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
>
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.

RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 325 (1986).

306 *See supra* text accompanying note 301.

307 *See supra* text accompanying notes 224–236, 248–250, 277–281.

308 Open Letter from Kitanaka Chisato & Yanazaki Kikuko, Co-Chairs, All Japan Women's Shelter Network, to Hague Conf. on Priv. Int'l L. (June 21, 2024) (on file with author) ("We think [Article 13(b)] . . . should be revised or the official interpretation of the article should be changed to clearly state that domestic violence, including emotional, economic, social, sexual, and other forms of domestic violence, as well as witnessing domestic violence of the child, are included in abuse."); *see also* text accompanying *supra* note 91.

309 *See supra* Section I.B.

abused him and that he should benefit from Article 13(1)(b).[310] Similarly, modern definitions of domestic abuse often include financial abuse.[311] The *Guide to Good Practice* itself mentions this as a type of domestic violence.[312] But without more, financial abuse should not be an adequate trigger for Article 13(1)(b). It would be good policy, as well as a restriction on the potential application of Article 13(1)(b), to define domestic violence so that Article 13(1)(b) would apply only when appropriate.[313]

The definition in the proposed treaty would recognize and require coercive control. That would narrow the potential application of Article 13(1)(b). That definition would exclude some acts as insufficient to trigger the Article 13(1)(b) defense, such as financial abuse by itself, or other acts without evidence of coercive control, such as a prior "abduction" to obtain safety for a parent and child or even some physical violence (such as acts of self-defense). At the same time, the definition would promote Article 13(1)(b)'s successful application in some cases with coercive control but without frequent and severe physical violence.

It is unclear if compliance with Article 36 should be assessed by considering the new treaty as a whole, or whether its various provisions related to Article 13(1)(b) must be disaggregated. If the former, then the new treaty's definition of domestic violence, which is a clear restriction on the application of Article 13(1)(b), would bootstrap the other provisions, such as the presumption of grave risk and the restriction on the use of protective measures to defeat the defense.

Third, Article 36 can be read to permit the various provisions even if they must be considered individually. Article 36, like any other treaty

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310 *Cf.* K.L. v. R.H., 285 Cal. Rptr. 3d 563, 575–76 (Ct. App. 2021) ("It is essential in a case such as this that the court rigorously evaluate the evidence to ensure that the moving party has, in fact, been victimized. This is so, particularly, where, as here, the trial court is aware that the acts committed by the moving party . . . are significantly more violent than the acts alleged by the moving party." (quoting Conness v. Satram, 18 Cal. Rptr. 3d 577, 583 (Ct. App. 2004))); *Conness*, 18 Cal. Rptr. at 583 (affirming a restraining order for a victim of domestic violence and finding that the trial court erred in finding the victim's actions sufficient to warrant granting a mutual restraining order in light of the history of violence). *But see* Sobiech v. Sobiech, No. A19-1928, 2020 WL 3042133, at *1–2 (Minn. App. June 8, 2020) (finding that a restraining order was unwarranted because the wife "'assaulted her husband, was assaulting her husband, and his actions were reasonable self-defense,' meaning that husband's actions 'did not constitute domestic abuse'").

311 *See* Istanbul Convention, *supra* note 93, art. 3(b) ("'[D]omestic violence' shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.").

312 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, at 9.

313 *See, e.g.*, Lisa Fischel-Wolovick, *The Definition, Prevalence, and Identifying Features of Domestic Violence*, HAGUE MOTHERS 2 (June 2024), https://www.hague-mothers.org.uk/wp-content/uploads/2024/06/Expert-paper-1.pdf [https://perma.cc/EWD2-QC7H] ("The history of conflicting definitions of domestic violence has hampered the courts' ability to identify and address the risks of harm to battered women and their children.").

provision, must be interpreted.[314] The question here is whether Article 36 prohibits agreements between state parties that would clarify, but not restrict, the defenses' application in various contexts.

The Vienna Convention's rules on treaty interpretation say that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[315] Certainly, the plain text of Article 36 does not prohibit agreements to clarify. Article 36 is silent on this point. The *travaux préparatoires* offer no insight at all about the drafters' intent for Article 36. Importantly, reading Article 36 to allow clarifications comports with the Hague Abduction Convention's object and purpose, a key consideration for treaty interpretation.

The underlying purpose of the Hague Abduction Convention is to further children's interests.[316] The Pérez-Vera Explanatory Report noted what that means in the context of the Convention: "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."[317] Although the drafters undeniably intended the defenses to be narrow,[318] it would conflict with the object and purpose of the Convention to believe they intended a conception of physical and psychological harm from 1980 or an understanding of an intolerable situation from forty-five years ago to determine forevermore children's wellbeing in these proceedings. In fact, an interview with Professor Pérez-Vera, the Reporter for the Hague Abduction Convention, revealed the drafters did not consider gender violence or its harms for children, and this fact requires a reinterpretation of the Convention.

> I believe that, almost 50 years later, we need to reinterpret the letter of the Convention in light of the new social realities in which it has to be applied. It is true indeed that the social reality to which we tried to

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314 THE OXFORD GUIDE TO TREATIES, *supra* note 295, at 732–33.

315 A treaty's terms are to be interpreted in good faith in light of the context and the treaty's object and purpose. Vienna Convention on the Law of Treaties, *supra* note 119, art. 31(1).

316 Hague Abduction Convention, *supra* note 5, pmbl. ("Firmly convinced that the interests of children are of paramount importance in matters relating to their custody."); *see also* RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 97 (2013). It is arguably proper to look at the treaty's object and purpose as a whole. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 119, art. 41(1) (discussing agreements to modify multilateral treaties between fewer than all the parties, and indicating it is possible when the modifications are consistent with the "object and purpose of a treaty *as a whole*," even when the treaty does not expressly provide for the possibility of such a modification (emphasis added)).

317 Pérez-Vera, *supra* note 41, para. 29 (emphasis added).

318 Schuz, *supra* note 316, at 300.

> respond was one of kidnappers, mostly fathers, who were not also holders of custody rights, and who took children away from their mothers. Now, on the contrary, several decades later, what we have is that most of the abductors are women who have the official rights of guardianship over their children but who are fleeing from an abuser.
>
> I believe that the fundamental element of change that was not taken into account was gender-based violence—it certainly existed but had not been made evident. We had not been aware that it was a phenomenon that was going to have such an impact on the lives of women and minors. So I do believe this is a fact that should make those applying the Convention think about the need to reinterpret the essential idea that those who are best placed to decide who should have the custody and guardianship of the child are the judges of the habitual residence before the displacement, the abduction, takes place. The problem is: if those judges happen to be in the same place where the abuser is, is it reasonable to request that the authority of the country where the mother has taken refuge with the child return both mother and child to the place where the abuser is? Or, on the contrary, can it be understood that such a return would place the child in an intolerable situation within the meaning of the Convention's Article 13?[319]

Article 36 does not preclude this type of reinterpretation, or clarification, to allow the Convention to better meet its objectives.

Finally, while international law would not preclude state parties from adopting a new treaty, politics might. Will countries want to enter into a new treaty that better protects domestic violence victims and their children if other countries claim the new treaty is an unpermitted derogation from the Hague Abduction Convention? While the Hague Abduction Convention has no penalty for unpermitted derogations,[320] countries might fear political repercussions. For example, the United States has the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 ("Goldman Act"); it provides a range of sanctions for countries that are noncompliant with the Hague

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319 Álvares, *supra* note 38.

320 PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 242 (1999) ("Faced with sustained non-compliance there is little Contracting States can do; certainly there is no mechanism prescribed within the text of the Convention . . . . Ultimately, in the absence of any sanction the operation of the Convention depends upon the goodwill of the signatory States."); *see also* Schuz, *supra* note 9, at 70 n.216 ("The idea that the Permanent Bureau should monitor compliance was rejected at the Sixth Special Commission Meeting in January 2012.").

Abduction Convention.[321] While a country should not be considered noncompliant for joining the new proposed treaty, ultimately noncompliance is a political determination. Other countries might be worried even though the sanction for noncompliance under the Goldman Act is typically mild.[322]

Becoming a party to a new treaty would involve a political calculation, but that calculation is not limited to assessing treaty partners' potential reactions. Domestic forces, such as domestic violence advocates and fathers' rights groups, will also try to have an influence.[323] Their impact may turn on the appeal of their rhetoric,[324] or decisionmakers' need to "negotiate the competing claims."[325] But policymakers may also be motivated by their country's human rights obligations to protect domestic violence survivors and their children,[326] especially if nongovernmental organizations (NGOs) generate negative publicity and

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321 Sean & David Goldman International Child Abduction Prevention and Return Act of 2014, 22 U.S.C. §§ 9101–9141; *id.* § 9101(19)(A)(i) ("The term 'pattern of noncompliance' means the persistent failure—(i) of a Convention country to implement and abide by provisions of the Hague Abduction Convention."); *id.* § 9101(19)(B)(iii) ("Persistent failure . . . may be evidenced" *inter alia*, if "the judicial branch . . . fails to regularly implement and comply with the provisions of the Hague Abduction Convention or bilateral procedures, as applicable."). Repercussions potentially exist for patterns of noncompliance, including the withdrawal of U.S. development assistance, security assistance, or other economic support. *Id.* § 9122(d)(5)–(7).

322 The most common formal repercussion for noncompliance is merely a demarche. *See generally* U.S. DEP'T OF STATE, REPORT TO CONGRESS ON SPECIFIC ACTIONS TAKEN AGAINST COUNTRIES DETERMINED TO HAVE BEEN ENGAGED IN A PATTERN OF NONCOMPLIANCE IN CASES OF INTERNATIONAL CHILD ABDUCTIONS, REP. NO. 2024008019 (2024) (discussing the sixteen countries that had demarches delivered in 2024).

323 *See generally* FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE 1 (Richard S. Collier & Sally Sheldon eds., 2006) (discussing fathers' rights groups' efforts and impact in Australia, Canada, Sweden, the United Kingdom, and the United States); Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525 (2015) (discussing the rise of fathers' rights groups in the United States, their tactics, and their political influence); Richard S. Collier, *The Fathers' Rights Movement, Law Reform, and the New Politics of Fatherhood: Some Reflections on the UK Experience*, 20 U. FLA. J.L. & PUB. POL'Y 65 (2009) (discussing the fathers' rights movement in England and Wales).

324 *See, e.g.*, Susan B. Boyd, *'Robbed of Their Families'? Fathers' Rights Discourses in Canadian Parenting Law Reform Processes*, *in* FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE, *supra* note 323, at 27, 41 (discussing how the issue of domestic violence was minimized by calling it an interest of the adult victim, not the child); Helen Rhoades, *Yearning for Law: Fathers' Groups and Family Law Reform in Australia*, *in* FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE, *supra* note 323, at 125, 130–33 (discussing the rhetoric of fathers' rights groups).

325 *See* Rhoades, *supra* note 324, at 136–37; Boyd, *supra* note 324, at 48.

326 *Cf.* Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673, 676 (2011) ("[D]omestic politics—not international reciprocity, retaliation, or reputation—is the crucial determinant of state compliance with international human rights law.").

public pressure.[327] Groups like FiLiA's Hague Mothers and Women Against Violence Europe are already rightly characterizing the problem with the Hague Convention as a human rights violation.[328] Their view is supported by the fact that the U.N. Special Rapporteur on violence against women and girls, the U.N. Special Rapporteur on the sale, sexual exploitation, and sexual abuse of children, and the U.N. Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment have all criticized countries' failure to consider family and domestic violence adequately in Hague Convention proceedings.[329] In sum, the viability of a new treaty is a political question rather than a legal question.

IV. THE NEW TREATY (ARTICLES AND COMMENTARY)

This Section proposes some core provisions for this new treaty. A number of standard topics would also need to be included, although they are not discussed here because they are relatively common and uncontroversial.[330]

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327 *See* SALLY ENGLE MERRY, GENDER VIOLENCE: A CULTURAL PERSPECTIVE 91 (2009) ("The major weapon of human rights compliance is communication: exposing points of violation of human rights and using international public opinion to condemn violating states.").

328 *See* Ruth Dineen, *The Hague Abduction Convention. A Human Rights Issue*, HAGUE MOTHERS (Sept. 11, 2023), https://www.hague-mothers.org.uk/2023/09/11/the-hague-abduction-convention-a-human-rights-abuse [https://perma.cc/K2BH-J5ZF]; *see also The Hague Mothers: Voices of Resilience for the Protection of Children*, WOMEN AGAINST VIOLENCE EUR. (Nov. 12, 2024), https://wave-network.org/the-hague-mothers-voices-of-resilience-for-the-protection-of-children [https://perma.cc/344R-D9TE] (discussing collaboration of Women Against Violence Europe, or WAVE, a feminist network promoting human rights of women and children, with FiLiA's Hague Mothers).

329 *See* Reem Alsalem, *Report of the Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences: Custody, Violence Against Women and Violence Against Children*, U.N. Doc. A/HRC/53/36, at 19 (Apr. 13, 2023); *see also* Letter from Reem Alsalem, Special Rapporteur on Violence Against Women & Girls, Its Causes & Consequences, Mama Fatima Singhateh, Special Rapporteur on the Sale, Sexual Exploitation & Sexual Abuse of Child., & Alice Jill Edwards, Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, to Christophe Bernasconi, Sec'y Gen. of Hague Conf. on Priv. Int'l L. (Sept. 19, 2023), https://www.ohchr.org/sites/default/files/documents/issues/women/sr/activities/20230919-Joint-Letter-Hague-Conference-Private-International-Law.pdf [https://perma.cc/L8V5-XMYS] ("[I]t is essential that the injustices wrought—albeit unintentionally—by the current implementation of the Hague Abduction Convention are recognised and acted upon.").

330 *See generally* U.N., FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK, U.N. Sales No. E.04.V.3 (2003) (providing practical drafting information for common final clauses of a multilateral treaty, which "generally include articles on the settlement of disputes, amendment and review, the status of annexes, signature, ratification, accession, entry into force, withdrawal and termination, reservations, designation of the depositary, and authentic texts" and may include "the relationship of the treaty to other treaties, its duration, provisional application, territorial application, and registration").

The new treaty could either address only the application of Article 13(1)(b) in the context of family violence or it could also address the related issues, i.e., jurisdiction to adjudicate the merits of custody, the availability of enforceable protective measures, choice of law related to relocation, etc. This Article does not choose between these two options, but instead lays out the fuller range of potential provisions so that government officials may consider the possibilities. Articles 1–6 address the application of Article 13(1)(b) in the context of family violence; Articles 7–10 reflect the more comprehensive approach. Articles 11–15 are additional provisions that would fit well with either approach. Other possible provisions undoubtedly exist,[331] and their omission from this proposal is not meant to be a statement about their merit. In addition, for simplicity, the model treaty only refers to the Hague Abduction Convention. However, a new treaty should also include relevant references to the Inter-American Convention on the International Return of Children.

Convention on Safety for Survivors of Family Violence Involved in International Custody Disputes

Article 1: Objectives

A. To ensure that the application of the Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Hague Abduction Convention] does not threaten the health and safety of victims of family violence.
B. To foster cooperation among Contracting States to protect family violence victims and their children from family violence and its effects.

Commentary:

This provision is intended to help with the treaty's interpretation. See *Vienna Convention on the Law of Treaties, art. 31(3)(a).*

Article 2: Relation to the 1980 Hague Abduction Convention

When the Hague Abduction Convention applies to a dispute, its application shall be complemented by the provisions of this treaty.

Commentary:

This treaty is intended to supplement the Hague Abduction Convention for countries that are party to both. This provision is similar

331 *See, e.g.*, Ripley, *supra* note 33, at 467 (calling for a protocol that would, inter alia, require states to forego criminal prosecution of the abductor upon return and that would resolve immigration issues if the abductor returned with the children).

to Article 96 of Brussels II-ter. It is meant to help coordinate the application of the new treaty and the Hague Abduction Convention. For countries that take a more comprehensive approach and also adopt Articles 7–10 of this treaty, a similar coordinating article should be added with respect to the 1996 Hague Protection Convention.

Article 3: Definition

For purposes of this treaty and the Hague Abduction Convention, "family violence" shall be defined as violent, threatening, or other behavior by the applicant that coerces or controls the person alleged to have removed or retained a child in breach of Article 3 of the Hague Abduction Convention [hereinafter "the respondent"], or causes that person to be fearful.

Commentary:

This definition is taken from Australian legislation. It is intended to limit the number of cases of family violence to which the Article 13(1)(b) defense applies. Although broader definitions are appropriate for other purposes, this treaty identifies family violence for purposes of triggering the Article 13(1)(b) defense, i.e., that return would pose to the child a grave risk of exposure to physical or psychological harm, or otherwise place the child in an intolerable situation. The abduction cases to which Article 13(1)(b) applies should be limited to those in which the respondent experienced family violence amounting to coercive control. Financial abuse can be evidence of coercive control, but on its own is not sufficient to trigger the defense. Similarly, psychological abuse that causes serious emotional harm qualifies as family violence, but lesser amounts would be evidence of coercive control.

"Family violence" for purposes of this treaty excludes child abuse, but nothing in this treaty is meant to restrict the application of Article 13(1)(b) in that context. In addition, this treaty's definition of "family violence" addresses situations in which the Hague Convention applicant is the perpetrator of family violence. Nothing in this treaty is intended to preclude Contracting States from adopting additional provisions to address the situation in which the applicant is the victim of family violence and the child was abducted by the respondent in furtherance of such violence. In particular, Article 11 (Risk Assessment) and Article 13 (Petition) could usefully be expanded to address this scenario. For clarity, this model treaty addresses the situation in which the respondent is the victim of family violence.

Article 4: Burden of Proof

Each Contracting State shall, consistent with its national law, consider applying a burden of proof that requires the respondent to prove Article 13(1)(b) of the Hague Abduction Convention, and facts on which it is based, by a preponderance of the evidence, unless a court presumes that allegations alone are sufficient.

Commentary:

Most Contracting States already use the preponderance of the evidence standard for the adjudication of the Article 13(1)(b) defense. A preponderance of the evidence means the "greater weight" of the evidence. It requires the respondent to persuade the decisionmaker that the probabilities are greater than 50% that the Article 13(1)(b) defense is made out. A burden of proof allocates the risk of error. The use of a more demanding burden of proof, such as "clear and convincing evidence," imposes the risk of error on the respondent and child, a result that is highly problematic in this context.

Because matters of domestic procedure are typically not addressed by private international law instruments, the provision is written to respect Contracting States' procedural autonomy.

Similarly, this provision does not require a live hearing for fact-finding, although a court may find it difficult to resolve a factual dispute and the application of the defense without such a hearing.

In determining whether family violence occurred, the absence of corroboration for the respondent's allegations does not, on its own, negate the truth of the allegations. Victims of family violence may not have disclosed the violence previously to authorities, medical personnel, or others and/or the speed of Hague Abduction proceedings may make obtaining any such evidence difficult, even if it exists.[332]

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332 *See, e.g.*, Weiner, *supra* note 52, at 307–08 ("[C]orroboration of abuse often does not exist. Violence tends to occur in private and, most of the time, there are no witnesses. Further, domestic violence victims often do not call the police for many reasons, including fear of retaliation by the abuser. Psychologist Peter Jaffe explained that 'domestic violence is notoriously difficult to substantiate,' and there is usually 'insufficient corroborating evidence,' in part because 'the majority of abuse victims do not contact the police.' Similarly, medical reports are typically nonexistent or unhelpful. They can be unhelpful because domestic violence victims 'frequently lie to medical providers, either because their abusers are with them when they are seeking treatment, or because of shame and embarrassment at their situations.' Documentation may not exist even when a victim calls the police or visits the doctor if domestic violence is sometimes 'tolerated or ignored' in the country where it occurred. In addition, even if there is corroborating evidence, the respondent may have no ability to obtain it from abroad because of the expedited nature of Hague Convention proceedings, among other things." (citations omitted)).

Article 5: Presumption that Article 13(1)(b) Applies and Return Should Be Denied

In cases in which a court determines there has been family violence perpetrated by the applicant against the respondent and the respondent invokes Article 13(1)(b) of the Hague Abduction Convention, the judge adjudicating the matter shall apply a rebuttable presumption that the return of the child would create a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation.

The presumption may be rebutted only by evidence that the applicant has accepted responsibility for the violence and is no longer a threat to the taking parent or the child. The presumption may not be rebutted if evidence establishes that the grave risk will exist regardless of the applicant's future actions.

Commentary:

Courts adjudicating the Article 13(1)(b) defense have historically required evidence of direct violence to the child.[333] *The* Guide to Good Practice *indicated that direct violence is unnecessary to trigger the defense. Consistent with the* Guide to Good Practice*, this provision recognizes that family violence against a parent can harm children in various ways, including when violence renews, when trauma is triggered by returning to the place of the abuse, or when the child is separated from a primary caregiver/protective parent.*[334]

Once family violence is found to have occurred, the presumption in favor of the Article 13(1)(b) defense is triggered. The respondent need not put on specific evidence about how the family violence affects the child, because harm to children from family violence is well established and child-specific evidence can be too costly to obtain. The presumption in favor of the Article 13(1)(b) defense is a weighty presumption, rebuttable only in exceptional cases. The presumption and what can rebut it (i.e., proof of the taking parent's and child's future "safety") is drawn, in part, from the American Law Institute's Principles of Family Dissolution.[335]

The court's assessment of whether the applicant is still a threat must assume, conclusively, that no effective protective measures can be adopted (e.g., restraining orders, incarceration, etc.) because the

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333 Weiner, *supra* note 52, at 250–51; Weiner, *supra* note 9, at 651–52, 654–57.

334 HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, paras. 57 & n.70, 59 & n.78, 64–65.

335 *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.11(3) & cmt. a (AM. L. INST. 2002); *see also* Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's Principles of the Law of Family Dissolution into Oregon Law*, 35 WILLAMETTE L. REV. 643, 706–08 (1999).

effectiveness of protective measures is inherently speculative. See *Article 6,* infra.

The applicant cannot rebut the presumption if evidence indicates that the child will suffer harm regardless of the applicant's future action, such as when the child has post-traumatic stress disorder (PTSD) that will be triggered by return. Relevant evidence about such harm might include expert reports from trained medical personnel who can assess for PTSD.[336] *Because respondent's accused of wrongful removal or retention may not have the resources to hire an expert, Contracting States should consider funding such evaluations when family violence is alleged.*

In determining whether the presumption has been rebutted, judges should only admit expert evidence from professionals with demonstrated expertise and clinical experience in working with victims of family violence or child abuse that is not solely forensic in nature.

Nothing in this Convention shall stop a judge from finding that it would be an intolerable situation to return a child when the respondent is legally unable to return with the child and reside in the child's country of habitual residence because of the requesting state's immigration law.[337]

Article 6: Protective Measures

An applicant may not rebut the presumption in Article 5 by citing the existence of, or future adoption of, protective measures, whether general or individualized.

A judge in the requested state may adopt protective measures to protect either parent and the child during the pendency of Hague Abduction proceedings as well as for a period after the decision is issued, regardless of whether the decision is for return or nonreturn.

Contracting States shall recognize each other's judicial orders for protective measures without any further process, and will convert such a foreign judicial order into a domestic order upon the request of the protected party, although such a conversion is not required for enforceability.

Commentary:

Protective measures include both legal orders and undertakings.

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336 Brandt, *supra* note 40, at 7; *see also* Taped Presentation: Stephanie Brandt on the Impact of Domestic Violence on Children (HCCH Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention 2024) (on file with author).

337 *See* Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, *supra* note 130, at 11 ("[T]he real possibility for the parent to return to the country of habitual residence and maintain contact with the child must be duly considered.").

While this treaty makes the availability of protective measures in the requesting state irrelevant to the adjudication of the Article 13(1)(b) defense, protective measures are often necessary, and sensible, both during the pendency of the proceedings and afterwards, regardless of the outcome of the Hague Abduction proceeding. For example, if the child is returned because the respondent agrees to that outcome, the respondent and child may still need protective measures to address the behavior of the applicant. Similarly, a court that returns a child may anticipate potential hardship to the respondent and child that could be avoided with protective measures.[338] *Alternatively, if the child is not returned, the respondent and child may need protective measures in the requested state in case the seeking parent shows up there or tries to harass the respondent and child from afar. If the respondent is the perpetrator of family violence, the applicant may need protection, especially if that party enters the country for the Hague Abduction proceedings.*

There are a range of potential protective measures suggested in the Guide to Good Practice on Article 13(1)(b), *and in the* Practice Guide for the Application of the Brussels IIb Regulation.[339] *In addition, the Istanbul Convention, Article 56(1), suggests some protective measures that can protect the rights and interests of family violence victims during proceedings.*[340]

Contracting States may want to develop a certificate of enforceability to facilitate cross-border recognition of measures.

To the extent Contracting States are also parties to the 1996 Hague Protection Convention, Article 11 of that Convention provides independent authority for taking "urgent measures" if the child is or is not returned.

Article 7: Coordination with Vienna Convention on Consular Relations[341]

If a respondent raises an Article 13(1)(b) defense and alleges family violence but the defense is unsuccessful and the child is returned to the requesting state, and if the Contracting States involved are also parties to the Vienna Convention on Consular Relations, the requested state shall send a consular officer to visit the child and the respondent (assuming the

338 *See* Honorati, *supra* note 65, at 17 ("Where the court is not fully convinced of the existence of a grave risk of harm but still cannot exclude that the situation may entail some kind of additional risk, the possibility of so-called 'soft landing' measures should be considered.").

339 *See supra* text accompanying notes 209–211; *see also* HCCH, GUIDE TO GOOD PRACTICE, *supra* note 17, para. 43.

340 Istanbul Convention, *supra* note 93, art. 56.

341 Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967).

respondent also returns). The visit shall be to determine their welfare, consistent with the Vienna Convention on Consular Relations. The visit shall occur within one week of the child's return and again approximately three months thereafter.

The consular officer shall connect the respondent and child with local resources, as needed, and shall report the condition of the respondent and child to the Central Authority of the requested state, national law permitting.

The Central Authority of the requested state shall share information received about the respondent and child with the judge who made the return decision, national law permitting.

The Central Authority of the requested state shall share information received about the respondent and children with qualified academic researchers for purposes of research, national law permitting.

Commentary:

The Vienna Convention on Consular Relations is a popular treaty with 182 contracting countries.[342] *Article 5, on consular functions, gives consular officers the authority to undertake visits of its nationals.*[343] *When neither the respondent nor the children are nationals of the requested state, consular officials of the requested state may still be able to arrange a wellness check by contacting the consular officials from the state of nationality. The Vienna Convention on Consular Relations allows a country to exercise consular functions on behalf of a third state.*[344]

Article 8: Jurisdiction [Alternatives A and B]

Alternative A: If a child is not returned to the state of the child's habitual residence because of a successful Article 13(1)(b) defense related to family violence, the court in the requested state shall have jurisdiction to adjudicate the underlying child custody matter. This jurisdiction shall exist regardless of whether a court in the state of the child's habitual residence has already been seized and/or issued a decision with respect to custody. The judges in the requested and requesting states shall cooperate to ensure that the judge in the requested state receives all reasonably accessible and necessary information to decide what is in the best interests of the child.

Alternative B: If a child is not returned to the state of the child's habitual residence because of a successful Article 13(1)(b) defense related to family violence, the court in the requesting state shall have jurisdiction

342 *See id.*

343 *Id.* art. 5.

344 *Id.* art. 8.

to adjudicate the underlying child custody matter, assuming such jurisdiction existed at the time of the wrongful removal or retention. However, a judge in the requested state or a party can ask the court in the requesting state to transfer jurisdiction to the requested state for purposes of deciding child custody. The judge in the requesting state shall prioritize the family members' safety when adjudicating the request to transfer jurisdiction. The judges in the requested and requesting states shall cooperate to ensure that the judge in the requesting state receives all reasonably accessible and necessary information to decide whether to transfer jurisdiction and, if it retains jurisdiction, to determine what is in the best interests of the child.

Commentary:

Article 16 of the Hague Abduction Convention explicitly prohibits Contracting States from deciding the merits of the custody dispute before the Hague Abduction petition is resolved. After a child is returned, a court in the child's habitual residence (i.e., the requesting state) typically has jurisdiction to decide the merits of the custody dispute. However, if a child is not returned because of a meritorious Article 13(1)(b) defense, the court in the requested state may not have jurisdiction to decide the merits of the custody dispute. Often the court in the child's habitual residence will still have jurisdiction. See, e.g., *Uniform Child Custody Jurisdiction and Enforcement Act, §§ 201–204, 208; Brussels II-ter, art. 29(3), (5), (6); 1996 Child Protection Convention, art. 7(1). Consequently, if a court in the child's habitual residence awards custody to the applicant in the Hague Abduction proceeding, the child will still be returned to the child's habitual residence, albeit indirectly, despite the respondent's meritorious Article 13(1)(b) defense. When appropriate, the court in the requesting state may be able to transfer its jurisdiction to a court in another country.* See, e.g., *Uniform Child Custody Jurisdiction and Enforcement Act, § 207; Brussels II-ter, art. 12; 1996 Hague Protection Convention, arts. 8, 9. However, nothing encourages the court in the requesting state to do so, and nothing requires courts to share information about family violence obtained in proceedings.*

To better address the needs of family violence victims who are respondents in Hague Abduction proceedings, this Article sets forth two options with respect to jurisdiction. Policymakers should select one of the alternatives for the new treaty. It is not intended that each Contracting State select either Alternative A or B for itself. Such variety would increase the potential for conflicting custody orders.

Alternative A: This provision vests jurisdiction in a court where the child is located after a successful Article 13(1)(b) defense. This location has the benefit of enhanced safety and convenience for the respondent,

who has been abused and made to flee for safety. It also has the benefit of having the child present in person for the adjudication. If sufficient time has passed since the date of the wrongful removal or retention, the child's current location may be the child's de facto habitual residence, although the Hague Abduction Convention determines the child's habitual residence for purposes of that Convention at the time of the wrongful removal or retention. See *Hague Abduction Convention, arts. 3, 4, 12.*

Alternative B: This provision vests jurisdiction to adjudicate custody in a court in the state of the child's habitual residence, notwithstanding the respondent's successful Article 13(1)(b) defense, assuming such a court had jurisdiction at the time of the wrongful removal or retention. The requesting state may assert an interest in determining the merits of the custody dispute.[345] *In some cases, most of the relevant evidence will be located in the state of the child's habitual residence, as it existed at the time of the child's wrongful removal or retention. Under Alternative B, the court in the state of the child's habitual residence can transfer jurisdiction to a court in the requested state. It is assumed such a request would be common and typically granted, although it would ultimately be the decision of the court in the state of the child's habitual residence whether to transfer jurisdiction after prioritizing safety considerations.* See *Article 9,* infra.

Regardless of whether Alternative A or B is selected, the judges in the two Contracting States must communicate and cooperate to ensure the decisionmaker has all relevant evidence for determining the best interests of the child. Necessary cooperation may include facilitating video testimony or conducting a custody evaluation of the child. In the event Alternative B is chosen, cooperation would include sharing the information specified in Brussels II-ter, art. 29, at a minimum. In the event Alternative A is chosen, cooperation would include sharing court files related to the child's custody.

Article 9: Relocation and Choice of Law

Each Contracting State shall have a mechanism in national law by which a parent can seek permission from a court, and from all persons with parental responsibility, to relocate lawfully with a child.

If the parent petitioning for relocation alleges the other parent has perpetrated family violence, the court shall resolve the relocation case expeditiously. If the family violence is established, the judge shall give substantial weight to the petitioning parent's and child's safety in determining whether to grant permission to relocate.

345 Schuz, *supra* note 9, at 65.

If the parent petitioning for relocation successfully raised an Article 13(1)(b) defense based on family violence in a Hague Abduction Convention proceeding, the court with jurisdiction to adjudicate the matter shall apply the law of relocation of either the requesting or requested state that is the most favorable to that parent. In determining whether to grant permission to relocate, the judge shall also give substantial weight to the petitioning parent's and child's safety.

Commentary:

Most commentators recognize that child abduction would be averted if countries provided parents with an expedient and affordable way to obtain permission to relocate.[346] *In addition, parents whose children are returned pursuant to the Hague Abduction Convention are sometimes eventually allowed to relocate to the requested state,*[347] *although the fact of the abduction can reduce the likelihood of obtaining permission.*[348] *The first two paragraphs of this Article ensure that each Contracting State has a mechanism to facilitate expeditious relocations prior to an abduction when family violence exists.*

Contracting States may have very different substantive laws regarding relocation. Some countries favor relocation and others do not. While commentators have called for countries to harmonize their national laws,[349] *this treaty does not favor a particular position on relocation generally. Instead, it requires decisionmakers always to give substantial weight to the location where the victims of family violence will be safest. In addition, this treaty embodies a choice of law rule that favors relocation after a successful Article 13(1)(b) defense predicated on family*

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346 HAGUE CONF. ON PRIV. INT'L L., *supra* note 127, para. 53. *See generally* Int'l Judicial Conf. on Cross-Border Family Relocation, Washington Declaration on International Family Relocation, HAGUE CONF. ON PRIV. INT'L L. (Mar. 2010), https://assets.hcch.net/upload/decl_washington2010e.pdf [https://perma.cc/6ND3-JV5Z].

347 REUNITE RSCH. UNIT, THE OUTCOME FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION 37 (2003), https://takeroot.org/ee/pdf_files/library/freeman_2003.pdf [https://perma.cc/M3F9-KU63]; *see also* Danielle Bozin, *Equal Shared Parental Responsibility and Shared Care Post-Return to Australia Under the Hague Child Abduction Convention*, 37 U.N.S.W.L.J. 603, 628–29 (2014) (indicating that in only approximately 13% of cases studied, primary carer mothers who had abducted their children were allowed to relocate after the children were returned (citing Danielle Bozin-Odhiambo, A Critical Analysis of the Hague Convention on Civil Aspects of International Parental Child Abduction (Apr. 2013) (Ph.D. dissertation, Griffith University))).

348 Bozin, *supra* note 347, at 630.

349 *See, e.g.*, Adriana de Ruiter, *40 Years of the Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child*, at 4, 15, POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFFS. (Nov. 2020), https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559/IPOL_IDA(2020)660559_EN.pdf [https://perma.cc/79FX-KRC6] (recommending the EU's "harmonisation of relocation proceedings and principles to allow relocation . . . as a logical consequence of the free movement of citizens").

violence. This approach is consistent with the Washington Declaration of 2010, which stated that "the best interests of the child should be the paramount (primary) consideration" and that a relevant consideration is "any history of family violence or abuse, whether physical or psychological."[350] *This provision is also consistent with the Washington Declaration's encouragement of an international instrument on the topic.*[351]

The third paragraph will be most relevant if the new treaty embodies Alternative B from Article 8. In that situation, a court in the state of the child's habitual residence would determine any relocation application subsequent to a successful Article 13(1)(b) defense unless that court transfers its jurisdiction. Because the respondent and child are likely to be located in the requested state and a court of that state found in the respondent's favor on Article 13(1)(b), two countries will have a significant connection to the matter. Consequently, the court adjudicating the merits of a relocation petition should apply the law of the country that is most likely to permit relocation. This provision is consistent with Articles 15(2) and 22 of the 1996 Hague Protection Convention.[352] *Again, the parent's and child's safety must be a paramount consideration in the adjudication of the matter under any country's law.*

Article 10: Best Interests of the Child

Each Contracting State shall ensure that legal disputes regarding custody or access are resolved according to the best interests of the child.

The fact that a parent has fled with a child in good faith to avoid family violence shall not be considered contrary to the best interests of the child, nor shall a parent be punished in a custody or access dispute, or a criminal proceeding, for such behavior.

Each Contracting State shall, consistent with its national law, consider adopting a presumption in custody and access proceedings that it is not in the best interests of a child for a parent who has perpetrated family violence to receive custody or access.

Commentary:

This Article is not meant to change the timing of a custody adjudication as set out in Article 16 of the Hague Abduction Convention.

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350 Int'l Judicial Conf. on Cross-Border Family Relocation, *supra* note 346, paras. 3, 4(v).

351 *Id.* para. 13.

352 *See* 1996 Hague Protection Convention, *supra* note 199, art. 15(1) (making the law of the state exercising jurisdiction the appropriate law); *id.* art. 15(2) (recognizing as an exception the law of another state that has a substantial connection to the matter); *id.* art. 22 ("The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.").

The first paragraph states a widely accepted practice. Article 3 of the Convention on the Rights of the Child requires countries to make the best interests of the child a primary consideration in the resolution of all actions concerning children, including custody and access disputes.[353] *In fact, most countries do so.*[354]

The second paragraph is loosely modeled on section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act,[355] *which states in commentary that it is not wrongful behavior for a parent to flee with a child to protect the parent or the child from family violence.*[356]

The third paragraph reflects a substantive rule of law that is very popular in the United States.[357] *This paragraph is phrased so to minimize interference with Contracting States' internal law, consistent with other private international law instruments. The third paragraph is included because custody and access proceedings, whether prior to or after a Hague Abduction Convention proceeding, sometimes give insufficient weight to family violence in the assessment of the child's best interests.*

Article 11: Risk Assessment

In any Hague Abduction Convention proceeding in which family violence is alleged, the Central Authorities and the court shall engage in risk assessment and risk management. The assessment shall use scientifically validated instruments and shall include a determination of the risk of lethality and repeated violence.

If necessary, and to the extent permitted by national law, the Central Authorities and court shall provide coordinated safety and support to a respondent who alleges family violence as a basis for the Article 13(1)(b) defense. Actions may include the imposition of protective measures, the notification of law enforcement about an immediate risk, and the nondisclosure of the respondent's and child's location to the applicant or applicant's representative.

To the extent permitted by national law and with the permission of the respondent after a successful Article 13(1)(b) defense based on family

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353 Convention on the Rights of the Child, *supra* note 137, art. 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.").

354 *See generally* D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes—A Comparative Exploration*, 39 FAM. L.Q. 247 (2005) (discussing resolution of parental custody disputes in different legal systems and geographic regions).

355 UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT § 208 cmt. (UNIF. L. COMM'N 1997).

356 *Id.* ("Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section.").

357 *See* ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4:14 n.9, Westlaw (database updated Dec. 2024).

violence, the Central Authorities shall forward to other Central Authorities information obtained from investigations or proceedings, the disclosure of which would help with any of the following: the prevention of criminal offenses; the investigation, prosecution, or adjudication of criminal offenses; the provision of social services; or the adjudication of family law matters.

A Central Authority receiving any information in accordance with the third paragraph shall submit such information to its competent authorities in order that appropriate action may be taken, and so those authorities can take account of the information in relevant civil and criminal proceedings.

Commentary:

This provision is loosely drawn from the Istanbul Convention, Articles 51, 63, and 64. It recognizes that cases involving allegations of family violence often can involve danger, both during the proceedings and afterwards, and that all governmental officials in the requested and requesting states should be aware of, and responsive to, this danger.

The Guide to Good Practice for Central Authorities *already indicates that Central Authorities should not give the location of the respondent and child to the applicant.*[358] *This Article requires governmental officials to offer support in various forms to victims of family violence consistent with national law and international obligations.*

The third and fourth paragraphs address the sharing of relevant information about family violence between Contracting States. Importantly, the transfer of such information is subject to the consent of the respondent. There is considerable literature about the harms of mandatory reporting in various contexts and how it can silence victims and remove their control, a critical component of recovery.[359] *When permitted, the sharing of relevant information about family violence can promote a coordinated approach to furthering safety.*

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358 HAGUE CONF. ON PRIV. INT'L L., 1980 CHILD ABDUCTION CONVENTION GUIDE TO GOOD PRACTICE: PART I CENTRAL AUTHORITY PRACTICE, § 4.10, at 48 (2003).

359 *Cf.* Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 88–106 (2017).

Article 12: Discovery

The Central Authorities of the requesting and requested states shall assist both parties in obtaining evidence abroad if they assist either party.

Commentary:

The Pérez-Vera Explanatory Report recognized the importance of assistance to the respondent.[360] *This provision reinforces what is already implicit in the Hague Abduction Convention, Article 7 (d), (e), and (i).*

Article 13: Petition

Any application for assistance to a Central Authority, pursuant to Article 8 of the Hague Abduction Convention, shall seek information regarding whether the applicant has been accused of family violence or child abuse. It shall also require that the applicant provide any relevant governmental records regarding allegations against the applicant to which the applicant has reasonable access. If reasonable access does not exist, the applicant shall provide information about the existence and location of such records.

Commentary:

Information about the applicant's history of family violence can be critical for purposes of risk assessment (Article 11) and the adjudication of the merits of the Article 13(1)(b) defense. Any deception related to the existence of this information would be similarly relevant. While courts can direct a parent to produce this information,[361] *requiring this information early in the process can both expedite proceedings and help authorities at the outset identify safety risks.*

Article 14: Legal Representation

If a Contracting State provides free or reduced-cost legal representation to the applicant in a Hague Abduction Convention proceeding pursuant to Article 26 of that Convention, or if a Contracting State acts as the petitioner in the Hague Abduction Convention proceeding for the applicant, it shall also provide legal representation on equivalent terms to a respondent who alleges family violence.

360 *See* Pérez-Vera, *supra* note 41, para. 117 (discussing Article 13(3)).

361 *LRR v. COL* [2019] NZCA 620 at [24] (N.Z.).

Commentary:

Providing legal counsel to the respondent will "ensure not only fairer representation, but greater equality in practical rights of access to experts, information and other resources, and so better decisions."[362]

This provision requires the respondent to have alleged family violence in order to obtain free or reduced-cost counsel from the government. A Contracting State might instead provide legal counsel to all respondents for the practical reason that a respondent may not know before legal counsel is obtained what allegations are relevant.

This provision only requires that legal counsel be provided to the respondent "on equivalent terms" as legal counsel is provided to the applicant. Therefore, if all applicants receive free legal counsel or are represented by an official of the Contracting State, regardless of income, then all respondents who allege family violence should receive free legal representation too. Alternatively, if a country has entered a reservation to Article 26 of the Hague Abduction Convention and only provides applicants with legal counsel if they qualify for legal aid, then the Contracting State may impose a similar restriction on the provision of legal counsel for respondents who allege family violence.

Article 15: Training

Contracting States shall ensure that authorities handling Hague Abduction Convention matters, including judges and Central Authority personnel, have training on the topics of family violence and child abuse, including myths, risk assessment, and the effect of trauma. Such training shall be designed in consultation with advocates for family violence victims and be grounded in scientifically validated information.

Commentary:

Currently, decisionmakers receive very different amounts of training on these topics.[363] *Yet it is essential to the effective and fair handling of these cases that decisionmakers and Central Authority personnel understand, at a minimum, the myths about family violence, the risk factors for further abuse, and the impact of trauma.*[364] *Any training must be based on scientifically validated information and designed in consultation with advocates for family violence survivors. This training should be general and not case specific in order to assure*

362 Ben Keith, *Four Practical Steps Towards Informed and Core Rights-Compliant Grave Risk Cases, Note for HCCH Forum on Domestic Violence and the Operation of Article 13(1)(b)*, HAGUE MOTHERS (June 2024), https://www.hague-mothers.org.uk/wp-content/uploads/2024/07/June-2024-HCCH-Forum-four-practical-steps-Keith-16vi24.pdf [https://perma.cc/Q5AE-C482].

363 Weiner, *supra* note 52, at 248–49, 249 n.105.

364 *Id.* at 237, 264, 306 n.430.

that it does not interfere in any way with judicial independence in the adjudication of these matters.[365]

CONCLUSION

Policymakers now know that family violence harms adults and children and that international law obligates them to address it, but efforts to address family violence in the context of the Hague Abduction Convention have been slow and, to date, inadequate. Yet policymakers can protect victims of family violence while simultaneously championing the Hague Abduction Convention. To achieve this outcome, like-minded countries should agree that their courts will interpret Article 13(1)(b) in a way that is best for victims of family violence. In the process, these countries can also agree on a range of related matters that arise in international custody disputes, thereby ensuring just outcomes for parents and children who have experienced family violence. This Article has provided a draft treaty that can modernize the Hague Abduction Convention so that authorities respond better to parents who flee transnationally with their children for safety.

365 Int'l Org. for Jud. Training, *Declaration of Judicial Training Principles*, at 3–4 (Nov. 8, 2017), https://ncfsc-web.squiz.cloud/__data/assets/pdf_file/0014/6152/2017-principles.pdf [https://perma.cc/N47G-7HJW] (suggesting that judicial training increases judicial independence).