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# INTOLERABLE SITUATIONS AND COUNSEL FOR CHILDREN: FOLLOWING SWITZERLAND’S EXAMPLE IN HAGUE ABDUCTION CASES

MERLE H. WEINER\*

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\* Philip H. Knight Professor of Law, *University of Oregon School of Law*. I appreciate the assistance that Professors Andreas Bucher and Leslie Harris gave me on this Article. I also want to thank James Baldock, Valerie Kamps, Snehata Karki, Amber Kolsrud, Ana Mamani-Haymes, Kali Montague, Rebekah Murphy, and Chris Potter for their research. Karyn Smith and Debby Warren skillfully assisted me with the Article’s production.

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#### INTRODUCTION

In the twilight days of 2007, Switzerland took decisive action to protect children who were being harmed by the application of the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Abduction Convention” or “Convention”).<sup>1</sup> Its Parliament passed the Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults (“Swiss Act”).<sup>2</sup> The Swiss Act, which should enter into force in mid-2009,<sup>3</sup> gives important and necessary guidance to Swiss courts about the phrase “intolerable situation” in Article 13(b) of the Hague Abduction Convention.<sup>4</sup> The Swiss Act also directs courts to appoint representatives for children in Hague child abduction proceedings.<sup>5</sup> The United States should follow Switzerland’s example and adopt similar reforms. The United States need not pass legislation to do so, but rather U.S. courts should follow Switzerland’s lead as the opportunities arise in individual cases.

This Article describes the Swiss law and the context for its adoption and then examines the doctrinal and practical significance of its provisions. A few recent U.S. cases are used to illustrate the need for courts in the United States to follow Switzerland’s example. For

1. 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. 98 [hereinafter Hague Abduction Convention], available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24).

2. Loi fédérale sur l’enlèvement international d’enfants et les Conventions de La Haye sur la protection des enfants et des adultes [LF-EEA] [Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and of Adults], Dec. 21, 2007, feuille fédérale suisse [FF] 34 (2008) [hereinafter Swiss Federal Act], available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Andreas Bucher, *The New Swiss Federal Act on International Child Abduction*, 4 J. PRIV. INT’L L. 139, 161–65 (2008).

3. At the time of publication, the Federal Council had not yet set the date for the Act’s entry into force, although it appears as if July 1, 2009 is the target date. E-mail from Andreas Bucher to Merle Weiner, Oct. 30, 2008 (on file with author).

4. Hague Abduction Convention, *supra* note 1, art. 13(b).

5. *Id.*

example, the Swiss interpretation of “intolerable situation” might have changed the 2007 decisions of the federal district court in *Adan v. Avans*.<sup>6</sup> The Swiss approach to appointing counsel for children in Hague child abduction proceedings might also have altered the outcome of a 2008 federal district court decision, *Mendez-Lynch v. Pizzutello*.<sup>7</sup> After considering potential drawbacks to the Swiss reforms, the Article concludes that U.S. courts have little to lose, and much to gain, by incorporating these Swiss ideas into the adjudication of Hague cases.

### I. THE SWISS LAW

The Swiss law guides Swiss courts in their application of the Hague Abduction Convention,<sup>8</sup> a treaty that applies to the transnational abduction of children primarily by their parents. The Convention requires contracting states to return an abducted child quickly to the child’s country of habitual residence, in most circumstances.<sup>9</sup> The Convention contains several exceptions to its remedy of return, two of which are particularly relevant to the Swiss reform. Article 13(b) provides that a court need not return a child if the return would pose “a grave risk that . . . return . . . would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>10</sup> Another portion of Article 13 makes the child’s own opinion relevant to the court’s obligation to return the child: “The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned

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6. *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 2212711 (D.N.J. July 30, 2007), *rev’d*, *In re Adan*, 554 F.3d 542 (3d Cir. 2008); *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 1850910 (D.N.J. June 25, 2007), *rev’d*, *In re Adan*, 554 F.3d 542 (3d Cir. 2008).

The *Adan v. Avans* case came before the district court once in 2006 and twice in 2007. The case went up on appeal twice. The *Adan v. Avans* case was appealed to the Third Circuit in 2006 following the district court’s one-sentence order to return the child, and the Third Circuit vacated the district court’s order and remanded the case. *In re Adan*, 437 F.3d 381 (3d Cir. 2006). On remand, the district court again ordered the child’s return. *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 1850910 (D.N.J. June 25, 2007). A month later, the district court rejected motions for reconsideration and a stay while the case was appealed to the Third Circuit. *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 2212711 (D.N.J. July 30, 2007). On appeal, both of the district court’s 2007 decisions were reversed, and the Third Circuit dismissed the Hague Convention petition. *In re Adan*, 544 F.3d 542 (3d Cir. 2008). The text will discuss all of these decisions, but it is the 2007 trial court decisions that are the most illuminating for purposes of this Article.

7. *Mendez-Lynch v. Pizzutello*, No. 2:08-CV-0008-RWS, 2008 WL 416934 (N.D. Ga. Feb. 13, 2008).

8. Hague Abduction Convention, *supra* note 1.

9. *Id.* art 12.

10. *Id.* art. 13(b).

and has attained an age and degree of maturity at which it is appropriate to take account of its views.”<sup>11</sup>

Reformers in Switzerland became concerned about the application of the Hague Abduction Convention, and these defenses in particular, after they observed the child custody case of Russell Wood and Maya Wood-Hosig (“the *Wood* case”).<sup>12</sup> In the *Wood* case, the mother took her two children from Australia to Switzerland.<sup>13</sup> When she was discovered in Switzerland, her children were forcibly removed from her and institutionalized for a year until they could be returned to Australia.<sup>14</sup> When the time finally came for the children to travel to Australia, the children had to be forced onto the plane.<sup>15</sup> Upon arrival in Australia, the children were again placed in foster care. The father was unable to care for the children, so the children could not be returned to him.<sup>16</sup> The mother did not return to Australia because she faced a criminal action there for the abduction.<sup>17</sup> Because it took some time for the Australian court to issue a custody decision, the children experienced several Australian foster homes.<sup>18</sup> Eventually, the Australian court gave the mother custody and allowed the children to return to Switzerland.<sup>19</sup> In short, the children ended up with exactly the same arrangement as before the Hague proceeding began; yet, they were forced to endure enormous distress and hardship as the process played out.

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11. *Id.* art. 13.

12. Parliament of Western Australia, Legislative Assembly-Grievance, Russell Wood & Maya Wood-Hosig, Aug. 24, 2006 (Mr. Dan Barron-Sullivan & Mr. David Templeman), available at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Hansard+-+Advanced+Search> (search “Search For” for “Wood” and “Date on” for “24/08/2006”) [hereinafter Legislative Assembly-Grievance]; Bucher, *supra* note 2, at 139.

13. Legislative Assembly-Grievance, *supra* note 12.

14. *Id.*

15. Bucher, *supra* note 2, at 139.

16. *Id.* at 139–40.

17. *Id.* at 139.

18. Legislative Assembly-Grievance, *supra* note 12.

19. *Id.* Although the father lodged an appeal, the trial judge allowed the children to return to Switzerland pending resolution of the appeal. *Id.* This was important for the mother’s case because an Australian law said that the judge does not have to return the child if the child lives in Australia for two years. If the proceedings had taken another six months, this benchmark would have been reached. *Id.*; see also Notes of Proceedings for the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction and the First to Review the Practical Implementation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Nov. 6 (comments of Professor Andreas Bucher) (on file with author) [hereinafter Notes of Proceedings].

To address the problems made manifest by the *Wood* case, delegates from Switzerland proposed to the international community that a new provision be added to the Convention that would supplement Article 13(b).<sup>20</sup> At the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention, held in 2006, the Swiss delegation introduced Working Document No. 2. Article 7 of that document, entitled “Return and best interest of the child,” would allow a court to refuse to return a child if the following criteria were met:

- (1) the placement with the applicant is manifestly not in the best interest of the child, (2) the [abducting parent] cannot care for the child in the child’s habitual residence (or cannot reasonably be required to do so), and (3) the placement in foster care is manifestly not in the best interest of the child.<sup>21</sup>

Despite vigorous advocacy by the Swiss, the proposal was rejected: “A clear majority of experts indicated that the Swiss proposal to amend the Convention, while raising important and timely issues for debate, should not be accepted.”<sup>22</sup>

The Swiss proposal probably failed because of the language used to frame the new provision. By describing the amendment as an application of the “best interest” principle,<sup>23</sup> as its title suggested, the

20. Switzerland proposed these changes because of “[s]everal distressing cases” that occurred in Switzerland. Special Comm’n on the Civil Aspects of Int’l Child Abduction, Working Doc. No. 1E, at 3 (2006) [hereinafter Working Doc. No. 1E]; see also Bucher, *supra* note 2, at 139–42 (describing the specific cases that Switzerland found distressing).

21. Special Comm’n on the Civil Aspects of Int’l Child Abduction, Working Doc. No. 2E, art. 7 (2006) [hereinafter Working Doc. No. 2E]. This was a refinement of Switzerland’s initial proposal, found in item 5 of Working Document 1. See Working Doc. No. 1E, *supra* note 20, item 5.

22. Hague Conference on Private International Law, October 30–November 9, 2006, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of 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*, at 45, ¶ 163 (Mar. 2007) [hereinafter *Report on the Fifth Meeting*].

23. The Swiss argued that this change was timely, given the worldwide adoption of the U.N. Convention on the Rights of the Child and “of the prominence given to the overriding interests of the child in everything that concerns it.” Working Doc. No. 1E, *supra* note 20, at Remarks: Point 5. Article 3(1) of the Convention on the Rights of the Child states: “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.” Convention on the Rights of the Child, G.A. Res. 44/25, Annex art. 3(1), U.N. Doc.A/Res/44/25 (Dec. 12, 1989), available at <http://www.cirp.org/library/ethics/UN-convention>. The Swiss also identified the issue that was to be addressed as follows: “Amending Art. 13, clause (b) so as to clarify the relationship between the principle of returning the abducted child and the interests of the child.” Working Doc. 1E, *supra* note 20, at Point 5.

provision looked as if it were the first step to a broader defense that would potentially excuse return whenever the best interest of the child required it.<sup>24</sup> In fact, the Swiss believe that decisions from the European Court of Human Rights require consideration of the child's best interest in all cases.<sup>25</sup> The United States opposed the proposal, noting that the best interest of the child is typically achieved by returning the child.<sup>26</sup>

Although Working Document No. 2 was not adopted, Switzerland is to be commended for bringing the *Wood* case and other problematic fact patterns to the world's attention. The Swiss demonstrated that the Hague Convention defenses are interpreted too narrowly in various scenarios, resulting in harsh outcomes for the children involved. These scenarios typically involve abductions by primary caretakers.<sup>27</sup> Some of these abductions occur in order for the abductor to escape family violence,<sup>28</sup> and courts sometimes return the child even though the primary custodian cannot safely return with the child.<sup>29</sup> Some of these children end up in foster care<sup>30</sup> or with the

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24. See *Report on the Fifth Meeting*, *supra* note 22, at 46, ¶ 165 (noting that “[a] majority of experts . . . cautioned that the Swiss proposal created an additional ground for refusal, which would undermine the principle of comity by inviting courts in requested States to examine the best interests of the child”).

25. Bucher, *supra* note 2, at 156–57 & n.32.

26. Notes of Proceedings, *supra* note 19.

27. Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 222–23 (2008) (indicating that 68% of the taking persons were primary or joint caregivers (citing *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction*, *infra* note 247, at 21–23)).

28. *Id.*

29. Courts have not yet embraced the idea that Article 20 of the Convention affords a defense to return in these cases either. I have argued elsewhere that it is a violation of Article 20 to make a domestic violence victim litigate custody in a venue where her safety is at risk. See Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701, 702 (2004) (arguing that Article 20 should be strengthened to allow the Hague Convention to operate more justly for domestic violence victims who flee transnationally with their children to escape domestic violence); Merle H. Weiner, *Using Article 20*, 38 FAM. L.Q. 583, 583–84 (2004) (detailing the aspects of an Article 20 defense that a domestic violence victim might make when responding to a Hague petition in the United States). Article 20 permits an assessment of whether return violates the human rights of any individual. See Hague Abduction Convention, *supra* note 1, art. 20 (“The 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.”).

30. See, e.g., *Adan v. Avans*, No. 04-55155 (WHW), 2007 WL 2212711, at \*4 (D.N.J. July 30, 2007) (arranging with Argentinean authorities for the child to enter foster care; case involved allegations of domestic violence and child sexual abuse), *rev'd*, *In re Adan*, 544 F.3d 542 (3d Cir. 2008); *In re L.L.*, (N.Y. Fam. Ct. May 22, 2000) *reported at* <http://www.hcch.net/incadat/fullcase/0273.htm> (holding that an Article

petitioner (the alleged abuser). In other cases, serious and credible child abuse allegations are made against the left-behind parent, but the court in the abducted-to nation returns the child anyway, believing that foster care in the child's habitual residence is an appropriate placement until the allegations are resolved. In yet other cases, the petitioner only has rights of visitation, or only seeks to establish visitation, but the court returns the child anyway,<sup>31</sup> even though the primary caretaker may not, or cannot, return with the child. The primary caretaker's reasons for not returning are varied, but may include an expired passport, an improper immigration status, the prospect of being criminally prosecuted upon return, fear of the petitioner, or an unwillingness to leave a full life in the abducted-to state. Switzerland succeeded in pointing out the limitations of the Convention and its defenses, as currently interpreted, in these types of situations.

In the context of Switzerland's attempt to expand the understanding of the Article 13(b) defense, Mr. J. David McClean, a delegate for the Commonwealth Secretariat who was present at the Convention's drafting, provided background for the words "intolerable situation" in Article 13(b).<sup>32</sup> He "indicated that the

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13(b) "grave risk" defense was not established, despite the fact that it was "highly likely that . . . [the father] engaged in a pattern of excessive corporal punishment with respect to all three children and domestic violence towards their mother," because the Dutch Child Protection Board intended to place the children in foster care pending an investigation upon their return); *see also* *Nunez Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (suggesting that a baby's possible institutionalization during the pendency of the Mexican custody proceedings could eradicate a grave risk of harm). Sometimes children are placed in foster care in the United States pending the adjudication of the Hague petition, as were the children in the *Wood* case. *See, e.g.,* *Arguelles v. Vazquez*, No. 08-2030-CM, 2008 WL 913325, at \*6 (D. Kan. Mar. 17, 2008) (indicating seven-year-old child was in protective custody and social worker indicated child was "closely bonded to her mother [the Respondent] and . . . the more expeditiously [the child] could return to a normal structured day-to-day existence, the better").

31. Although the Convention clearly does not permit the remedy of return for those petitioners who only have rights of access, a number of courts around the world have held that the remedy applies if the right of access is coupled with a *ne exeat* clause prohibiting the child's removal from the jurisdiction without the permission of the court or the other parent. There is a split among U.S. courts on this issue. *Compare* *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003) (holding "that a *ne exeat* clause does not transmute access rights into rights of custody under the Convention"), *and* *Gonzalez v. Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002) (same), *and* *Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000), *with* *Furnes v. Reeves*, 362 F.3d 702, 716 (11th Cir. 2004) (finding that under Norwegian law the *ne exeat* clause is a right to custody under the Convention because of a broad definition of custody that includes "the right to determine the child's place of residence"), *and* *Croll*, 229 F.3d at 150-53 (Sotomayer, J., dissenting) (citing foreign countries that believe a *ne exeat* clause creates a right of custody).

32. Notes of Proceedings, *supra* note 19.

words ‘intolerable situation’ in Article 13(b) were meant to be a flexible concept that could address many of the harder cases.”<sup>33</sup> In particular, he explained that the phrase “intolerable situation” was added to the 1980 Convention to deal with exceptional cases where a court could not find a grave risk of harm to the child, but returning the child would have been absurd as a procedural matter. He further explained that the provision was prompted by a case in which a United Kingdom court was asked to return a child to California, even though everyone recognized that the California court would certainly allow the child’s relocation to the United Kingdom.<sup>34</sup>

The notes of the drafting session suggest that Mr. McClean’s description is accurate. A U.K. delegate stated:

[I]t was necessary to add the words “or otherwise place the child in an intolerable situation” since there were many situations not covered by the concept of “physical and psychological harm.” For example, where one spouse was subject to threats and violence at the hands of the other and forced to flee the matrimonial home, it could be argued that the child suffered no physical or psychological harm, although it was clearly exposed to an intolerable situation.<sup>35</sup>

This history has been largely ignored and has led to problems in the implementation of the Convention.<sup>36</sup>

The conversation at the Fifth Meeting of the Special Commission breathed life into the term “intolerable situation.” A report summarizing the proceedings noted that the experts “emphasi[z]ed the concept of an ‘intolerable situation[,]’ which was included in

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33. Weiner, *supra* note 27, at 292–93 (citing Notes of Proceedings, *supra* note 19).

34. *Id.*

35. See *Procès-verbal No 8*, 3 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION—CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ—ENLÈVEMENT D’ENFANTS 297, 302 (1982) (reporting the statement of Mr. Jones of the United Kingdom from the meeting of Tuesday morning, October 14, 1980). Mr. Leal of Canada thought that “the meeting should not concern itself unduly with such situations [as Mr. Jones described]. Social workers tended to take different views at different times concerning the rights and wrongs in these matters.” *Id.*; see also Shireen Fisher, *How Far Did the Conclusions and Recommendations of the Fifth Meeting of the Special Commission Advance the Interpretation of Article 13(1)(b), Grave Risk Defence?*, XII THE JUDGES’ NEWSL. 54, 56, 58 (2007) (citing both Mr. Jones’ statement in *Procès-verbal No 8* from the meeting of Tuesday morning, October 14, 1980, and Mr. Leal’s response). Judge Fisher astutely points out how much progress has been made in understanding domestic violence since Mr. Leal’s remarks. *Id.* at 58.

36. See generally Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 541–42 (2004) (arguing that return orders in cases of domestic violence pose extremely grave risks because the incidence and severity of abuse increase after the victim tries to separate from his or her abuser, despite a judge’s efforts or promises to protect the child or partner).



Article 13 of the Convention to address those situations where the return of a child would not necessarily create a grave risk, but where it would still be inappropriate to order the return.”<sup>37</sup> Consequently, although the delegates decided not to formally expand Article 13(b) to address these hard cases,<sup>38</sup> “[e]ven Switzerland was eventually satisfied that the difficult cases could be resolved on the basis of the current text, and that the case law could develop adequately to address these situations.”<sup>39</sup>

After the Fifth Meeting of the Special Commission, Switzerland took unilateral action to ensure that “intolerable situation” would, in fact, cover future situations like the *Wood* case, at least in Swiss courts.<sup>40</sup> On December 21, 2007, the Swiss Parliament passed a law that says an “intolerable situation” exists for purposes of Article 13(b) when, but not only when, the following criteria are met:

- a. placement with the parent who filed the application is manifestly not in the child’s best interests;
- b. the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or if this cannot reasonably be required from this parent; and
- c. placement in foster care is manifestly not in the child’s best interests.<sup>41</sup>

37. *Report on the Fifth Meeting, supra* note 22, ¶ 166.

38. The Fifth Meeting of the Special Commission to Review Operation of the Convention indicated that the Commission “reaffirms Recommendation 4.3 of the 2001 meeting of the Special Commission: The Article 13, paragraph 1b), ‘grave risk’ defen[s]e has generally been narrowly construed by courts in the Contracting States, and this is confirmed by the relatively small number of return applications which were refused on this basis.” See Hague Conference on Private International Law, October 30–November 9, 2006, *Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of 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*, § 1.4.2 (Nov. 2006) [hereinafter *Conclusions and Recommendations of the Fifth Meeting*].

39. Weiner, *supra* note 27, at 293.

40. Swiss Federal Act art. 5, Dec. 21, 2007, feuille fédérale suisse [FF] 36 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 162. Switzerland also presented another version of its proposal, in the form of a draft Protocol, to the Permanent Bureau. The Council on General Affairs and Policy, in April 2008, reserved for “future consideration of the feasibility of a Protocol containing auxiliary rules designed to improve the operation of the Convention.” See Bucher, *supra* note 2, at 145.

41. Swiss Federal Act art. 5, Dec. 21, 2007, feuille fédérale suisse [FF] 36 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 162.

The new Swiss Act has other important articles,<sup>42</sup> but most notable are the provisions that emphasize the child's autonomy and independent interest in the proceedings. For example, the Swiss Act ensures representation for the child. Article 9 states, "The court shall order that the child be represented and designate as a representative a person experienced in welfare and legal matters. This person may file applications and lodge appeals."<sup>43</sup> The Act also requires the court to "hear the child in an appropriate manner or appoint an expert to carry out this hearing unless the age of the child or another valid reason prevents this."<sup>44</sup> These provisions make concrete for all cases in Swiss courts, not just those involving European Union members, the requirement in *Brussels II bis*<sup>45</sup> that whenever an Article 12 or 13 defense is raised, "it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."<sup>46</sup>

The Swiss Act serves as a concrete reminder that States can minimize the negative consequences that the Hague Abduction Convention creates for particular children. The Swiss legislation should reduce the number of children negatively impacted, and it does so within the spirit and framework of the Convention. The Article now discusses the doctrinal and practical significance of these reforms for litigants in the United States, assuming courts in the United States were willing to incorporate these Swiss ideas into U.S. law and practice.

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42. The Swiss law has some other interesting provisions, although a discussion of those provisions is beyond the scope of this Article. For example, the Swiss Act gives considerable direction about the handling of these cases and wisely recommends that the Central Authority involve specialists with multidisciplinary knowledge to assist the family in reaching a voluntary resolution, employing conciliation and mediation if necessary. See Swiss Federal Act arts. 3, 4, Dec. 21, 2007, *feuille fédérale suisse* [FF] 35 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 162 (setting forth the instructions for the establishment of a network of experts and institutions to assist in conciliation and mediation); Bucher, *supra* note 2, at 145–46 (arguing that the use of experts and specialists will increase the number of harmonious resolutions that will better reflect the child's best interest).

43. Swiss Federal Act art. 9(3), Dec. 21, 2007, *feuille fédérale suisse* [FF] 37 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 163.

44. *Id.* art. 9(2).

45. Council Regulation 2201/2003, 2003 O.J. (L 338) 1 (EC) ("Brussels II bis"), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF>.

46. *Id.* at 6, ch. 2, art. 11(2).

## II. INTOLERABLE SITUATION

Courts in the United States should recognize that “intolerable situation” is a separate defense to the Convention’s remedy of return, and accept the Swiss formulation as a good articulation of one type of “intolerable situation.”<sup>47</sup>

### A. *The Conflation of Intolerable Situation and Grave Risk of Harm*

Courts in the United States have given virtually no attention to the term “intolerable situation.” A close review of cases in the United States decided since the beginning of 2006 and a summary review of older cases indicate that courts routinely analyze facts only under the “grave risk of physical or psychological harm” standard in Article 13(b). Courts either ignore the “intolerable situation” language or assume it is coextensive with the “grave risk of harm” language.<sup>48</sup> Courts in other countries sometimes exhibit a similar imprecision.<sup>49</sup> Such an interpretation is clearly wrong since the language of the provision plainly says that return is not required if “there is a grave

47. Courts in the United States could adopt the Swiss interpretation of the Convention in a manner that was consistent with the approach U.S. courts take to treaty interpretation. See generally Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 296–98 (2002) (arguing that the variety and flexibility of approaches to treaty interpretation in the U.S. permit consideration of subsequent practice by treaty partners).

48. See, e.g., *Diallo v. Bekemeyer*, No. 4:07CV1125SNL, 2007 WL 4593502, at \*11 (E.D. Mo. Dec. 28, 2007) (analyzing solely under Article 13(b)’s grave risk of harm provision “hotly disputed” testimony about domestic violence and evidence about stress in couple’s relationship due to petitioner’s marijuana use); *Van Driessch v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 841 (S.D. Tex. 2006) (naming only two defenses to a wrongful removal claim in case where there were allegations of domestic violence and drinking problems by the father: a grave risk of physical or psychological harm and a violation of principles relating to the protection of human rights or freedoms); *Baxter v. Baxter*, 423 F.3d 363, 373–74 (3d Cir. 2005) (reversing district court’s grant of the Article 13(b) defense based upon the environment in Australia being intolerable, finding the facts did not show grave risk of harm); *Blondin v. Dubois*, 19 F. Supp. 2d 123, 127 (S.D.N.Y. 1998), *vacated on separate grounds*, 189 F.3d 240 (2d Cir. 1999) (finding that return of children would violate Article 13(b), in part, because children were well-settled in the United States, and a return to France would cause mother and children to live with father, thereby presenting a grave risk of psychological harm or an intolerable situation without distinguishing between the two). But see *In re Marriage of Witherspoon*, 155 Cal. App. 4th 963, 967, 974 (Cal. Ct. App. 2007) (recognizing return of children to Germany, where they would either be in protective custody or in the custody of an allegedly suicidal mother with an alleged history of drinking and mental health issues, might be an “intolerable situation” in addition to a “grave risk of harm”).

49. See NIGEL LOWE, MARK EVERALL QC & MICHAEL NICHOLLS, *INTERNATIONAL MOVEMENT OF CHILDREN: LAW, PRACTICE AND PROCEDURE* 330 (2004) (“Although the ‘grave risk’ relates to the separate components, namely, physical harm, psychological harm and placing the child in an intolerable situation, in practice they are rarely pleaded or treated as distinct exceptions.”).

risk that [the child's] return would expose the child to physical or psychological harm *or otherwise* place the child in an intolerable situation.<sup>50</sup>

The aggregation of the discrete concepts in the United States is probably attributable to a report by the U.S. State Department prepared for the Senate Committee on Foreign Relations.<sup>51</sup> This report conflated the two provisions in Article 13(b) by using child sexual abuse as the example of an "intolerable situation."<sup>52</sup> Since child sexual abuse also poses a "grave risk of physical and psychological harm" to the child, the two concepts were made to look coterminous. The State Department said:

"[I]ntolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard [him or her] against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.<sup>53</sup>

Although the State Department's example might cause courts to assume "intolerable situation" and "grave risk of physical or psychological harm" are co-extensive, this interpretation is not required by the State Department's report. The report does not say that a "grave risk of physical or psychological harm" is required for an "intolerable situation," or that child sexual abuse is the only type of "intolerable situation." Rather, the language only suggests that the drafters believed a "grave risk of physical or psychological harm" was an "intolerable situation." It would be incorrect to assume that a "grave risk of physical or psychological harm" is required for an "intolerable situation," given the words "or otherwise" in the provision and the legislative history from the drafting of the Convention.

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50. Hague Abduction Convention, *supra* note 1, art. 13 (emphasis added).

51. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986) [hereinafter Legal Analysis].

52. *Id.* at 10510.

53. *Id.*

The State Department's analysis is generally persuasive authority,<sup>54</sup> and its report has been cited in numerous judicial opinions that blend the two exceptions together.<sup>55</sup> For example, in *Blondin v. Dubois*,<sup>56</sup> the U.S. Court of Appeals for the Second Circuit cited the State Department's report when discussing the "grave risk of harm" language, not the "intolerable situation" language.<sup>57</sup> It said:

[A]t one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13b; the latter do.<sup>58</sup>

In developing a spectrum for the "grave risk of harm" defense, the Second Circuit chose examples for one endpoint that had little, if any, connection to physical or psychological harm. Rather, these examples were offered during the Convention's drafting,<sup>59</sup> and were reiterated in the State Department report, to show situations that would not qualify as an "intolerable situation." The Second Circuit's conflation of the concepts did not affect its analysis in *Blondin* of

54. See *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008) (noting that although the State Department's analysis is not binding, it is entitled to deference (citing *Baxter v. Baxter*, 423 F.3d 363, 373 n.7 (3d Cir. 2005))).

55. A search on Westlaw "allcases" database found eighteen cases that cited the Report's language, in whole or in part (search conducted July 21, 2008 for the following: Intolerable w/s situation and "money is in short supply" and Hague).

56. 238 F.3d 153 (2d Cir. 2001).

57. *Id.* at 162.

58. *Id.*

59. The reference to economic or educational disadvantage first appeared in a report by the Special Commission that led to the initial drafting of a convention. See Elisa Pérez-Vera, *Report of the Special Commission*, 3 ACTES ET DOCUMENTS DE LA QUATORZIEME SESSION—CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE—ENLEVEMENT D'ENFANTS 173, 203, ¶ 97 (1982) [hereinafter Pérez-Vera, *Report of the Special Commission*]. A proposal by the U.S. delegation to tighten the Article 13(b) defense reiterated the reference. See *Procès-verbal No 2*, 3 ACTES ET DOCUMENTS DE LA QUATORZIEME SESSION—CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE—ENLEVEMENT D'ENFANTS 257, 263, at No. 12 (1982). While delegates agreed that economic and educational disadvantage should not trigger the defense, see, e.g., *id.* at 301 (noting the comment of Mr. Holub from the Czechoslovakia delegation), the U.S. proposal was nonetheless overwhelmingly defeated by a vote of 19 to 5, with 2 abstentions. See *id.* The Pérez-Vera Explanatory Report explains that it would be wrong to infer from the rejection of the U.S. proposal that the exceptions should receive a wide interpretation. See Elisa Pérez-Vera, *Explanatory Report*, 3 ACTES ET DOCUMENTS DE LA QUATORZIEME SESSION—CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE—ENLEVEMENT D'ENFANTS 426, 461, at ¶ 116 (1982) [hereinafter Pérez-Vera, *Explanatory Report*].

whether the child there faced a grave risk of harm,<sup>60</sup> but it contributed to the invisibility of the “intolerable situation” defense. This invisibility has substantive implications for other cases.

*B. The Substantive Implications of Disaggregating the Concepts*

The failure to disaggregate the “grave risk of harm” and “intolerable situation” defenses in Article 13(b) has unnecessarily limited the scope of the “intolerable situation” defense. Most obviously, something may create an “intolerable situation” for the child, yet not cause the child a “grave risk of physical or psychological harm.”<sup>61</sup> The separation of siblings is arguably such a situation.<sup>62</sup>

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60. An expert testified about the serious psychological harm the children might experience if they were returned to France, regardless of the French government’s ability to protect the children from violence. *Blondin*, 238 F.3d at 163. These were facts that “belong on the latter end of the spectrum.” *Id.* at 162.

61. See PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 151-54 (1998) (citing cases where the return of a child might not cause a “grave risk of harm,” yet still might meet the “intolerable situation” defense).

Some courts have read the provisions together to inform their view of what constitutes a “grave risk of harm.” These courts have said that the “grave risk of physical or psychological harm” must rise to a fairly serious level to be relevant. See, e.g., *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1260–61 (M.D. Fla. 2008) (citing *Thomson v. Thomson*, [1994] 119 D.L.R.4th 253, 286 (Can.) (explaining “otherwise” means that the harm must be “to a degree that also amounts to an intolerable situation”)); *Re A (A Minor) (Abduction)*, (1988) 1 Fam. 365, 372 (C.A.) (U.K.) (upholding judge’s order that returned child and holding that the risk of psychological harm must be “weighty” and the potential harm “substantial, and not trivial,” which was supported by the words “or otherwise place the child in an intolerable situation”).

This Article takes no position on whether this interpretation is correct or not. It certainly can be argued that the framers viewed any level of certain harm to a child to be sufficient to invoke the defense. It would have been easy enough to add the words “serious” or “life-threatening” before “physical or psychological harm,” which was not done. In fact, a restrictive interpretation arguably contradicts the Pérez-Vera report because the report says, without qualifying the type of harm or including the word “otherwise,” that the Convention’s remedy “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.” See Pérez-Vera, *Explanatory Report*, *supra* note 59, at 433, ¶ 29.

62. See *Re T (Abduction: Child’s Objections to Return)*, [2000] 2 Fam. 192, 192–93 (C.A.) (U.K.) (holding that the younger child of two siblings should not be returned to Spain alone because this would place the younger child in an “intolerable situation” given that “the two children had been through difficult times together; the younger child had been dependent on his sister and she had acted as his ‘little mother’ at times”); Cour de la Cassation [Cass. 6e civ.] [highest court of ordinary jurisdiction], June 22, 1999, Bull. Civ. 1999, N 209, M. Lemontey (Fr.). *But see* *Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953, 958 (E.D. Mich. 2001) (expressing reluctance to separate siblings, but ordering one child’s return pending determination of other child’s maturity defense, although the respondent may not have argued that separation of the siblings would be an intolerable situation); *In re L.L.*, (N.Y. Fam. Ct. May 22, 2000), available at <http://www.hcch.net/incadat/fullcase/0273.htm> (holding that the separation of an older child, who had reached

Similarly, removing a child from the child's primary caretaker and placing the child in foster care pending the resolution of a custody dispute may be an "intolerable situation," even though the arrangement may not pose a "grave risk of harm" to the child. Sending a child back to a war zone perhaps qualifies as another such example.<sup>63</sup> Imposing unnecessary and burdensome travel and litigation expenses on the family, when the court knows the abductor and child will ultimately be allowed to relocate, might also qualify.<sup>64</sup> These examples demonstrate that the scope of Article 13(b) is broader than merely "grave risk of harm."

Analyzing "intolerable situation" separately from "grave risk of harm" has another important substantive effect. It actually changes the likelihood that an Article 13(b) defense will be successful when the respondent argues that return will pose a "grave risk of harm." For a successful "grave risk of harm" defense, many courts now require both a grave risk of physical or psychological harm to the child and a lack of ameliorative measures that might reduce the risk associated with return.<sup>65</sup> Ameliorative measures can include undertakings by the left-behind parent, or assurances by the central authority or a court in the child's habitual residence.<sup>66</sup> Many judges consider ameliorative measures as part of the defense, although this judicially created amendment to Article 13(b) is now coming under

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maturity, from two other children did not pose an intolerable situation for the younger children should they be returned to their father).

63. *Cf.* *Silverman v. Silverman*, 338 F.3d 886, 900-01 (8th Cir. 2003) (holding Article 13(b) defense was not established since Israel is not a "zone of war" and the mother offered insufficient proof of how the fighting would directly put the children at grave risk of harm); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (saying, in dicta, that the Article 13(b) "grave risk of harm" would be made out if child is in imminent danger prior to resolution of the custody dispute because the requesting state is a war zone). *But cf.* *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996) (holding Article 13(b) defense was not established since Israel is not a "zone of war" because, in part, the city where the children lived was free from fighting, and businesses and schools are open).

64. *See supra* text accompanying notes 32-34.

65. *See, e.g.*, *Blondin v. Dubois*, 189 F.3d 240, 248-49 (2d Cir. 1999) (remanding the case to the district court to consider the availability of all possible ameliorative measures that could reduce the risk of harm from the child's repatriation, not just those requested in the petition).

66. *See, e.g.*, *Blondin v. Dubois*, 238 F.3d 153, 162 n.11 (2d Cir. 2001). Some courts believe that even if the court in the requesting state can give the child adequate protection, the court in the requested state must explore ameliorative measures in order to reduce the risk attending return. *See In re Adan*, 437 F.3d 381, 397 (3d Cir. 2006) (finding that even though Argentina's ability to provide protection was not in question, when ordering the return of a child to Argentina, the court should carefully tailor the order to include specific protections to ameliorate the risk of harm since the Argentinean authorities might not act immediately, including specifying in whose custody the child should be returned).

considerable criticism by some courts.<sup>67</sup> Where the requirement exists, it creates a tremendous obstacle for respondents. It is difficult to prove by clear and convincing evidence that another jurisdiction cannot, or will not, protect a child, especially if the jurisdiction has a foster care system. However, this obstacle becomes less formidable if the “intolerable situation” defense is considered along with the “grave risk of harm” defense. After all, the availability of foster care should not be an acceptable way to defeat the “grave risk of harm” defense if foster care itself poses an “intolerable situation” for the child. It is illogical to allow an “intolerable situation” to defeat the “grave risk of harm” defense.

The “intolerable situation” language also has another substantive implication for courts considering whether to return a child. The language heightens the importance of broad comprehensive undertakings. Undertakings have been used to mitigate “grave risks of physical or psychological harm.”<sup>68</sup> The U.S. State Department is currently trying to reign in courts’ use of undertakings by suggesting that undertakings have become too broad in scope and too common.<sup>69</sup> Yet broad and liberal undertakings appear entirely proper when one focuses on “intolerable situation,” and not simply “grave risk of harm.” Judge Singer’s opinion in the English case of *Re O (Child Abduction: Undertakings)* illustrates the appropriateness of the approach.<sup>70</sup> As to the “intolerable situation,” he stated:

In this case the children would find themselves in an intolerable situation if upon their return to Greece they were for any appreciable period to find themselves deprived of the continuity of

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67. There are many problems with the judicially created amendments to Article 13(b). Most notably, a judge might have difficulty determining whether the state of habitual residence can adequately address a risk because the law on the books is often different than the law as applied. *See, e.g.*, *Baran v. Beaty*, 526 F.3d 1340, 1346–48 (11th Cir. 2008) (declining to require that the responding parent demonstrate that the “child’s country of habitual residence is unable or unwilling to ameliorate the grave risk of harm which would otherwise accompany the child’s return” because the requirement is difficult to prove and was not contemplated by the Convention); *Van De Sande v. Van De Sande*, 431 F.3d 567, 57–71 (7th Cir. 2005) (holding that the rendering court must determine “that the children will in fact, and not just in legal theory, be protected if returned” to the abusing parent’s custody). In addition, protections may at times be inadequate because the harm stems from the children’s fear of return, regardless of the actual protections that exist. *See, e.g.*, *Danaipour v. McLarey*, 386 F.3d 289, 303–04 (1st Cir. 2004) (holding that returning the children to Sweden would definitely result in psychological harm to the children, “regardless of any possible conditions or undertakings imposed”); *Blondin*, 238 F.3d at 163 n.11 (finding that “the authorities, through no fault of their own, may not be able to give the children adequate protection”).

68. Weiner, *supra* note 27, at 295.

69. *Id.*

70. *Re O (Child Abduction: Undertakings)*, (1994) 2 Fam. 349, 362 (U.K.).



day-to-day care hitherto afforded them by their mother. So would it be if they returned to live in a home shared contrary to her wishes by the father, or visited by him irrespective of her opposition. And whereas for many families' financial constraints are inevitable . . . , were these children to be subject to a situation where the resources to finance their customary lifestyle risk being cut off, that would constitute a situation of hardship severe enough in the context of their experience to be described as intolerable. So would it be for them if their mother was unable effectively to function as their carer, as for instance if she were subject to the type of extreme emotional bombardment to which marital disharmony sometimes leads, or if she were subjected to penal sanction or civil penalty for her actions initially in removing the children wrongfully, or for the manner in which subsequently she had resisted an order for their return in these courts. In the local and social isolation in which the mother would find herself, so seemingly humdrum a facility as the use or the withholding of a car might well represent for the children, because of its direct and indirect impact on their daily lives, the difference between a tolerable situation and one that was not.<sup>71</sup>

To mitigate the grave risk of an intolerable situation that would have existed if the children were returned, Judge Singer insisted upon undertakings that would operate until a Greek court became seized of the matter.<sup>72</sup> The father agreed to extensive undertakings, including not to remove or seek to remove the children from the mother's care and control, to provide a car for the mother and to pay for the costs of its operation, to provide an apartment for the sole occupation of the mother and children, to pay all the children's school fees, and to pay the medical costs of the mother and children. Further undertakings included agreeing to pay for the mother's and children's return, not to institute or support any proceeding for the punishment of the mother related to the children's removal (whether criminal or civil), to pay the mother's maintenance, to pay the mother's reasonable legal costs for proceedings in Greece, and not to pester her.<sup>73</sup> After finding that these undertakings would be honored, or at least given some effect by the Greek courts if not honored, Judge Singer held that these undertakings alleviated the

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71. *Id.* at 349.

72. *See id.* at 362.

73. *Id.* at 354; *cf.* *Pantazatou v. Pantazatos*, No. FA 96713571, 1997 WL 614572, at \*1 (Conn. Super. Ct. Sept. 24, 1997) (imposing broad undertakings so mother could return to Greece with child and so child would not suffer psychological harm from separation).

risk that the children would find themselves in an “intolerable situation.”<sup>74</sup>

*C. The Scope of an Intolerable Situation Defense*

Before turning to the specifics of the Swiss proposal, it is helpful to think about the scope of the “intolerable situation” defense. After all, Judge Singer’s description of what would be intolerable, broad as it was, deserves some exploration. Moreover, one can only evaluate the Swiss proposal’s consistency with the Convention by understanding the scope of “intolerable situation” more generally.

“Intolerable situation” is not defined in the Convention, but the words “grave risk” and “intolerable” suggest that the defense is narrow.<sup>75</sup> The drafting history reveals that the phrase “intolerable situation” was supposed to evoke an objective sense that return was unwarranted.<sup>76</sup> The Special Commission rejected the word “unacceptable,” believing that an “unacceptable” situation required a highly subjective assessment.<sup>77</sup>

“Intolerable” is commonly understood to mean unbearable. The Oxford English Dictionary states that “intolerable” means “cannot be tolerated, borne, or put up with; unendurable, unbearable, insupportable, insufferable.”<sup>78</sup> Its looser meaning is “[e]xcessive, extreme, exceedingly great.”<sup>79</sup> Adopting what appears to be a combination of both the stricter and the looser meanings of the word, the Court of Appeal for Ontario defined “intolerable” as “an extreme situation, a situation that is unbearable; a situation too severe to be endured.”<sup>80</sup>

The child’s perspective may be relevant to an assessment of whether the defense exists, but the child need not believe a situation

74. *Re O*, (1994) 2 Fam. at 372.

75. This is confirmed by the Pérez-Vera Explanatory Report, which calls for all the defenses to be interpreted in a “restrictive fashion.” Pérez-Vera, *Explanatory Report*, *supra* note 59, at 434, ¶ 34.

76. *Id.* ¶ 33.

77. See Pérez-Vera, *Report of the Special Commission*, *supra* note 59, at 203, ¶ 97 (noting that the Special Commission “had in mind an objective case” and rejected replacing the word “intolerable” with “unacceptable” “because this latter word comprises an element of subjective evaluation which had to be avoided”).

78. 8 THE OXFORD ENGLISH DICTIONARY 10 (2d ed. 1989).

79. *Id.*

80. *Jabbaz v. Mouammar*, [2003] 171 O.A.C. 102, 109 (Ont. Ct. App.) (Can.); see also *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619, 639 (H.L.) (appeal taken from Eng.) (U.K.) (“‘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.’”).

is intolerable for it to be so.<sup>81</sup> A child may be unaware of, or not care about, grave risks that adults would agree exposed the child to an “intolerable situation.” Cases involving an infant, for example, might fall into this category. Nor is the child’s view that something is intolerable determinative; a child may find an experience “intolerable” even though reasonable adults would disagree.<sup>82</sup> For example, the child may find it unbearable to leave a school where the child has developed many close friends, although adults might conclude that the benefits of departure outweigh the disadvantages and that the child’s angst will be transitory. Yet, at some point, the child’s views, even if initially unconvincing to reasonable adults, may change the adults’ views. The duration and depth of the child’s unhappiness (or likely unhappiness) should cause a reassessment of whether the situation is, in fact, intolerable. Few adults can stand to see a child in utter despair. This objective approach, which takes account of the child’s feelings without making them determinative, aligns with the drafters’ desire to protect individual children from intolerable situations while at the same time limiting the breadth of the defense.

A situation can be physically, mentally, or morally “intolerable.”<sup>83</sup> It seems likely that the “intolerable situation” defense encompasses a morally intolerable situation. After all, the “grave risk of harm” provision already addresses physical and mental harm to a child, and “intolerable situation” would be surplusage if its meaning were the same as “grave risk of physical or psychological harm.”<sup>84</sup> In addition, the Special Commission that proposed the Convention “intended [the term psychological harm] to cover both the mental harm and a certain aspect of the moral harm, but it . . . knowingly avoided the latter expression which is too vague and which could even be interpreted as encompassing religious convictions.”<sup>85</sup> The same intention likely also exists with respect to the phrase “intolerable situation,” if for no other reason than moral harm fits equally well, if not better, with that defense than with the defense of psychological harm.

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81. Cf. *In re D*, [2007] 1 A.C. at 641–43 (discussing the importance of listening to children and describing the difference between taking account of a child’s view and doing what the child wants).

82. See *supra* note 81 and accompanying text.

83. 8 THE OXFORD ENGLISH DICTIONARY 10 (2d ed. 1989).

84. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.6, at 230–31, 237 (7th ed. 2007) (provisions in a statute should be interpreted so as not to render any of the terms surplusage).

85. See Pérez-Vera, *Report of the Special Commission*, *supra* note 59, at 203.

Examples given by the drafters, as well as subsequent case law, also support the conclusion that an “intolerable situation” is a morally intolerable situation. The fact patterns that give rise to the claim of an “intolerable situation” are all broadly similar: the benefits of return seem dubious for a particular child. Yet the outcomes vary depending upon the type, degree, and likelihood of suffering the child might experience. For example, “the Special Commission thought that the exception would not apply if the child’s return was thought to be prejudicial to his economic or educational future.”<sup>86</sup> An Ontario appellate court held that a left-behind mother’s uncertain immigration status in the United States did not make the return of the child to the United States an “intolerable situation,” especially since she would only be deported, if at all, to Canada.<sup>87</sup> On the other hand, an Israeli court held that the inability of a mother to support her children in the child’s habitual residence placed them in an “intolerable situation.”<sup>88</sup> A court in England ruled similarly.<sup>89</sup> The cases reflect an assessment of what sacrifices society can morally expect from an individual child for purposes of benefiting the greater good, e.g., generally deterring abduction. This highly fact-dependent assessment is nothing more than a question of morality with a

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86. *Id.* at 203, ¶ 97.

87. *Jabbaz v. Mouammar*, [2003] 171 O.A.C. 102, 110 (Ont. Ct. App.) (Can.).

88. Family Appeal 621/04, D.Y. v. D.R., in The Hague Conference on Private International Law, October 30–November 9, 2006, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prelim. Doc. No. 2, at 200 (Oct. 2006), available at [http://www.hcch.net/upload/wop/abd\\_pd02efs2006.pdf](http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf) [hereinafter *Collated Responses*].

89. *In re J* [Abduction: Acquiring Custody Rights By Caring for Child], [2005] 2 FLR 791. The court in *In re J* found that the petitioner did not have rights of custody. *Id.* ¶ 25. In the alternative, the court held that returning the child would place the child in an intolerable situation. *Id.* ¶ 30. Both parents were English, and returning the child to Greece would mean that the parties would be litigating in a foreign language that neither spoke fluently. *Id.* ¶¶ 30, 31. During the pendency of the Greek proceedings, which could take considerable time, the mother would live in Greece without “a degree of comfort.” *Id.* ¶ 32. The mother would probably have to rely upon social security, all the while unable to work to pay off a very large credit card debt because her housing would be remote and she would not have a workable car. *Id.*

There are other cases where the defense has been established. One author reports, “[a] court in Ireland refused to return abducted children to their father because it felt that the father’s inability to manage money, which in turn caused the family’s eviction nine times, was an ‘intolerable situation.’” A French court refused to return a child to Los Angeles based on the belief that the environment is polluted and therefore dangerous to the child’s health. Similarly, a German court refused return of children to England since German is not spoken in English schools or in the children’s home.” Lisa Nakdai, Note, *It’s 10 P.M., Do You Know Where Your Children Are?*, 40 FAM. CT. REV. 251, 255 (2002) (citations omitted).

utilitarian emphasis.<sup>90</sup> The “intolerable situation” defense is established at the point that the disadvantage faced by an individual child outweighs the potential benefits all children receive from deterring international abduction. The drafters hoped to set a high enough threshold for intolerability so that observers would agree that the type and degree of hardship were not justified in a particular case.<sup>91</sup>

The Swiss formulation of “intolerable situation” identifies a situation that most observers would find morally intolerable. It is a good formulation because the defense has as its centerpiece the requirement that the child will be separated from his or her primary caregiver, an event that is likely to be difficult, if not unbearable, for both the child and the parent, and that has identifiable risks for the child.<sup>92</sup> Since placement with the left-behind parent also has to be manifestly not in the child’s best interest, the left-behind parent has less moral claim to the child’s return. The abductor must also have a morally defensible reason for not returning with the child. Consequently, the Swiss formulation has intuitive appeal. Nonetheless, whether a grave risk of a morally “intolerable situation” exists ultimately depends upon the particular facts of the case, and it

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90. Professor Graglia has a succinct and helpful description of utilitarian morality:

The usual distinction is between a principle-based morality, as advocated by Immanuel Kant, and utilitarianism, a morality based on consequences. . . .

Utilitarianism maintains that the rightness or wrongness of conduct depends on its consequences. To a secularist claiming no aid from the supernatural, the above assertion seems self-evident. How is it possible to judge an action except by its consequences? Kantian tradition answers by judging an action’s inherent justice or rightness, which should somehow be determined apart from and regardless of consequences. “Do justice,” the Kantian view advises, “though the heavens fall”—that is, do what is inherently right, even though it brings about an unimaginable disaster. Surely that has to be wrong: If doing justice will bring about an unimaginable disaster, we must rethink our idea of justice.

Lino A. Graglia, *Government Promotion of Moral Issues: Gambling, Smoking, and Advertising*, 31 HARV. J.L. & PUB. POL’Y 69, 69 (2008) (citation omitted).

91. In this sense, the defense differs from the rejected public policy defense because that defense relied solely on the public policy of the requested state. Weiner, *Strengthening Article 20*, *supra* note 29, at 708–10.

92. See Swiss Federal Act art. 5, Dec. 21, 2007, feuille fédérale suisse [FF] 36 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 162–63 (outlining situations, such as placement in foster care, that are intolerable situations); cf. Carol Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons for Relocation Law*, 40 FAM. L.Q. 281, 285–86 (2006) (citing research indicating that a child’s relationship with his or her mother during infancy and early childhood significantly affects his or her ability to develop and sustain intimate relationships during the child’s lifetime). See generally M. Rutter, *Maternal Deprivation Reassessed*, in IV CHILD WELFARE: MAJOR THEMES IN HEALTH AND SOCIAL WELFARE 162 (Nick Frost ed., 2005) (canvassing issues and understandings since Bowlby’s 1951 review of the field).

is impossible to say categorically that all fact patterns satisfying the Swiss criteria should qualify for the defense. For example, an assessment of moral intolerability may require determining whether the primary caretaker became such solely by virtue of the abduction.

*D. The Use of the Swiss Formulation for Hard Cases*

The benefit of the “intolerable situation” defense, and the Swiss formulation, is quite evident in one of those situations for which the Swiss law was designed. It helps address the problem of primary caretakers who flee with their children to avoid domestic violence. These abductors sometimes have trouble defeating an application for their children’s return even though the courts acknowledge the violence in their lives.<sup>93</sup> Some courts are unable to appreciate the connection between domestic violence against the parent and the physical and psychological well-being of the child.<sup>94</sup> Other courts do not understand that a situation can be dangerous even if the physical violence is only “sporadic.”<sup>95</sup> Fortunately, courts in the United States are becoming increasingly sensitive to the relevancy and sufficiency of

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93. See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 654–58 (2000) (noting cases in which violence against an adult was held not to create a “grave risk of harm” for a child and cases in which courts defer to the returning jurisdiction to provide adequate protection).

94. See *id.*; Merle H. Weiner, *Strengthening Article 20*, *supra* note 29, at 717–18; see, e.g., *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at \*8 (E.D.N.Y. May 7, 2008) (stating that mother’s allegations that father was physically violent toward her and abused alcohol were irrelevant because there was no evidence that father ever abused child or was likely to do so); *Nunez v. Ramirez*, No. CV 07-01205-PHX-EHC, 2008 WL 898658, at \*5 (D. Ariz. Mar. 28, 2008) (finding allegations that parties had intense arguments and that father allegedly struck the mother, including once in front of their child, to be irrelevant to whether the children would be placed in an intolerable situation or face a grave risk of harm); *Diallo v. Bekemeyer*, No. 4:07CV1125SNL, 2007 WL 4593502, at \*11 (E.D. Mo. Dec. 28, 2007) (finding contested evidence of domestic violence against the mother and evidence of stress in the relationship to be irrelevant to Article 13(b) because there was no evidence that petitioner directed any violence towards the children); *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 828, 847 (S.D. Tex. 2006) (“[A]lthough Smith alleges Van Driessche was abusive to her, she does not allege he was abusive to [the child].”); *In re A.V.P.G. and C.C.P.G.*, 251 S.W.3d 117, 128 (Tex. Ct. App. 2008) (“Even with allegations of physical abuse to the spouse, grave risk is not proven when there is no evidence that the non-abducting party physically abused the children.”).

95. Some courts still discount domestic violence because it is “sporadic.” See, e.g., *Arguelles v. Vazquez*, No. 08-2030-CM, 2008 WL 913325, at \*13-\*14 (D. Kan. Mar. 17, 2008) (stating the child witnessing a few instances of violence not directed toward her did not place her at risk); *McManus v. McManus*, 354 F. Supp. 2d 62, 70 & n.5 (D. Mass. 2005) (noting that “[e]vidence of real but sporadic or isolated incidents of physical abuse, or of some limited incidents aimed at persons other than the child at issue, have not been found sufficient to support application of the ‘grave risk’ exception[.]” and finding that respondent’s alleged violence “appears isolated and remote in time, and importantly, was allegedly directed at [the mother] and not the children who are the subject of the petition for return”).

domestic violence for the Article 13(b) “grave risk of harm” defense,<sup>96</sup> although there is still considerable resistance.<sup>97</sup> The district court’s

96. Numerous courts in the United States have recognized that physical abuse perpetuated against the abductor is relevant to the Article 13(b) defense, even absent physical abuse to the children. For cases where courts have granted the Article 13(b) defense based upon allegations of violence toward the mother with minimal, if any, direct abuse of the children, see, e.g., *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008) (determining that the father’s previous violent acts contributed to the grave risk of harm if the child were returned to the father); *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000) (finding the father’s continued disregard of court orders suggested that he would violate any undertakings he made to ensure the children’s safety); *Matovski v. Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 2600862, at \*3 (S.D.N.Y. Aug. 31, 2007) (pointing to a doctor’s conclusion that a risk of future abuse to the children existed because of repeated abuse towards the mother); *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 409 (E.D.N.Y. 2005) (despite the fact that one of the three children was never physically abused and not suffering post-traumatic stress disorder, court found a grave risk of physical and psychological harm if that child were returned); *Dimer v. Dimer*, No. 99-2-03610-7SEA (Wash. Super. Ct. July 29, 1999), available at <http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=218&lng=1> (granting Article 13(b) defense because of violence perpetrated against mother).

In some cases, the respondent has alleged that the petitioner committed acts of violence against both the child and mother, and the courts view the violence in the family as cumulative. See, e.g., *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007); *In re Adan*, 437 F.3d 381, 396 n.6 (3d Cir. 2006); *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005); *Van de Sande v. Van de Sande*, No. 05 CV 1182, 2008 WL 239150, at \*10 (N.D. Ill. Jan. 29, 2008); *Elyashiv*, 353 F. Supp. 2d at 408; *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 JG, 2005 WL 67094, at \*3 (E.D.N.Y. Jan. 13, 2005); *Blondin v. DuBois*, 19 F. Supp. 2d 123, 127 (S.D.N.Y. 1998).

97. While more and more courts recognize that adult domestic violence is relevant to the “grave risk of harm defense,” some courts still dismiss the violence because it is only “sporadic.” See *supra* note 95. These courts do not understand that “sporadic” violence needs to be contextualized within the parties’ relationship before it can be discounted. Some batterers exercise substantial power and control short of physical violence, and the use of occasional battery reinforces their ability to maintain power and control through fear, humiliation, and other means. See, e.g., Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward A New Conceptualization*, 52 SEX ROLES 743, 743 (2005) (explaining coercive control and the various acts that contribute to it); Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985–86 (1995) (indicating that “physical violence may not be the most significant factor about most battering relationships” and that “sporadic” violence can reinforce other methods of control). A court cannot make an assessment of dangerousness by merely characterizing the violence as sporadic, without considering all of the abusive behavior. Some batterers who exercise only sporadic violence can be quite dangerous. See, e.g., Stark, *supra*, at 1017–18 (noting examples where the overall violence level in the relationship has been low). The danger can be to the child. Stark states:

Although all battering relationships present the serious risk that the batterer will hurt the mother by hurting her child, particularly when the violence level is high, it is most convincing as a post-separation strategy when the overall level of violence in the relationship has been low (for example, where possible means of control such as withdrawal or absence from the home have been dominant). Signs of tangential spouse abuse include little interest in parenting prior to the divorce, the Father insisting on a protracted custody fight despite little chance of success, the Father exhibiting a highly defensive personal style, lacking empathy for mother or children, and being unwilling to accept

opinions in *Adan v. Avans*, discussed below, demonstrate the lingering reluctance of some courts to regard domestic violence allegations as relevant to the “grave risk of harm” defense, and more importantly for purposes of this Article, their disregard of the “intolerable situation” language.<sup>98</sup> The Swiss formulation of

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responsibility for any violence, control tactics, substance use, or other problems. Another important sign is the children’s fear of their father.

*Id.*

The coercion and control in the relationship are also relevant to whether returning the child poses a grave risk that the children will be placed in an “intolerable situation.” The absence of continuous physical violence says nothing about the harm to the victim from the controlling behavior and the consequent effect on the children. *Cf.* Leslie A. Sackett & Daniel G. Saunders, *The Impact of Different Forms of Psychological Abuse on Battered Women*, 14 VIOLENCE & VICTIMS 105, 113 (1999) (finding “psychological abuse was a much stronger predictor of fear than physical abuse”); *id.* at 105 (“72% of the battered women [in one study] reported that emotional abuse had a more severe impact than physical abuse . . . .”) (citing D.R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOL. 107 (1990)); *see also* Lauren Bennett, Lisa Goodman & Mary Ann Dutton, *Risk Assessment Among Batterers Arrested for Domestic Assault: The Salience of Psychological Abuse*, 6 VIOLENCE AGAINST WOMEN 1190, 1191, 1199–2000 (2000) (indicating that psychological abuse had a strong predictive power of reabuse within three months of charges for misdemeanor domestic violence).

For an example of how courts miss the significance of coercion and control, see *Arguelles*, 2008 WL 913325, at \*3, \*4, \*14 (discounting significance of allegations related to power and control, including threat that petitioner was “capable of killing” if respondent ever left him, suicidal acts by petitioner, and admissions that he “felt like hurting his wife,” because acts were “limited” and not directed at child). *But see* *Matovski v. Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 2600862, at \*3 (S.D.N.Y. Aug. 31, 2007) (finding “petitioner repeatedly, and for a period of years, inflicted upon respondent physical, verbal and psychological abuse” and concluding petitioner “was very controlling and respondent was afraid to disobey him for fear of retribution”).

The U.S. Court of Appeals for the Sixth Circuit recently addressed the range of physical violence that exists in relationships and categorized it for purposes of the Article 13(b) defense. *See* *Simcox v. Simcox*, 511 F.3d 594, 607–08 (6th Cir. 2007) (suggesting three broad categories of abusive situations exist: (1) the abuse is relatively minor, so the 13(b) defense most likely will not be met; (2) the abuse is “clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect,” so 13(b) defense most likely will be granted; and (3) the abuse falls somewhere between these two extremes, so whether a 13(b) defense is granted is highly fact-specific). This categorization has already been cited by other courts. *See, e.g.*, *Giuseppe v. Giuseppe*, No. 07-CV-15240, 2008 U.S. Dist. LEXIS 29785, at \*11–13 (E.D. Mich. Apr. 11, 2008). Notably, the Sixth Circuit did *not* say that relatively minor abuse cannot establish the defense, only that it is “unlikely.” *Simcox*, 511 F.3d at 607. For cases “in the middle” of the violence spectrum, the court noted the “fact-intensive inquiry,” “including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.” *Simcox*, 511 F.3d at 607–08. To accomplish this inquiry, courts must look at the nature of the abuse, which goes beyond considering the number of times a party has been hit.

98. *See generally* *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 2212711 (D.N.J. July 30, 2007), *rev’d*, *In re Adan*, 2008 WL 4368881 (3d Cir. Sept. 22, 2008); *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 1850910 (D.N.J. June 25, 2007) (deciding case on remand), *rev’d*, *In re Adan*, 2008 WL 4368881 (3d Cir. Sept. 22, 2008). To be clear, some courts abroad have considered it to be an “intolerable situation” if the mother faced possible domestic violence upon return. *See, e.g.*, *PF v. MF*, [1992]



“intolerable situation” seems particularly apt and helpful for respondents and children who face a situation like that alleged in *Adan*.

*E. An Example: Adan v. Avans*

The district court’s decisions in *Adan v. Avans*,<sup>99</sup> both before and after the Third Circuit’s first appellate decision in the case, illustrate the difficulties some respondents still face when they allege they are victims of domestic violence and try to invoke the Article 13(b) “grave risk of harm” defense.

1. *The facts*

*Adan* involved a naturalized U.S. citizen mother (Avans), who fled to the United States with her daughter.<sup>100</sup> The father (Adan) had abused the mother in Argentina, and the mother alleged that he had also abused their daughter, Arianna.<sup>101</sup> The mother claimed that the Argentinean police and courts did not protect her.<sup>102</sup> The father invoked the Hague Convention to obtain Arianna’s return to Argentina.<sup>103</sup>

At the initial hearing, the mother alleged very serious domestic violence, claiming that the father was violent to her over the course of their relationship.<sup>104</sup> Among other things, he allegedly “locked her in his bedroom, beat her, threatened her with further harm if she ever left him[,]” “tried to suffocate her with a pillow,” threatened “to drown the child if Avans ever left him,” “pushed her while holding [the child,]” screamed in the infant’s ear until Avans agreed to return to him, threatened Avans and the child with a gun, chained the gate of Avans’s home shut so she could not leave, and raped her in front of their daughter.<sup>105</sup> Avans also alleged that Adan sexually abused their daughter. She claimed that she found a pubic hair on the three-year-old’s vagina, that her daughter said that she bathed with her father and that he “loves [her] with his tongue” (i.e., kissed her by putting his tongue inside her mouth), and that the father “was

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2 I.R. 390 (Ir.), available at <http://www.hcch.net/incadat/fullcase/0102.htm> (holding the return of children to father would be an “intolerable situation” where the father was violent toward the mother and one of the children, and the father financially neglected the children).

99. *Adan*, 2007 WL 1850910; *Adan*, 2007 WL 2212711.

100. *In re Adan*, 437 F.3d 381 (3d Cir. 2006).

101. *Id.* at 386–87.

102. *Id.* at 386.

103. *Id.* at 385.

104. *Id.* at 385–87.

105. *Id.* at 385–86.

putting something hot in her butt' that hurt."<sup>106</sup> The mother claimed that the Argentinean police and court system did nothing to help her because the father paid bribes to the police and judges.<sup>107</sup> She claimed, for example, that the police did not enforce her temporary restraining order when the father allegedly violated it.<sup>108</sup> The mother took her daughter to the United States after that incident, although the Argentinean trial court had not yet adjudicated her allegations against the father.<sup>109</sup>

The district court issued a one-sentence order granting the father's petition for his daughter's return.<sup>110</sup> The court's oral comments revealed that the court did not believe the allegations amounted to a "grave risk,"<sup>111</sup> and even if they did, the child should be returned because "this matter is best determined by Argentinean courts because it is all interwoven with a struggle . . . for custody and determination of domestic abuse, which is not the purpose of the Convention."<sup>112</sup>

On appeal, the U.S. Court of Appeals for the Third Circuit vacated the district court's order and remanded the case. The Third Circuit thought that the allegations, if true, would give rise to a successful Article 13 defense.<sup>113</sup> The appellate court could not determine, however, whether the evidence of child abuse was clear and convincing and whether the Argentinean courts were incapable or unwilling to give the child adequate protection.<sup>114</sup> The Third Circuit criticized the district court for ignoring "large portions of [the mother's] testimony" and adopting "an overly compartmentalized view of child abuse."<sup>115</sup> For example, the trial court ignored Avans's testimony regarding the child's baths with her father and the father's screaming in the child's ear.<sup>116</sup> The appellate court noted that Adan denied sexually assaulting his daughter, but "he did not specifically deny particular acts of abuse."<sup>117</sup> The Third Circuit instructed the district court to consider the totality of the circumstances on remand,

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106. *Id.* at 386.

107. *Id.*

108. *Id.*

109. *Id.* at 386.

110. *Id.* at 387.

111. *Id.* at 388.

112. *Id.*

113. *Id.* at 395.

114. *Id.*

115. *Id.* at 396.

116. *Id.*

117. *Id.* at 386.

for this approach might make “innocent”<sup>118</sup> acts look more ominous.<sup>119</sup>

The Third Circuit also focused on the domestic violence allegations. It found those allegations independently significant, even without taking account of three pieces of evidence that Avans tried to use to supplement the record on appeal.<sup>120</sup> The appellate court noted the father’s denials, but again commented that “he did not specifically deny particular acts of abuse” at the hearing.<sup>121</sup> The Third Circuit criticized the lower court for its lack of findings on specific allegations, such as “the allegations that Adan abused Avans and raped her in front of Arianna.”<sup>122</sup> Also, the district court “did not reject Avans’s testimony that she had been repeatedly abused, raped, and threatened with a gun.”<sup>123</sup>

The Third Circuit held that the evidence of domestic violence, standing alone, was sufficient to establish a “grave risk of harm” to Arianna:

[T]he evidence of Adan’s abuse of Avans is relevant to the District Court’s determination of whether returning Arianna to Argentina would expose the child to a grave risk of harm. See, e.g., *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Circuit) (holding that such evidence is relevant when considering whether a grave risk of harm to a child exists because ‘credible social science literature establishes that serial spousal abusers are also likely to be child abusers’ and ‘both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser’).<sup>124</sup>

118. *Id.* at 396–97. For example, the trial court said that the statement that he “love[d] [her] with his tongue” is “not significant because . . . it’s not unusual in this country at least for parents and grandparents to at times in playing with young toddlers to kiss them with tongues on the cheeks and then sometimes the tongue may have gone too far.” *Id.* at 388.

119. See *id.* at 397 (suggesting that although the manner of kissing the child might on its own seem innocent, “when coupled with [the mother’s other] reports . . . such an incident is far less susceptible to innocent explanation”).

120. The evidence was the following: (1) documents that showed Avans now had a permanent restraining order against Adan in New Jersey because he apparently repeatedly violated the temporary order; (2) an e-mail from Adan to Avans in 2004 that said, “when I see you I think I will rape you totally”; and (3) another e-mail from 2004 that said, “now that my mind is clear from drugs and from alcohol I can realize all the time I lost and all the damages I caused you, (and [Arianna]).” *Id.* at 388.

121. *Id.* at 386.

122. *Id.* at 388.

123. *Id.* at 396. In fact, the district court “discounted” the gun incident, which it thought was relevant to proving a “grave risk of harm” to the child, because it happened approximately twenty-three months before Avans removed the child from Argentina. *Id.* at 388.

124. *Id.* at 396 n.6.

By citing *Walsh*, the Third Circuit acknowledged that domestic violence poses risks to children in addition to the risk that the perpetrator will also abuse the child. *Walsh* cited state and federal laws and cases that explicitly discussed the potential for children to be physically harmed by violence that is directed at the adult victim, as well as the potential for emotional harm from witnessing the abuse.<sup>125</sup>

The Third Circuit also addressed Argentina's ability to protect the mother and child, on the theory that the availability of such protection defeats an Article 13(b) defense.<sup>126</sup> The Third Circuit noted that the district court had not sufficiently analyzed Argentina's ability to protect Avans and her daughter.<sup>127</sup>

Avans testified about her numerous experiences with Argentine law enforcement when police officers refused to offer her any assistance, and the fact that Adan violated a temporary restraining order issued by an Argentine court after the police refused to enforce it. Adan did not contest these allegations in his testimony, and the District Court did not discount Avans' testimony. . . . It therefore failed to consider and reject the majority of Avans's proof related to the inaction of Argentine courts and police.<sup>128</sup>

On remand, Avans lost again.<sup>129</sup> Judge Walls, the judge who initially ordered the return of the child, again ordered that the child be returned.<sup>130</sup> This time, however, the court made detailed findings of fact. Although the court believed that Adan committed domestic violence,<sup>131</sup> it thought that Avans exaggerated the violence.<sup>132</sup> It discounted Avans's allegations because she added new allegations of

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125. See *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (citing, *inter alia*, H.R. Con. Res. 172, 101st Cong., 104 Stat. 182, 5182 (1990) that says "[w]hereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent," and *Custody of Vaughn*, 664 N.E.2d 434, 439 (Mass. 1996), where the court noted, "[i]t is well documented that witnessing domestic violence, as well as being one of its victims, has a profound impact on children. . . . There are significant reported psychological problems in children who witness domestic violence.") (citation omitted).

126. *In re Adan*, 437 F.3d at 395.

127. *Id.* at 396.

128. *Id.* at 397-98.

129. *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 1850910, at \*14 (D.N.J. June 25, 2007), *rev'd*, *In re Adan*, 544 F.3d 542 (3d Cir. 2008).

130. *Id.*

131. The district court found "that Avans was the subject of domestic abuse from time to time by the Petitioner and that what she alleges, in the main, is plausible." *Id.* at \*11. This included a finding that "[a]t times, [Adan] resorted to using force." *Id.*

132. The court refused to accept all of Avans's allegations and did not find that the abuse was "chronic and pervasive." *Id.* The court thought Avans "exaggerated and embellished the abuse in order to prevail in court." *Id.*

violence on remand<sup>133</sup> and returned to Adan three times.<sup>134</sup> It also did not believe that the domestic violence made the allegations of child sexual abuse more probable;<sup>135</sup> in fact, it found that Avans had not proven the alleged child abuse by clear and convincing evidence.<sup>136</sup> The court never considered whether the domestic violence alone created any risks to the child other than the alleged sexual abuse. The court also concluded that Avans failed to establish by clear and convincing evidence that “Argentine authorities are unable or unwilling to protect her and her child.”<sup>137</sup> The court believed that the particular judge scheduled to hear the matter in Argentina was not corrupt.<sup>138</sup> The Argentinean judge had assured the U.S. court that the child would not be returned to her father pending the hearing, but would be placed in foster care.<sup>139</sup> Apparently, the child was to be taken into protective custody by a social worker upon arrival in Argentina,<sup>140</sup> even though the mother might return to Argentina also.<sup>141</sup>

The court denied Avans’s request that it reconsider its decision.<sup>142</sup> Avans claimed the court “committed clear error in finding that the child had not been sexually abused without ordering an independent evaluation of [the child] to determine as much.”<sup>143</sup> In response, the court chastised Avans for suggesting that it should have ordered an examination for the child, noting that the court had no obligation to *sua sponte* order an examination and that neither party had requested it.<sup>144</sup> The court also noted that Avans could have, but did not, put in her own evidence on this point.<sup>145</sup> The court reiterated that even if

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133. See *id.* (“For example, Avans makes far greater allegations of abuse by Adan now than in her earlier June 2005 testimony without any explanation why she omitted such earlier. . . . This Court is not clearly convinced of the believability of such ‘latter’ allegations.”).

134. The court also inferred that the abuse was not as bad as alleged because “Avans has returned to Adan on at least three different occasions over the course of their relationship.” *Id.*

135. *Id.* at \*12.

136. *Id.* at \*13.

137. *Id.*

138. See *id.* at \*14 (arguing that one could just as easily read news stories that highlight potential shortcomings in the United States court system and further explaining that “no specific evidence has been presented to suggest that the proceeding which will take places in San Martin . . . will be anything other than fair and appropriate”).

139. *Id.* at \*13.

140. *Id.* at \*14.

141. *Id.* at \*6.

142. *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 2212711, at \*7 (D.N.J. July 30, 2007).

143. *Id.* at \*2.

144. See *id.* at \*2–3.

145. *Id.* at \*3.

sexual abuse were found, the Argentinean court system could protect the child.<sup>146</sup> Avans also wanted the court to consider post-hearing evidence that the petitioner was convicted of contempt for violating the restraining order.<sup>147</sup> The court held that the contempt conviction was irrelevant because the event occurred after the hearing on remand.<sup>148</sup> The court put an exclamation mark at the end of its decision: it refused to stay its decision pending appeal.<sup>149</sup>

The Third Circuit did, however, grant a stay.<sup>150</sup> The case was fully briefed and argued orally. Avans was permitted to supplement the appellate record with a psychological report detailing an examination of Arianna that was conducted after the district court's order was issued.<sup>151</sup>

On the day of oral argument, the Third Circuit, in an amazing show of resolve, ruled from the bench that there was a grave risk of harm as a matter of law. It reversed the trial court and stated that a judgment order be entered "yesterday" denying the father's petition.<sup>152</sup> The panel focused on a report from Department of Youth and Family Services that detailed the risks of physical and psychological harm that Arianna would face if she were returned, as well as other evidence.<sup>153</sup> The Court of Appeals expressed dismay that the district court gave no consideration to various pieces of evidence suggesting psychological and physical harm before making its ruling.<sup>154</sup> It is unclear whether the Third Circuit will issue a written opinion, but hopefully one will be forthcoming because lower courts still need guidance on the "grave risk of harm" component of Article 13(b).

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146. See *id.* at \*4 (explaining that "a ninety-day restraining order [against Adan] was granted" to Avans leading up to the trial in Argentina and that there was no evidence that the Argentinean courts could not appropriately protect the child).

147. *Id.*

148. See *id.* (stating that a motion to reconsider is used to bring information to the court's attention that existed at the time of the hearing and that may have changed the court's decision; it is not to be used to extend the time for litigating a matter).

149. *Id.* at \*7.

150. E-mail from Daniel Mulvihill to Merle H. Weiner, July 21, 2008 (on file with author).

151. *Id.*

152. E-mail from Leonard Evans to Jeffrey Edleson and Erika Sussman, Sept. 23, 2008 (on file with author).

153. *Id.*; Bob Braun, *Court Spares Girl, 8, From Deportation*, Newark Star Ledger, Sept. 23, 2008, [http://blog.nj.com/njv\\_bob\\_braun/2008/09/court\\_spares\\_girl\\_8\\_from\\_depor.html](http://blog.nj.com/njv_bob_braun/2008/09/court_spares_girl_8_from_depor.html) (last visited Nov. 10, 2008).

154. E-mail from Evans, *supra* note 152. Braun reports that Judge Garth cited twelve pieces of evidence regarding the abuse of the mother and child that the judge had improperly excluded. See Braun, *supra* note 153.

2. *Was the situation in Adan an “intolerable situation”?*

It is easy to find fault with the district court’s analysis in *Adan v. Avans*. Among other things, the court’s reasons for finding that Avans exaggerated the domestic violence are subject to criticism.<sup>155</sup>

155. The court was correct that Avans made new allegations of violence against Adan at the hearing on remand. Some of the new allegations had independent corroboration, suggesting that they were not manufactured. For example, Avans’s older son claimed he witnessed Adan choking Avans, forcing her head under water, and locking her in the backyard in 1999. See *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 1850910, at \*9 (D.N.J. June 25, 2007), *rev’d*, *In re Adan*, 2008 WL 4368881 (3d Cir. Sept. 22, 2008).

The fact that some allegations were new does not mean the allegations were fabricated or others exaggerated. First, the remand hearing occurred two years after the initial hearing on the Hague petition. Compare *In re Adan*, 437 F.3d 381, 381 (3d Cir. 2006) (noting that Adan’s petition was filed in 2005), with *Adan*, 2007 WL 1850910, at \*1 (dealing with the remand hearing in 2007). The timing of the remand hearing gave the respondent time to recall all of the abuse and made it more likely that any repression of the abuse had abated. See Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221–22 (1993) (“Numerous indicators of psychological distress and dysfunction have been identified as sequelae to physical and sexual violence. These include . . . difficulty concentrating, or memory problems such as amnesia and dissociation . . .”) (citing, *inter alia*, Loewenstein, *Psychogenic Amnesia and Psychogenic Fuge: A Comprehensive Review*, in DISSOCIATIVE DISORDERS: A CLINICAL REVIEW 47 (David Spiegel et al., eds., 1987)); Stephanie Vitanza, Laura C.M. Vogel, & Linda L. Marshall, *Distress and Symptoms of Posttraumatic Stress Disorder in Abused Women*, 10 VIOLENCE & VICTIMS 23, 24, 31 (1995) (citing data that showed 33% to 84% of women seeking help as victims of physical violence have Post-Traumatic Stress Disorder).

Second, Avans’s attorneys may have decided that Avans should testify to *all* of the abuse on remand to show better the long-term pattern of violence and emotional harm directed at Avans, especially as the Third Circuit had indicated that domestic violence toward the parent is itself relevant. See *In re Adan*, 437 F.3d 381, 398 (3d Cir. 2006) (directing the district court to take into account allegations of abuse to both Arianna and her mother). This strategy, and the new allegations, should have buttressed her argument, not undermined it. In addition, her attorneys may have suggested that Avans should include some details about why she returned to Adan on three occasions. This testimony raised additional allegations of violence: Avans said that “she moved back to Argentina out of fear that Adan would hurt the child if she did not”; that she “did not want to put her cousin through the ordeal of having Adan show up uninvited and make a scene” because he was harassing her; and finally, that “she returned because Adan had threatened to come to the United States and kill her and Arianna if she did not.” *Adan*, 2007 WL 1850910, at \*10. The court did not believe her reasons, and interpreted her actions as demonstrating that “the alleged abuse was not as bad as” she claimed. *Id.* at \*12.

The district court made a point of criticizing the lack of corroborating evidence for some of Avans’s claims. For example, the court said “Avans did not submit any police reports into evidence.” *Id.* at \*9. Apparently Avans’s counsel tried to submit photocopies of documents, but the court insisted that the documents comply with the Federal Rules of Evidence and be properly authenticated. See e-mail from Daniel Mulvihill, *supra* note 150 (on file with author). This requirement was directly contrary to federal law, which expressly says documents in Hague proceedings need not be authenticated. See 42 U.S.C. § 11605 (2006) (stating that “no authentication of such application, petition, document, or information shall be required in order for the [Hague Convention] application, petition, document, or information to be admissible in court”).

Yet for purposes of this analysis, it is sufficient to assume that only some of Avans's allegations were in fact true, as the district court found. The court held "that Avans was the subject of domestic abuse from time to time by the Petitioner and that what she alleges, in the main, is plausible."<sup>156</sup> This included a finding that "[a]t times, he resorted to using force."<sup>157</sup> While it is not exactly clear which allegations the district court found substantiated, one is left with a considerable amount of violence if one assumes the truth of only some of the allegations made at the initial hearing and reiterated at the remand hearing.<sup>158</sup> It is important to note that the court never rejected Avans's testimony regarding police inaction and did not find that the police would act any differently if she returned.<sup>159</sup>

Assuming these facts, the concept of "intolerable situation," as defined by the Swiss,<sup>160</sup> could have led the district court to rule differently. The first criterion is that "placement with the parent who filed the application is manifestly not in the child's best interests."<sup>161</sup> The district court's decision suggests that it would have found this criterion satisfied. After all, the district court approved of the arrangement whereby the child would enter foster care upon her return to Argentina.<sup>162</sup> Judge Walls probably recognized that the mother's child abuse allegations might be true, despite her inability to meet the high burden of proof (clear and convincing evidence). After all, the only expert called in the case said that she needed more time to determine whether the child had been sexually abused.<sup>163</sup>

Even if the father's alleged abuse had been directed solely at the mother and not the child, the first prong of the Swiss law would have been satisfied. It is detrimental for a child to be in the custody of a domestic violence perpetrator. Congress has said, "[F]or purposes of determining child custody, credible evidence of physical abuse of a

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156. *Adan*, 2007 WL 1850910, at \*11.

157. *Id.*

158. This approach seems justified given that the judge thought the mother was "a little more credible" than the father in the first hearing and that the father "lied or was not being truthful when he denied that he had ever verbally threatened [Avans] or abused her, if we use that term in the context of verbal abuse." *In re Adan*, 437 F.3d at 387.

159. *Id.* at 397.

160. *See supra* text accompanying note 41 (outlining the Swiss law for describing an intolerable situation).

161. *Id.*

162. *See Adan*, 2007 WL 1850910, at \*14 (explaining the Argentinean judge "made clear" that Arianna would become a ward of the state until a full hearing was conducted).

163. *See id.* at \*10 (commenting that "Dr. Borjas was unable to offer a professional opinion" as to whether the child had been sexually abused but "indicated that further study would be necessary").



spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.”<sup>164</sup> The American Bar Association (“ABA”) recommends that “where there is proof of abuse, batterers should be presumed by law to be unfit custodians for their children.”<sup>165</sup>

The facts of *Adan v. Avans* also satisfied the second Swiss criterion.<sup>166</sup> Avans “[was] not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or . . . this [could] not reasonably be required from this parent.”<sup>167</sup> Avans’s unrefuted testimony about her inability to get police protection in Argentina would make it both unfair and unwise to expect her to return to Argentina.<sup>168</sup>

Finally, it manifestly would not be in Arianna’s best interest to be placed in foster care. Being placed in foster care pending a custody determination is a confusing and unsettling experience for a young child.<sup>169</sup> From the child’s perspective, foster care means separation from a loving parent, and that is very difficult. Even children who are removed to family foster care because of serious abuse or neglect almost uniformly describe missing their families: “56% reported that

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164. COMM. ON THE JUDICIARY, SENSE OF RESPECTING CHILD CUSTODY DETERMINATIONS, H.R. REP. No. 101-737 (Sept. 21, 1990); *see also* Merle H. Weiner, *The Potential and Challenge of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL’Y & L. 749, 751–52 (2003) (listing laws and law reform efforts that acknowledge the connection between domestic violence and custody, visitation, and related determinations).

165. HOWARD DAVIDSON, AM. BAR ASS’N, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 13 (1994). The ABA report identifies three characteristics of unfit custodians in this context:

First, the abuser has ignored the child’s interests by harming the child’s other parent. Second, the pattern of control and domination common to abusers often continues after the physical separation of the abuser and victim. Third, abusers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.

*Id.*

166. *See supra* text accompanying note 41 (setting forth the criteria that define an “intolerable situation” under the Swiss Act).

167. *Id.*

168. *See In re Adan*, 437 F.3d 381, 397 (3d Cir. 2006) (emphasizing that Adan did not contest Avans’s testimony related to the failure of Argentinean police officers to provide her any assistance, and noting that the district court did not discount Avans’s testimony).

169. *Cf.* Peggy D. Dallmann, Comment, *The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by U.S. Courts*, 5 IND. INT’L & COMP. L. REV. 171, 197 n.160 (1994) (“Ordering the child back to another country to be placed in a third party’s hands (which could be either a foster home or some type of foster-care institution) would only result in even more disruption in the short life of a young child, especially where the court has good reason to believe that the child has already experienced an emotionally traumatic family life.”).

they miss their parents most of the time.”<sup>170</sup> Foster care, consequently, can both precipitate and exacerbate behavioral and emotional problems.

When a child has a loving, non-abusive parent as the caregiver, foster care is also an inferior option because the new family is of an unknown quality. One study found that 13% of foster parents were ranked as “barely adequate.”<sup>171</sup> Another study found that 25% of the children were “physically punished severely” while in foster care.<sup>172</sup> A study that reviewed many of the studies concluded,

[T]here is reason to believe that a proportion of approved foster parents and families (approximately 15–20%) have problems in their home environment, family functioning and parenting. . . . [I]n several key areas—parental mental health, marital conflict, social support, and temperament—we simply do not know what, if any, proportion of foster parents have significant limitations.<sup>173</sup>

It is well known that foster care placement is often not stable,<sup>174</sup> and this presents yet another reason why it is manifestly not in a child’s best interest to be placed there when a loving, non-abusive parent is available instead. Even children who come into foster care without behavioral problems may be negatively affected by switching placements.<sup>175</sup> Admittedly, most custody adjudications are not supposed to drag on for years, and the horror stories about foster care are generally referencing long-term foster care. Children’s time in care, in fact, may be reduced if a country has expedited procedures for provisional measures.<sup>176</sup> Yet the *Wood* case is a

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170. Penny Ruff Johnson et al., *Family Foster Care Placement: The Child’s Perspective*, 74 CHILD WELFARE 959, 967 (1995).

171. Isabel Dando & Brian Minty, *What Makes Good Foster Parents?*, 17 BRIT. J. SOC. WORK 385, 389 (1987).

172. See DAVID FANSHEL ET AL., FOSTER CHILDREN IN A LIFE COURSE PERSPECTIVE 91 (1990) (reporting data from an interview study that asked foster children about their experience in the Casey Family Living Program).

173. John G. Orme & Cheryl Buerhler, *Foster Family Characteristics and Behavioural and Emotional Problems of Foster Children: A Narrative Review*, 50 FAM. REL. 3, 12 (2001).

174. See Sigrid James, *Why Do Foster Care Placements Disrupt? An Investigation of Reasons for Placement Change in Foster Care*, 78 SOC. SERV. REV. 601, 605–06 (2004) (concluding that the average number of placement changes for foster children over an eighteen month period was 3.6, but noting some children in the study changed placement as many as fifteen times over the eighteen month period).

175. See Rae R. Newton et al., *Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviours and Number in Placements*, 24 CHILD ABUSE & NEGLECT 1363, 1372 (2000). But see Orme & Buerhler, *supra* note 173, at 3 (arguing that “the link between foster care placement and child problem behaviours is not well established, and the causal direction of this relationship is unclear”); *id.* at 12 (bemoaning the “startling” lack of research that exists on foster family characteristics and the behavioural and emotional problems of foster children).

176. See, e.g., *Re O* (Child Abduction: Undertakings), (1994) 2 Fam. 349, 362 (U.K.) (noting that a custody contest can take eighteen months to two years to

reminder that foster care instability can occur even for children awaiting a custody adjudication.<sup>177</sup> Custody cases can be significantly delayed for a variety of reasons, including court calendars, the unavailability of court services (such as custody evaluators), and the parties themselves.<sup>178</sup> One study indicated that it took, on average, eighteen to twenty-two months to complete a contested custody dispute in three Colorado counties.<sup>179</sup> Even if a custody case proceeds quickly, so that the children only need short-term foster care, placement instability can occur. Placement changes occur for a wide variety of reasons, including for reasons that have nothing to do with the child. Interruptions are caused by administrative rules (e.g., strict time limits for short-time placements, such as thirty days) and foster family particularities (e.g., the foster family relocates, goes on vacation, or has a life emergency and can no longer provide care).<sup>180</sup>

It is impossible to predict whether the district court would have found an “intolerable situation” in *Adan v. Avans* if it had followed the Swiss approach.<sup>181</sup> However, it certainly might have made a difference because the Swiss approach was meant for just such a case. The Swiss formulation would have helped guide the court to the conclusion that returning Arianna would pose a grave risk that she would be placed in an intolerable situation. Likewise, the Swiss formulation should assist other courts in their assessment of whether a situation is “intolerable,” and thereby potentially change the results for some respondents and children whose cases evoke our sympathy.

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complete, with appeals, but emergency procedures exist to obtain a provisional order and that can be heard within one or two months); *Report on the Fifth Meeting*, *supra* note 22, ¶ 167 (quoting Chair who believed that the Special Commission recognized that children’s interests “may be affected in those cases where there was likely to be a long delay in the habitual residence country before the custody proceedings were heard”).

177. See Legislative Assembly-Grievance, *supra* note 12 (noting the children were kept away from their parents for nineteen months, with no contact with their father, and transferred between six different foster homes during that period).

178. See *id.* (referring to the procedures in the *Wood* case that delayed the progress of the custody adjudication).

179. See Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 712–13 (1982) (examining contested custody cases in Denver, Jefferson, and Adams counties, from 1973 to 1978).

180. See James, *supra* note 174, at 619–20 (finding that within an eighteen month period, 580 foster children averaged around three placement changes, with a range of 0 to 15).

181. The trial court’s general hostility to the mother and her allegations—and its disregard of the Third Circuit’s guidance—suggests that the mother may have lost even with this argument. See discussion *supra* Part II.E.1.

F. *Are There Reasons to Reject the Swiss Understanding of “Intolerable Situation”?*

Some may oppose this Article’s call for courts in the United States to follow Switzerland’s example. Critics may worry about the invigoration of the “intolerable situation” defense generally, and about the permissiveness of the provisions in the Swiss statute. On the other hand, some critics may worry that the Swiss law risks restricting the defense unnecessarily. On balance, the Swiss proposal appears appropriate, although the criteria must not be interpreted too broadly nor deemed essential prerequisites to the defense’s success.

1. *The risk of creating a loophole*

Fearmongers who oppose invocation of the “grave risk of harm” defense will undoubtedly claim that the use of “intolerable situation” will spell doom for the Convention, creating a loophole too large to fix. These critics would prefer to maintain the status quo, where courts and parties largely ignore the separate meaning of “intolerable situation.”

Ignoring the defense, however, is unacceptable from a separation of powers perspective. The words are meant to be invoked in an appropriate situation, and the only question is whether a situation qualifies. A court that ignores the defense, or subsumes it under the “physical or psychological harm” defense, unjustifiably disregards the intent of the Convention’s drafters and Congress.<sup>182</sup>

The “intolerable situation” provision should not become a loophole because the “grave risk of harm” defense has not become one. Contracting states have managed to keep the interpretation of that provision narrow.<sup>183</sup> Courts should be similarly vigilant in policing the application of the “intolerable situation” defense. They should not find an “intolerable situation” when the facts establish no more than the situations identified in the State Department report as insufficient: a home where money is in short supply, or more limited educational or other opportunities in the habitual residence.<sup>184</sup> Yet a significant difference exists between those situations and a situation

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182. The International Child Abduction Remedies Act (ICARA) incorporates the exceptions set forth in Article 13(b). See 42 U.S.C. § 11603(e)(2)(A) (2006); see also *supra* notes 32–36.

183. See *Conclusions and Recommendations of the Fifth Meeting*, *supra* note 38, § 1.4.2 (noting that the courts in contracting states have rejected few applications based on an Article 13(b) “grave risk of harm” defense).

184. Legal Analysis, *supra* note 51, at 10510.

in which a child will be taken from a loving parent and placed in institutional care for the sole purpose of litigating a custody dispute in a particular jurisdiction. For cases that fall outside of these recognized parameters for the defense, judges should be guided by the admonition that the defense is to be narrowly interpreted and the child's situation must evoke an objective sense of intolerability.<sup>185</sup> In addition, when respondents invoke the Swiss formulation in particular, judges should ensure that the respondent satisfies all of the prongs of the Swiss proposal—and by clear and convincing evidence<sup>186</sup>—so that the Swiss formulation itself does not become a loophole.

2. *The appropriateness of the underlying criteria*

It is worth examining each of the prongs of the Swiss law to see whether any one of them poses a particular risk to the Convention's operation. The discussion below concludes that the particular criteria in the Swiss statute are not themselves problematic.

a. *First criterion*

The first criterion requires an evaluation of whether placement with the left-behind parent is “manifestly not in the child's best interest.”<sup>187</sup> Some may be concerned that this criterion integrates a best interest inquiry into the analysis. At first blush, the criterion appears to require a merits determination, something that courts adjudicating Hague petitions are supposed to avoid.<sup>188</sup>

Yet the Swiss approach is not akin to a merits determination because it contains the word “manifestly.” A requirement that placement with a parent be “manifestly not in the child's best interest” creates a high hurdle for the respondent to surmount. Therefore, this first criterion requires a much different analysis than the comparative exercise of deciding which parent is a better custodian for the child. The defense focuses the court solely on the

185. See *supra* text accompanying notes 75–80.

186. International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A) (2006) (requiring that the respondent establish the Article 13(b) or Article 20 exception by clear and convincing evidence).

187. See Swiss Federal Act art. 5(a), Dec. 21, 2007, *feuille fédérale suisse* [FF] 36 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 162.

188. See Hague Abduction Convention, *supra* note 1, art. 16 (“[T]he judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.”).

petitioner, and the court must find a significant concern that affects that parent's fitness. As Professor Bucher, one of the drafters of the Swiss Act, stated, "[a] certain amount of strictness is imperative so as not to transform the dispute into a custody case."<sup>189</sup> Courts already engage in a similar sort of examination when they apply the "grave risk of harm" provision of Article 13. In fact, whenever a court finds that the left-behind parent poses a grave risk of physical or psychological harm to the child, this first criterion would be established, although a grave risk of harm would not be necessary to meet this criterion. For example, it would be sufficient if the petitioner did not want custody but was only seeking the child's return to obtain or effectuate access rights. These facts could be discovered with a few questions. The first criterion would also be satisfied if the petitioner were a domestic violence perpetrator, even if the court found that none of the violence had been directed toward the child or that the violence had been sporadic.<sup>190</sup> These facts will typically be in the record already if the respondent raised a "grave risk of harm" defense.

*b. Second criterion*

The second criterion will probably also generate debate. Its formulation is fairly broad,<sup>191</sup> and Professor Bucher envisions a wide interpretation of the provision.<sup>192</sup> Not only would an abductor not be expected to return if her safety were at risk or she were subject to criminal prosecution,<sup>193</sup> but the provision would also cover situations in which the abductor has good reasons to remain in the abducted-to forum, such as a new marriage or caring for a sick family member.<sup>194</sup> It would apply whenever the habitual residence is not "reasonably bearable" for the parent because "the problems and psychological burden felt by the abducting parent upon return also affect the child and endanger his personal well-being."<sup>195</sup>

It would also be unreasonable to expect the abductor to return when the left-behind parent only seeks to maintain or establish visitation, and not custody, so long as the left-behind parent could

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189. Bucher, *supra* note 2, at 158.

190. *See supra* text accompanying notes 165–166.

191. *See supra* text accompanying note 41.

192. *See* Bucher, *supra* note 2, at 159, 161.

193. *Cf.* Re M (Abduction: Child's Objections), [2007] EWCA (Civ) 260, at ¶ 92 (Eng.) (Wilson, L.J., concurring) (commenting in *obiter dictum* that efforts by Serbia to imprison abductor for drugs that were planted on her might qualify for the "intolerable situation" defense given the child's fear for her mother's safety).

194. *See* Bucher, *supra* note 12, at 158.

195. *Id.* at 159–60.

obtain visitation in the abducted-to country.<sup>196</sup> One can imagine a number of other reasonable bases for the abductor's unwillingness to return. For example, the parent might lack resources to litigate custody in the child's habitual residence, but might qualify for legal aid in the abducted-to country. In short, the second criterion may cover a wide variety of situations where the abductor could not, or need not, return.

It may seem inconsistent with the Convention to permit the defense in some of the situations described immediately above. Imagine, for example, a primary caretaker who claims she should not be expected to return because she has a new spouse in the abducted-to country, and the court in the child's habitual residence would not permit her to relocate. Justice Singer, for one, concluded that the inability to relocate would not constitute an "intolerable situation," unless that were categorically true for all abductors.<sup>197</sup> He believed a contrary conclusion would "thwart the object of the Convention that the courts of the country of a child's habitual residence should be the forum where decisions concerning him are taken."<sup>198</sup>

Although the second criterion is broad, its breadth must be kept in context. The second criterion is one of three criteria, and all three criteria must be satisfied to establish an "intolerable situation." Unless placement of the child with the other parent is manifestly not in the child's best interest and the child will be placed in foster care (or, perhaps, some other placement that is substandard when compared to the primary caregiver's care), the defense will not apply.<sup>199</sup> It is also useful to recall the function of the intolerable situation defense. The defense gives courts some flexibility to avoid morally intolerable outcomes when deciding whether litigation

196. See *id.* at 160; Working Doc. No. 1E, *supra* note 20, at 2.

197. *Re O* (Child Abduction: Undertakings), (1994) 2 Fam. 349, 356 (U.K.).

198. See *id.* at 356 (explaining that an inability to relocate—even if it caused the mother to be upset so as to seriously affect her ability to care for the children—would not be an "intolerable situation," although an embargo on the removal of children from the country might be); see also *P v. P* (Minors) (Child Abduction), (1992) 1 Fam. 155, 161 (U.K.) (rejecting defense when it rested on the fact that returning the children would cause the mother to return and she would become "a deeply unhappy person" and that "[a]n unhappy mother means unhappy children"); *In re M* (Abduction: Undertakings), (1995) 1 Fam. 1021, 1027 (C.A.) (U.K.) (finding that a *ne exeat* clause was not an intolerable condition because the mother could seek its modification). At least one commentator has said the same even for situations in which the petitioner only has rights of visitation coupled with a *ne exeat* clause. See Kathleen A. O'Connor, *What Gives You the Right!?—Ne Exeat Rights Should Constitute Rights of Custody After Furnes v. Reeves*, 24 PENN ST. INT'L L. REV. 449, 472 (2005).

199. See Swiss Federal Act art. 5, Dec. 21, 2007, feuille fédérale suisse [FF] 36 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf>, translated in Bucher, *supra* note 2, at 162.

should occur in a particular forum. After all, the Pérez-Vera Report says the Convention's remedy "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."<sup>200</sup> Courts should avoid placing a child in an intolerable situation, even if the abductor receives some incidental benefit from the court's decision.

To be clear, the adoption of the Swiss formulation would not mean that custodial parents have *carte blanche* to disregard relocation restrictions and *ne exeat* clauses; the defense will not always succeed because respondents may lack facts to support the other criteria. Even if the "intolerable situation" defense were to succeed, the court in the habitual residence could still sanction the custodial parent for contempt of its court order.<sup>201</sup> In addition, a judge adjudicating custody in the requested state should certainly consider, and address appropriately, the abductor's initial actions. That court, for example, may decide that the fact of the abduction itself matters to its custody decision, even if the abductor's reasons for refusing to return to the child's habitual residence are reasonable for purposes of the "intolerable situation" defense. The abductor's reasons for the abduction may have been unjustified, showing the party to be insensitive to the child's needs and interests. The court that adjudicates custody and access will be able to examine thoroughly all of the allegations and do what is best for the child.

*c. Third criterion*

The third criterion requires that "foster care" manifestly not be in the child's best interest. The term "foster care" should be interpreted to reflect the purpose of the defense. For example, "foster care" should not cover an arrangement like in *Re S*,<sup>202</sup> a case in which a young girl was being returned to her mother and they were both to live together in an analysis home in Sweden.<sup>203</sup> An analysis home is

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200. Pérez-Vera, *Explanatory Report*, *supra* note 59, at 433, ¶ 29.

201. In most cases, it would be improper, in my opinion, for the authorities in the requested state to file criminal charges and extradite the abductor after an Article 13(b) defense has been established. Unfortunately, the U.S. State Department recently sought the extradition of an abductor who claimed she fled to Costa Rica from the U.S. for safety reasons, but the request was denied after the woman obtained asylum from Costa Rica for her experiences with domestic violence in the United States. See Gillian Gillers, *U.S. Citizen, Wanted by Uncle Sam, Freed from Jail*, *TICO TIMES*, July 29, 2008, available at [http://www.ticotimes.net/dailyarchive/2008\\_07/072808.htm#story1](http://www.ticotimes.net/dailyarchive/2008_07/072808.htm#story1).

202. See *Re S* (Abduction: Return into Care), (1999) 1 Fam. 843 (U.K.).

203. See *id.* (describing that the mother and child were to "be placed in an investigation home for assessment" so that Swedish authorities could assess whether the mother's cohabitee made sexual advances toward her child, as alleged).



“arranged like a normal home,”<sup>204</sup> but gives the social services staff the opportunity to investigate thoroughly the situation, including “the mother’s ability and qualifications to care for the child[,]”<sup>205</sup> while also protecting the child against the risk of further abuse.<sup>206</sup> This arrangement was proposed in *Re S* because the mother’s husband allegedly had sexually abused the child,<sup>207</sup> thereby prompting the father to abduct the child. On the other hand, “foster care” might cover a situation in which the child was being returned to a placement akin to foster care, although it had a different name or structure.<sup>208</sup> The defense is meant to protect against the separation of a child from the child’s primary caregiver during the pendency of the custody adjudication when it is manifestly not in the child’s best interest to be with the other parent and when the nature of any third party placement is inferior to the abductor’s care.

### 3. *The risk of limiting the “intolerable situation” defense*

The final concern about the Swiss criterion is of a different type, and requires little ink to address. Some may worry that the Swiss formulation is too limited. After all, under the Swiss formulation, it would not be an “intolerable situation” to return a three-year-old child to a fit parent who had rights of custody solely by virtue of a statutory *ne exeat* clause even if (1) the child had been abducted almost immediately after birth so that the child and left-behind parent were strangers, (2) the abductor refused to return with the

204. *Id.* at 845.

205. *Id.* at 846.

206. *Id.* at 843.

207. It appeared that the mother had since separated from her husband, and he would not be living in the home. *See id.* (noting that the mother had a new cohabitant).

208. *Cf.* Ontario Ct. v. M and M (Abduction: Children’s Objections), (1997) 1 Fam. 475 (U.K.). In *M and M*, the Ontario court was seeking the return of children for whom custody and access proceedings had been instituted by the grandmother. *Id.* The children had been removed to England by their parents pending the court’s decision. *Id.* The English court rejected the Hague application, finding that there was a grave risk of an “intolerable situation” if the older child were returned. *Id.* at 485. The father could not return with the child because the father had been deported; the mother could return with the child but would be left homeless and without money in Canada; and the older child, a nine-year-old, felt very strongly that she did not want to leave her parents and her settled life in England. *Id.*

The defense might also apply in a situation like that described in the Collated Responses. Apparently a court in the Netherlands granted an Article 13(b) defense because the mother could not obtain permission to live in the state of habitual residence and the court was concerned that the father could not care for the child alone. *See* Gerechtshof Amsterdam, 3 Nov. 2005, LJN: AV0718 (Neth.), in *Collated Responses*, *supra* note 88, at 205 (explaining that returning the child to the father would not have been in the best interests of the child and that a return would likely pose a grave risk to the child).

child because of new family obligations, a fear of criminal prosecution, and an inability to support herself or her child in the other country, and (3) the courts in the child's habitual residence would deny the abductor permission to relocate. In this hypothetical, a court adjudicating the return of the child might believe that foster care is unnecessary and, therefore, the third criteria would not be met. The inability to satisfy the Swiss formulation might inhibit the court from granting the "intolerable situation" defense, even though the court might still perceive return to be an "intolerable situation" for the child. Without deciding whether the "intolerable situation" defense should apply in such a case, it seems as if this fact pattern might be dealt with through other means: the Article 12 well-settled defense,<sup>209</sup> the Article 13(b) "grave risk of harm" defense,<sup>210</sup> a refusal to equate a *ne exeat* clause with rights of custody,<sup>211</sup> or by encouraging nations to adopt permissive relocation policies. To the extent that these other options were unavailing, the Swiss proposal does not foreclose the application of the "intolerable situation" defense because the Swiss criteria are not the exclusive method for establishing an "intolerable situation."<sup>212</sup>

### III. COUNSEL FOR CHILDREN

The Swiss legislation is also admirable because it directs courts to appoint counsel for children when their parents are parties to a Hague Convention proceeding. Switzerland's automatic rule has the advantage of eliminating parents' and courts' discretion on this issue—a discretion that has caused inequities in the protection of children's interests. In fact, Switzerland required that counsel be appointed in all cases because it found that judges were rarely exercising their authority and appointing representatives for children

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209. See, e.g., *Van Driessche v. Ohio-Esezeoboh*, 466 F. Supp. 2d 828, 848, 852 (S.D. Tex. 2006) (finding child was well-settled; the fact that the respondent was potentially subject to criminal prosecution in the requesting country suggested that the court should not apply equitable tolling provision, but should grant the defense).

210. See *Blondin v. Dubois*, 238 F.3d 153, 164–65 (2d Cir. 2001) (suggesting that a court may consider the fact that a child is settled as part of an analysis of "grave risk of harm").

211. See *supra* text accompanying note 31 (describing how courts in the United States are split on whether rights of visitation coupled with a *ne exeat* clause create custody rights entitling the holder to a remedy of return).

212. In fact, courts around the globe have sometimes interpreted "intolerable situation" differently than the Swiss law. See *supra* text accompanying notes 88 and 89. The types of decisions discussed in notes 61–64, 88, 89, 98, and 193 would be unaffected by the Swiss interpretation of "intolerable situation."

in divorce proceedings, and the drafters had a commitment to ensuring that every child in a Hague proceeding have counsel.<sup>213</sup>

Courts in the United States sometimes appoint guardians *ad litem*, counsel, or both for children in Hague cases,<sup>214</sup> but many courts do not. Federal courts have the authority to appoint representatives for children by virtue of the Federal Rules of Civil Procedure,<sup>215</sup> and perhaps by the state law of the jurisdiction in which they sit.<sup>216</sup> State courts have found authority in their own state law provisions.<sup>217</sup> However, most parents fail to ask courts to appoint counsel for the child (although courts may have the authority, or even the obligation,<sup>218</sup> to appoint representatives *sua sponte*<sup>219</sup>). Nor do courts

213. See Bucher, *supra* note 2, at 150 (noting that Article 9(3) is innovative because it makes it “compulsory for the judge to designate a representative who acts as custodian for the child”). The lack of appointed counsel for children in divorce proceedings appears to be an issue in many European countries. See Branka Resetar & Robert E. Emery, *Children’s Rights in European Legal Proceedings: Why Are Family Practices So Different From Legal Theories?*, 46 FAM. CT. REV. 65, 73 (2008) (noting that children participate in custody proceedings in less than five percent of cases in Italy and Croatia).

214. Some courts adjudicating Hague petitions appoint a guardian *ad litem*: Danaipour v. McLarey, 286 F.3d 1, 8 (1st Cir. 2002); Lieberman v. Tabachnik, No. 07-CV-02415-WYD, 2007 WL 4548570 (D. Colo. Dec. 19, 2007); McManus v. McManus, 354 F. Supp. 2d 62, 69 (D. Mass. 2005); Olguin v. Santana, No. 03 CV 6299(JG), 2004 WL 1752444 (E.D.N.Y. Aug. 5, 2004). Some courts appoint an attorney who acts in the dual role of both the guardian *ad litem* and the child attorney: Kufner v. Kufner, 519 F.3d 33, 37 (1st Cir. 2008); Wasniewski v. Grzelak-Johannsen, No. 5:06-CV-2548, 2007 WL 1461794, at \*1 (N.D. Ohio May 16, 2007). In divorce and custody proceedings, courts sometimes appoint two individuals, both a guardian *ad litem* and an attorney for the children: Schult v. Schult, 699 A.2d 134, 135 (Conn. 1997); Schain v. Schain, No. FA000156786S, 2002 WL 450387, at \*8 (Conn. Super. Ct. Feb. 26, 2002).

215. See Kufner v. Kufner, 519 F.3d 33, 37 (1st Cir. 2008) (using Federal Rule of Civil Procedure 17(c) as authority in a Hague Abduction Convention case); see also *infra* note 218 (describing Rule 17).

216. See, e.g., Wasniewski, 2007 WL 1461794, at \*2 (using Ohio Juv. R. 4(B)(2),(8) as authority).

217. See Wittman v. Wittman, No. FA0740006469S, 2007 WL 826536, at \*1 (Conn. Super. Ct. Feb. 21, 2007) (citing CONN. GEN. STAT. § 46b-54(a) (2004)). A court’s inherent authority to protect the interests of minors would presumably also be of use. See generally 43 C.J.S. *Infants* § 329 (2008) (citing cases in Arizona courts, New York courts, and the Tenth Circuit where the trial court relied on its inherent authority to appoint a guardian *ad litem* for a child).

218. See FED. R. CIV. P. 17(c) (“The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.”); cf. Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958) (reversing and remanding case because trial judge did not consider *sua sponte* whether minors should have a guardian *ad litem* appointed). The court’s decision to replace the child’s representative, who is frequently the parent, would be reviewed for an abuse of discretion. See Gaddis v. United States, 381 F.3d 444, 453 (5th Cir. 2004) (holding that while the court has discretion, “the court should usually appoint a guardian ad litem” when it appears that the minor’s general representative has interests that may conflict with the minor’s) (citations omitted).

219. The National Center for Missing and Exploited Children reports that federal court judges, in particular, are particularly “inclined to grant a motion to appoint a

receive many requests from third parties because few professionals participate in Hague proceedings (compared to custody cases).<sup>220</sup> Even when requests are made, some courts reject them.<sup>221</sup>

A. *The Case for Appointing Counsel for Children*

If the decision to appoint counsel for children in Hague cases turned solely on whether children had interests affected by the proceedings, children would be appointed counsel in every case. Hague proceedings are very important to the children whose transnational movement prompted the legal proceedings. Just like the abduction itself, the proceedings can have a profound impact on children's lives. The child may welcome the proceeding because the child wants to return to a loving left-behind parent. Alternatively, the Hague proceeding may return a child to a country the child abhors, separate the child from his or her primary caregiver, or expose the child to a left-behind parent who has harmed or will harm the child. A return order may put the child's physical and legal custody in a state of limbo or upset the child's settled physical environment, causing the child considerable anxiety. The proceeding may leave the primary caregiver who abducted her child anxious and depressed as she decides whether to return with the child, and the child may witness, and be affected by, her anxiety. In addition, the child may experience the proceeding as frightening if the child is uncertain about what to expect, or alienating if the court does not listen to the child. Alternatively, the child may feel that he or she has been thrust into the middle of a dispute that the child would prefer to ignore.

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*guardian ad litem* or to *sua sponte* seek the advice of someone who is not beholden to either parent." NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN & KILPATRICK STOCKTON LLP, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 70 (2007), available at [http://www.missingkids.com/en\\_US/training\\_manual/NCMEC\\_Training\\_Manual.pdf](http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf) [hereinafter LITIGATING INTERNATIONAL CHILD ABDUCTION CASES]; cf. Karen Prosek, *The Family Court's Expectations of Child's Counsel*, 16 J. CONTEMP. LEGAL ISSUES 203, 206 (2007) (reporting that about seventy percent of the discretionary counsel appointments for children in Family Court are done *sua sponte* by the court).

220. For example, under some rules, mediators for the parties can suggest that a representative should be appointed for the child. See, e.g., S.F. County Superior Ct. Rules, Rule 11.7(C)(2)(a)(3) (July 2008), available at [http://www.sfgov.org/site/courts\\_page.asp?id=85541](http://www.sfgov.org/site/courts_page.asp?id=85541) ("The mediator may recommend that the Court appoint an attorney to represent any child involved in a custody or visitation proceeding."). Mediation is not as common in Hague proceedings as it is in family law matters generally, at least not yet.

221. See, e.g., *Clarke v. Clarke*, No. 08-690, 2008 WL 2217608, at \*4 n.3 (E.D. Pa. May 27, 2008) (finding no authority in state law for an appointment in a Hague case); *Hasan v. Hasan*, No. 03-11960-GAO, 2004 WL 57073, at \*4 (D. Mass. Jan. 13, 2004) (claiming an appointment would lead the court to litigate the children's best interests, something prohibited by the Convention).

1. *Potential conflicts of interest*

Although the child has a tremendous interest in the process as well as the outcome of the Hague proceeding, courts probably do not appoint counsel for children in Hague proceedings when asked, or when they themselves think of it, for the same reason counsel are often not appointed for children in custody disputes. There is an assumption that the parents can adequately represent their children's interests.<sup>222</sup> This assumption makes sense in the vast majority of custody cases because the court is trying to determine the child's best interest and both parents are helping to inform the court's decision on what is best for the child. Yet this reasoning makes little sense in the context of a Hague proceeding. A Hague case differs from a custody case in that a Hague proceeding does not adjudicate the child's best interests. Consequently, neither parent will necessarily be focused on the child's best interest, nor will the court. That reality makes a representative for the child imperative because there is a great chance that the parents' positions will conflict with the child's interests.<sup>223</sup>

A simple example illustrates this point. Imagine that a left-behind parent seeks a fourteen-year-old child's return, and the abductor seeks to block return by relying on the "well-settled" defense in Article 12 and the age and maturity defense in Article 13.<sup>224</sup> Assume

222. See, e.g., Nancy Moore, *Conflicts of Interests in the Representation of Children*, 64 *FORDHAM L. REV.* 1819, 1821 (1996) ("[I]t is not uncommon for courts to assume that the child's interests [in proceedings such as custody] will adequately be protected either by another party to the proceeding or by the court itself.") (citations omitted); *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (With Commentary)*, 13 *J. AM. ACAD. MATRIMONIAL L.* 1, 2-3 (1995) [hereinafter *Representing Children: Standards for Attorneys*] ("In the absence of a particular reason for assigning representation for a child, the representative frequently will merely duplicate the efforts of counsel already appearing in the case."); see also *C.W. v. K.A.W.*, 774 A.2d 745, 748 n.3 (Pa. Super. Ct. 2001) ("Since both parties and the trial court are focused on the child's best interests, it appears that the appointment of a guardian *ad litem* would not be proper absent extraordinary circumstances . . .").

223. See *Wasniewski v. Grzelak-Johannsen*, No. 5:06-CV-2548, 2007 WL 1461794, at \*2 (N.D. Ohio May 16, 2007) (appointing an attorney who would also serve as both the child's guardian *ad litem* and attorney in Hague Convention proceeding because the child's "interests may conflict with those of his parents and [the appointment] may be necessary to afford him and his family a fair hearing"); Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 393, 430 (2002) ("[I]f the test is whether the case belongs to a category in which there is a potential for a conflict between the interests of the child and his parents, separate representation should be ordered in nearly all abduction cases.").

224. Article 12 states, in relevant part: "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Hague Abduction Convention, *supra* note 1, art. 12.

that the child wants to remain with the abductor in the requested state, but prefers not to have her views expressed to the court. She fears that sharing her view will harm her relationship with the left-behind parent. In addition, the child does not want her therapist's records revealed to either parent, although the abductor seeks to use them to help establish that the child is well-settled, and the left-behind parent wants to use them to demonstrate that the abductor has unduly influenced the child's opinion.<sup>225</sup> This scenario illustrates that the child's interests may not be represented by either parent, and may in fact conflict with both parents' interests.

Practical differences between a custody contest and a Hague proceeding also make it more likely that the child's interests will be ignored or misrepresented in a Hague proceeding. The assumption underlying the Convention is that abduction harms children.<sup>226</sup> Yet the parent whose views are theoretically aligned with the child's interests has little or no contact with the child. The abduction takes the child away from that parent. Therefore, as a practical matter, it is the abductor who is responsible for representing the child's interests, but presumptively their interests are not aligned. The abductor wants to defeat the return petition, but the Convention presumes that children should be returned. Even if a particular defense exists (e.g., the well-settled defense), the child may have a strong desire to return to the habitual residence. It is unlikely that such information will be presented to the court if the child is not represented, as the left-behind parent may not even know the relevant facts. Even where the abductor's and child's interests are perfectly aligned, the respondent herself may be unrepresented,<sup>227</sup> which will weaken the presentation

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225. See *In re Berg*, 886 A.2d 980, 986–87 (N.H. 2005) (holding that children had a right to assert a therapist-client privilege with regard to therapist notes that father sought in visitation dispute and stating “[t]he weight of authority in other jurisdictions supports protection for the therapy records of children who are at the center of a custody dispute or whose interests may be in conflict with those of their natural guardians”); *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 307–08 (Fla. Dist. Ct. App. 2001) (holding that the child had a privilege that the child could assert and that the parents could not waive). It is worth mentioning that counsel may be able to negotiate solutions to such evidentiary conflicts. For example, Gary Melton has suggested, in the context of health services, that the child's participation may help the parties negotiate a way to release the clinician's records, but with certain exceptions that the parties may agree upon in advance. See Gary Melton, *Parents and Children: Legal Reform to Facilitate Children's Participation*, AMER. PSYCHOLOGIST, Nov. 1999, p. 935, 940.

226. See Pérez-Vera, *Report of the Special Commission*, *supra* note 59, at 182 (discussing the Conclusions of the Special Commission of March 1979 and stating that “abduction of children is contrary to their interests and welfare”) (citation omitted).

227. See, e.g., *Grijalva v. Escayola*, No. 2:06-cv-569-FtM-29DNF, 2006 WL 3827539, at \*4 (M.D. Fla. Dec. 28, 2006) (respondent appeared *pro se* and “there [was] no

of the child's perspective. Even if the abductor is represented, a court may discount the child's views and assume the position is "not authentically the child's own" because it is presented through the attorney for the abducting parent.<sup>228</sup> Nor are experts regularly brought in to give the court an unbiased perspective of the child's interests apart from the parents' positions, unlike high-conflict custody cases that often involve custody evaluators. This reality makes the child's need for a representative more pressing.

The possible conflicts exist not just at the time of the adjudication, but also at the time the return order is enforced. Imagine, for example, that the court has ordered the child's return, but the child absolutely refuses to get on the plane for the return trip. Imagine further that the left-behind parent has asked the police to execute the order, and the police are ready to do so with force. The respondent may sympathize with the child but may not bring the child's situation to the court's attention, especially if she thinks that she will be blamed for undermining the child's return.<sup>229</sup> These sorts of possibilities suggest that children should have counsel in Hague proceedings.

Another way of thinking about the wisdom of counsel in these cases is to recognize that child abduction cases are high-conflict custody cases, even though the issue of custody is not being litigated. The need for children to have counsel in high-conflict custody cases is well recognized.<sup>230</sup> In these cases, parents may be so focused on their own objectives (which can include, for example, punishing the

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evidence as to the wishes of the children"); *In re Nicholson*, No. 97-1273-JTM, 1997 WL 446432, at \*4 (D. Kan. July 7, 1997) (respondent appeared *pro se* and court determined the child did "not raise any substantial objection to returning to Germany"). In *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619 (H.L.) (appeal taken from Eng.) (U.K.), Baroness Hale suggested that the abductor may not be receiving a fair trial when she lacks an attorney.

228. Cf. *In re D*, [2007] 1 A.C. at 642 (suggesting the child should be heard in every Hague case unless it appears inappropriate and "[i]t is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's view to the court").

229. See Bruch, *supra* note 36, at 534 n.20 (discussing *Re J*).

230. See, e.g., *In re Berg*, 886 A.2d 980, 985 (N.H. 2005) ("[W]hen custody of the child becomes the subject of a bitter contest between mother and father, the personal interests of the contestants in almost all cases obliterate that which is in the best interests of the child. It is at this point that it can be said that the interests of both parents become potentially, if not actually, adverse to the child's interests.") (quoting *Bond v. Bond*, 887 S.W.2d 558, 560 (Ky. Ct. App. 1994)); Am. Bar Assoc. Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 131, 153 (2003) [hereinafter *ABA Standards of Practice*] (recognizing in part IV.A.2.j that a level of acrimony is a factor a court can weigh in determining whether to appoint representation for children).

other parent),<sup>231</sup> that the child's interests are not adequately represented.<sup>232</sup> The feelings and interests of the parents in Hague cases may similarly crowd out attention to the feelings and interests of the children. In addition, child abduction cases frequently involve allegations of domestic violence and child abuse, and counsel for the minor is recommended for these sorts of cases too.<sup>233</sup> In domestic violence cases, "guardians *ad litem* . . . help prevent batterers from using children as tools or pawns,"<sup>234</sup> and ensure that evidence of domestic violence is brought to the court's attention.<sup>235</sup> The ABA observes that whenever the case has allegations of "dangers to the child" there is "an especially compelling need for lawyers to protect the interests of children."<sup>236</sup> Since a great number of Hague respondents allege that return will create a "grave risk of harm" for the child, Hague cases are particularly appropriate disputes in which to appoint a representative for the child.

Conflict between the parents' interests and child's interests is one of the primary factors that motivates courts to appoint a representative for a child.<sup>237</sup> A rule requiring the appointment of counsel in all Hague cases makes good sense because Hague cases, by their nature, are ripe for conflicts of interest, and the conflicts are unlikely to come to courts' attention. Consequently, a categorical

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231. Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing To Do*, 27 PACE L. REV. 869, 892, 899 (2007).

232. *Id.* at 871.

So when should the child's voice be added to the debate? My answer is whenever the child's interests and the parent's interests are not aligned, or the same. Most of these instances occur because the parents have lost sight of the needs of their children for some reason. Three reasons that come instantly to mind are abuse and neglect situations, domestic violence in the family, and high conflict custody cases.

*Id.* at 891.

233. See *ABA Standards of Practice*, *supra* note 230, at 153 (stating that appointment of counsel may be appropriate in cases of past or present family violence).

234. Honorable Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 287 (1999).

235. *Id.* at 288.

236. *ABA Standards of Practice*, *supra* note 230, at 152.

237. See, e.g., *Nicholson v. Williams*, 205 F.R.D. 92, 100-01 (E.D.N.Y. 2001) (appointing an attorney as a guardian for children in civil rights action brought by their mothers, alleged domestic violence victims, against agency for removal of the children; a "potential for conflict of interest" between the mothers and their children existed); *Ford v. Ford*, 216 N.W.2d 176, 177 (Neb. 1974) (approving independent counsel for children in a divorce proceeding to determine the legitimacy of the children, reasoning that a decision as to the legitimacy of the children is one in which the children have vital interests that may be adverse to those of the parents); see also *LOWE, EVERALL & NICHOLS*, *supra* note 49, at 365 (noting "the perceived inability of or inappropriateness for either parent to represent the children's view" as the "common feature" in various Hague cases where counsel was appointed for the child).



rule is entirely appropriate for these high-conflict cases and would save the court the time and expense of individualized assessments.

## 2. *Other policy justifications*

There are at least six other reasons why children in Hague proceedings should have counsel, apart from guaranteeing that their interests are accounted for.<sup>238</sup> First, the child's representative can help ensure that all of the evidence relevant to an important issue, like a "grave risk of harm" defense, is brought to the court's attention. The child's representative acts as a fact investigator for the court, either directly as a guardian *ad litem* or indirectly as a lawyer for the child. In one case, for example, the guardian *ad litem* (an attorney) reviewed the records of the foreign country's proceedings as well as the foreign law and raised concerns about whether contact between the mother and child would be terminated if the child were returned.<sup>239</sup> An additional fact investigator can be critical because the parties' lawyers do not always gather all the relevant facts for whatever

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238. There may also be a procedural due process right to counsel, but this Article does not explore that possibility. Cf. Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 138–39 (2008) (discussing the constitutional right to counsel in abuse and neglect proceedings under *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Arguably the same analysis would apply if the court is relying on foster care in the habitual residence to protect the child. As Atwood states,

Children have profound liberty interests in their own safety, health and well-being as well as interests in maintaining the integrity of the family unit and protecting their family relationships. An erroneous decision to place a child in foster care will harm the child by the removal itself, the out-of-home living experience, and the consequent disruption in family relationships.

*Id.*

239. *In re Marriage of Ieronimakis*, 831 P.2d 172, 194–95 (Wash. Ct. App. 1992); see also *Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2007 WL 4548570, at \*2 (D. Colo. Dec. 19, 2007) (appointing a guardian *ad litem* "to aid [the judge] in understanding all of the pertinent factors concerning the minor children"). In *Lieberman*, the duties of the guardian *ad litem* included the following:

(1) to investigate all aspects of the social background of each of the minor children by talking to the Petitioner, Respondent, the minor children, reviewing court records from legal proceedings in Mexico and engaging in any further fact inquiry or investigation that the guardian *ad litem* deems appropriate; (2) to investigate Respondent's allegations of abuse, mistreatment of each of the minor children for the purpose of determining if Respondent's allegations are accurate, truthful and verifiable; (3) to provide facts, evidence and recommendations, as to each child, concerning whether returning said child to Mexico would expose him or her to a grave risk of physical or emotional harm or otherwise subject the child to an intolerable situation; and to investigate the wishes of the children and their respective maturity levels (to the extent that these issues relate to exceptions within ICARA) and make appropriate recommendations on this point.

*Id.*; see *Olguin v. Santana*, No. 03 CV 6299(JG), 2004 WL 1752444, at \*7 (E.D.N.Y. Aug. 5, 2004) (instructing the guardian *ad litem* to conduct fact investigation of various issues).

reason, and courts do not necessarily ask the parties to obtain the critical evidence.<sup>240</sup> For example, the district court in *Adan v. Avans* chided the respondent, in response to her motion for reconsideration, for not asking for an independent evaluation of whether the child had experienced child abuse.<sup>241</sup> A representative for the child would undoubtedly have done so. Courts even receive useful information when the child's representative finds that there is no useful information to bring to the court's attention after a diligent search. In one recent case, the guardian *ad litem* investigated allegations of abuse and suggested the allegations lacked evidentiary support.<sup>242</sup> Apart from fact investigation, the child's representative can make appropriate arguments so that the evidence's relevance is made manifest. In some cases with allegations of domestic violence, the abductor never raises the Article 13(b) defense and consequently the allegations have limited legal significance.<sup>243</sup>

The child's attorney would presumably assist the court through fact investigation and argument on other aspects of the case too, not just the Article 13(b) defense.<sup>244</sup> Yet it seems particularly essential to have

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240. See *Nunez v. Ramirez*, No. CV 07-01205-PHX-EHC, 2008 WL 898658, at \*5 n.5 (D. Ariz. Mar. 28, 2008) (suspecting that "psychological harm might result" from the separation of the mother and child, but the mother failed to present evidence on this point and "the Court's review of the authorities has not revealed a case in which a Court, *sua sponte*, has ordered a psychological examination of the children"). But see FED. R. EVID. 706(a) ("Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.").

241. *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 2212711, at \*3 (D.N.J. July 30, 2007), *rev'd*, *In re Adan*, 544 F.3d 542 (3d Cir. 2008).

242. *Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2008 WL 1744353, at \*3 (D. Colo. Apr. 10, 2008); see also *Robles Antonio v. Barrios Bello*, No. Civ.A.1:04-CV-1555-T, 2004 WL 1895126, at \*1 (N.D. Ga. June 7, 2004) (relying on report of guardian *ad litem* in finding there was no evidence that the petitioner ever abused the child and recommending that the child be returned to Mexico).

243. See *In re B. Del. C.S.B.*, 525 F. Supp. 2d 1182, 1185-86 n.1, 4 (C.D. Cal. 2007) (explaining that the mother alleged that the father was physically abusive and was arrested for domestic violence); *Washiewski v. Grzelak-Johannsen*, No. 5:06-CV-2548, 2007 WL 2462643, at \*5 (N.D. Ohio Aug. 27, 2007) (denying stay pending appeal and holding it was not error to exclude evidence of alleged child abuse when allegations are not relevant to age and maturity defense, and respondent never raised an Article 13(b) defense). In other cases, appellate courts have reprimanded trial courts for failure to hear from children who were of sufficient age and maturity, apparently because no one suggested they should be heard. See *In re Marriage of Witherspoon*, 66 Cal. Rptr. 3d 586, 594-95 (Cal. Ct. App. 2007) (stating that the ages of the children and surrounding circumstances suggested the trial court should hear from the children on remand).

244. See *Schuz*, *supra* note 223, at 431-32 (suggesting that an attorney should be appointed, *inter alia*: (1) when there is a question as to where the child habitually resided; (2) when the grave risk of harm exception may apply; (3) where the consent

a representative for the child in any case where an Article 13(b) defense is, or should be, raised, simply because the potential harm to the child of a mistaken ruling is so dire and the likelihood of a mistake is so great in these expeditious proceedings.<sup>245</sup> Involving additional lawyers can help get all the evidence gathered in the short time before the hearing.<sup>246</sup>

Second, children need counsel in Hague cases because a Convention defense relates to the child's own views.<sup>247</sup> The ABA recommends appointing a representative for the child whenever the child's concerns or views are relevant to a custody action.<sup>248</sup> The same rationale applies in the Hague context. The attorney can educate the child about the benefits or disadvantages of stating his or her views, help the child develop his or her views, and assist the child in articulating his or her reasons for the views.

Counsel can also inform the court that the child wants to be heard when neither parent plans to call the child.<sup>249</sup> Providing an attorney

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or acquiescence defense is asserted; and (4) where evidence shows the child objects to being returned).

245. Hague Abduction Convention, *supra* note 1, at art. 11.

246. See *Basil v. Ibis Aida De Teresa Sosa*, No. 8:07-CV-918-T-27TGW, 2007 WL 2264599, at \*4 (M.D. Fla. Aug. 6, 2007). In *Basil*, the petition was served on the respondent on May 29, 2007. *Id.* The June 7, 2007 hearing was postponed until June 14, 2007 because petitioner had just retained counsel and needed time to respond to the petition. *Id.* On June 14, the respondent asked for a continuance in order "to further the evidentiary foundation" for the Article 13(b) defense, which was based on spousal violence. *Id.* The court denied the motion and called the request for a continuance "implicitly acknowledg[ing] that the evidence she presented does not rise to the level of a grave risk." *Id.* at \*13 n.15.

247. See *supra* text accompanying note 11 (giving text of Article 13 "age and maturity" defense). This defense, in whole or in part, was the basis for refusing to return the child in thirteen percent of cases of judicial non-return in the United States in 2002, up from zero cases in 1999. Compare Hague Conference on Private International Law, October 30–November 9, 2006, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: National Reports*, Prelim. Doc. No. 3, Part II, at 645 (Oct. 2006), available at [http://www.hcch.net/upload/wop/abd\\_pd03efs2006.pdf](http://www.hcch.net/upload/wop/abd_pd03efs2006.pdf) (reporting that thirteen percent of U.S. cases involving judicial refusal to return the child were based on the child's objection), with Hague Conference on Private International Law, October 30–November 9, 2006, *1991 Statistical Analysis, Part II: National Report United States*, Prelim. Doc. No. 3, at 13 (2001), available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2857](http://www.hcch.net/index_en.php?act=publications.details&pid=2857) (reporting that none of the ten U.S. cases of judicial non-return were based upon the child's objection to return).

248. *ABA Standards of Practice*, *supra* note 230, at 153 (VI.A.2.c).

249. See *In re Marriage of Witherspoon*, 66 Cal. Rptr. 3d 586, 594–95 (Cal. Ct. App. 2007) (stating that thirteen and eleven-year-old children should be heard by the trial court on remand even though neither party called them to express their preferences); Bruch, *supra* note 36, at 534 n.20 (discussing *Re J*, a case involving a mother who did not bring to the court's attention her son's fears about the father's alleged abuse because, the court opined, she feared being blamed for trying to influence the child, and the older child's views were only made known to the court when the older child obtained his own counsel and appealed the decision ordering

for the child guarantees that the child has the opportunity to express his or her views, either directly or through the representative, consistent with Article 12 of the U.N. Convention on the Rights of the Child.<sup>250</sup> Having the opportunity to participate can be very important to a child's well-being. Joan Kelly, a clinical psychologist and researcher, reports that children excluded from the divorce process "complain about feeling isolated and lonely . . . and many older youngsters express anger and frustration about being left out."<sup>251</sup> In fact, "a huge body of research show[s] that for children . . . perceived control is related to mental health,"<sup>252</sup> including research from child protection proceedings.<sup>253</sup> Research by Reunite, a U.K. charity focused on international child abduction, indicates that these findings are probably equally applicable to abduction proceedings.<sup>254</sup>

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return). As Baroness Hale of Richmond stated in one Hague Abduction Convention case before the House of Lords:

[T]here is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

*In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619, 641 (H.L.) (appeal taken from Eng.) (U.K.).

250. Article 12 states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

U.N. Convention on the Rights of the Child, *supra* note 23. The United States is not a party to the U.N. Convention on the Rights of the Child (CRC). However, our Hague treaty partners are parties to the CRC. Therefore, the United States's respect for the CRC is important if the United States is to maintain an interpretation of the Hague Convention that is uniform with our treaty partners.

251. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 149 (2002).

252. Melton, *supra* note 225, at 938.

253. See Atwood, *supra* note 238, at 145-46 ("Research shows that children [in child protection proceedings] resent their exclusion from decision-making involving their welfare and suffer low self-esteem and feelings of powerlessness when they are not consulted or informed about actions taken that affect them.")

254. See Marilyn Freeman & Anne-Marie Hutchinson, *The Voice of the Child In International Child Abduction*, [2007] INT'L FAM. L. 177, 177 (reporting the findings from *International Child Abduction, The Effects* (Reunite 2006), including that "[c]hildren reported feeling a lack of faith as a result of having been failed by the

However, just as some children do not want the responsibility of expressing their preferences during a custody adjudication,<sup>255</sup> some children undoubtedly feel similarly during a Hague proceeding. In fact, making a choice can “create stress and compromise parent-child relationships.”<sup>256</sup> Counsel for the child can inform the court whether the child wants to express his or her own thoughts and what the boundaries are for any such testimony. For example, the child may want to be heard, but may not want to express a preference for staying or returning.

Lawyers are also very important for influencing courts’ receptivity to children’s views. The Convention leaves the age at which a child should be heard to the “discretion of the competent authorities.”<sup>257</sup> Case law demonstrates that the determination is highly individualized, although courts have sometimes imposed a categorical age requirement.<sup>258</sup> When courts have discounted children’s views because of their age, either categorically<sup>259</sup> or otherwise,<sup>260</sup> the children often have lacked attorneys. Children would benefit from having advocates argue that they are old enough to have their voices heard.

After the attorney helps a child clear the age hurdle, the attorney can argue that the child’s views should make a difference to the outcome. Part of the argument is legal, as there are “conflicting interpretations in U.S. courts” about the form an objection should take.<sup>261</sup> Part of the argument is factual, as some courts discount

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legal system and the adults involved” because children were not taken seriously and “their views [were] not carrying much weight”).

255. Kelly, *supra* note 251, at 151 (“Children not only clearly understand the difference between expressing their thoughts and making final decisions, but most state that they do not want to make autonomous choices.”).

256. *Id.* at 151.

257. See Pérez-Vera, *Explanatory Report*, *supra* note 59, at 433, ¶ 30 (“[A]ll efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.”).

258. See *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992) (holding that the defense “simply does not apply to a nine-year-old child”).

259. *Id.* (child was unrepresented).

260. See *In re B Del. C.S.B.*, 525 F. Supp. 2d 1182, 1198 (C.D. Cal. Dec. 3, 2007) (ten-year-old child); *Wasniewski v. Grzelak-Johannsen*, No. 5:06-CV-2548, 2007 WL 2344760 (N.D. Ohio Aug. 15, 2007) (thirteen-year-old child); *Yang v. Tsui*, No. 2:03-cv-1613, 2006 WL 2466095, at \*15 (W.D. Pa. Aug. 25, 2006) (ten-year-old child); *Escaf v. Rodriquez*, 200 F. Supp. 2d 603 (E.D. Va. 2002) (thirteen-year-old child).

261. Anastacia M. Greene, *Seen and Not Heard? Children’s Objections Under the Hague Convention on International Child Abduction*, 13 U. MIAMI INT’L & COMP. L. REV. 105, 137 (2005). For example, some courts require that the child’s objection be based on the problems with the habitual residence, and not the benefits of the abducted-to state or the problems with the left-behind parent.

children's views based on the child's immaturity,<sup>262</sup> or the abductor's influence,<sup>263</sup> or a variety of weak or debatable reasons.<sup>264</sup> The decisions are simply "idiosyncratic."<sup>265</sup> As one court noted, "[t]he results reached in published decisions seem to vary considerably,

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262. See, e.g., *England v. England*, 234 F.3d 268, 272–73 (5th Cir. 2000) (finding thirteen-year-old child was not mature enough for the court to consider her view under Article 13 because she had multiple foster care placements, Attention Deficit Disorder, a Ritalin prescription, and learning disabilities); *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 615 (E.D. Va. 2002) (finding that thirteen-year-old child was "not exceptionally mature"). There is no "set criteria for determining 'maturity'" and courts have evaluated child's maturity with and without expert testimony. *Greene*, *supra* note 261, at 132.

263. *Lieberman v. Tabachnik*, No. 07-cv-02415-WYD, 2008 WL 1744353, at \*15 (D. Colo. Apr. 10, 2008) (refusing to honor child's preference because of possibility that child was influenced by respondent); *In re B. Del C.S.B.*, 525 F. Supp. 2d at 1199 (discounting ten-year-old's testimony because she used the word "harassed" and "lovable" which suggested adult influence); *Hazbun Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 615 (E.D. Va. 2002) (refusing to honor thirteen-year-old child's preference, in part, because "some of [thirteen year old's] statements regarding reasons for staying in the United States appear to be the product of suggestion, echoing the preferences of his father"); see also Department of State, Hague International Child Abduction Convention: Text & Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (1986) ("A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child."). But see *Laguna v. Avila*, No. 07-CV-5136 (ENV), 2008 WL 1986253, at \*9–10 (E.D.N.Y. May 7, 2008) (granting defense when thirteen-year-old child exhibited, *inter alia*, "a perceptive understanding of the key issues presented for trial" and stating, "the risk of undue influence . . . is no excuse for judicial paralysis. Such testimony should be taken, considered, and where appropriate, can support an age and maturity defense.") (citations omitted); *Kofler v. Kofler*, Civil No. 07-5040, 2007 WL 2081712, at \*9 (W.D. Ark. July 18, 2007) (finding that children's views were not unduly influenced by respondent, although it was respondent's impetus that led them to write letters to the court); *Blondin v. Dubois*, 78 F. Supp. 2d 283, 296 (S.D.N.Y. 2000) (coaching by abductor was not equivalent to "undue influence").

264. See, e.g., *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1257–59 (M.D. Fla. 2008) (discounting ten-year-old's statement that he did not want to return "to Mexico primarily out of concern for his mother"—after child testified to a court-appointed child psychologist that he "recalled [the father] hitting and kicking their mother"—because, *inter alia*, "[t]he well-being of his mother should not be a child's concern"); *In re B. Del C.S.B.*, 25 F. Supp. 2d at 1199 (discounting ten-year-old's views because although the child "objects to being returned to a country she has not visited in five years, and to a father she has not seen in five years," she "cannot be expected to weigh the immediate yet short-term effects of returning to Mexico against the barriers she will face as she matures into adulthood as an illegal alien in the United States"); *Toiber v. Toiber*, [2006] 208 O.A.C. 385, 393 (Ont. Ct. App.) (Can.) (calling thirteen-year-old's statement that she did not want to go back to Israel and that she disliked her father no more "than those often expressed by a child caught in the vortex of a custody battle"). Compare *Toiber*, *supra*, with *LOWE, EVERALL & NICHOLS*, *supra* note 49, at 334 (discussing rulings where courts have held that the word "objects" has its literal meaning and does not mean views more impassioned than in a typical custody dispute).

265. See *De Silva v. Pitts*, 481 F.3d 1279, 1287 (10th Cir. 2007) ("Given the fact-intensive and idiosyncratic nature of the inquiry, decisions applying the age and maturity exception are understandably disparate.").

even among children in a similar age group.”<sup>266</sup> Counsel for the child can also address the policy concerns that sometimes lead courts to reject the defense, even when they find children to be of age and mature. While a number of courts have recognized that “a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child,”<sup>267</sup> a number of other courts have cautioned that honoring a child’s decision can undermine the Convention.<sup>268</sup> Zealous advocacy for the child is essential in light of all of the factors that courts consider when deciding whether to heed or ignore a child’s voice. As the National Center for Missing and Exploited Children has posited: “Why would one object to giving the child a voice in such an important decision? Certainly, it is difficult to argue that the child should not have an advocate.”<sup>269</sup>

Third, counsel may help alleviate the stress that the Hague proceeding produces in the child. Counsel can advocate for procedures that will mitigate the child’s discomfort. For example, it may be important for a particular child not to speak with the judge directly or to have a support person there when the conversation occurs (i.e., his or her lawyer). Joan Kelly notes that “[f]rom a clinical perspective, being interviewed in chambers is a formidable and inherently stressful experience for most school-aged youngsters.”<sup>270</sup> The Pérez-Vera Explanatory Report also recognizes

266. *Man v. Cummings*, No. CV 08-15-PA, 2008 WL 803005, at \*4 (D. Or. Mar. 21, 2008) (citations omitted).

267. See *De Silva*, 481 F.3d at 1286 (quoting *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001)) (honoring child’s preference); *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005) (remanding to district court for determination of whether children objected to being returned and whether they were sufficiently mature for their views to be considered); *Di Giuseppe v. Di Giuseppe*, No. 07-CV-15240, 2008 WL 1743079, at \*8 (E.D. Mich. Apr. 11, 2008) (honoring children’s preferences); *Leites v. Mendiburu*, No. 6:07-cv-2004-Orl-19DAB, 2008 WL 114954, at \*6 (M.D. Fla. Jan. 9, 2008) (honoring child’s preference).

268. See *In re B Del. C.S.B.*, 525 F. Supp. 2d at 1199 (noting that child’s testimony was likely coached and that child did not grasp consequences of remaining an illegal immigrant in the United States); *Wasniewski v. Grzelak-Johannsen*, No. 5:06-CV-2548, 2007 WL 2344760, at \*5 (N.D. Ohio Aug. 15, 2007) (noting that honoring child’s preference may reward a parent for circumventing the Convention’s structures); *Yang v. Tsui*, No. 2:03-cv-1613, 2006 WL 2466095, at \*15 (W.D. Pa. Aug. 25, 2006) (noting that child’s wish not to return to her habitual residence was a result of being wrongfully retained for more than three years and honoring the child’s wish would undermine the Convention and “reward the malfeasant parent”); see also *JPC v. SLW, SMW*, [2007] 2 FLR 900, ¶¶ 48–49 (Eng.).

269. LITIGATING INTERNATIONAL CHILD ABDUCTION CASES, *supra* note 218, at 71. NCMEC suggests some reasons why the attorney for the petitioner might oppose appointment of a guardian *ad litem*, but the reasons all relate to the possibility of expanding the proceeding into a merits proceeding. *Id.* This would not occur if the court focused on the Hague Abduction Convention and restricted evidence to the issues and defenses permitted by the Convention.

270. Kelly, *supra* note 251, at 154.

this fact.<sup>271</sup> A major reason some courts appoint a guardian *ad litem* is to avoid requiring the child to testify.<sup>272</sup> On the other hand, some children may find it important to talk to the judge directly. Determining which is true for a particular child can be important to the child's well-being. Counsel can also reduce a child's stress by informing the child about the proceedings and answering his or her legal questions. Finally, counsel for the child may be able to remind the court of other concerns the child has related to the proceedings. The child may have his or her own need to resolve the matter expeditiously, perhaps to begin the school year in a particular place, or to delay the execution of an order, perhaps until the school year is completed.

Fourth, counsel can help secure the child's well-being during the pendency of the proceedings. As the ABA states, "[t]he purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented."<sup>273</sup> For example, the court may need to increase the child's contact with the left-behind parent, or impose conditions to prevent the reabduction of the child by either parent.

Fifth, the child's representative may facilitate settlement between the parents. By emphasizing the child's interests and proposing solutions that go beyond the zero-sum position of the parents, the child's representative may help the parents find a middle ground.

Sixth, and finally, appointing a representative for the child will enhance the likelihood that the child will follow the order. There may exist barriers to the child's cooperation, such as the timing of the return, and the child's representative can make these issues known to the court. Additionally, the child's representative can

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271. See Pérez-Vera, *Explanatory Report*, *supra* note 59, at 433, ¶ 30 (stating that "this provision [the age and maturity defense] could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents").

272. See *Wittman v. Wittman*, No. FA074006469S, 2007 WL 826536, at \*2 (Conn. Super. Ct. Feb. 21, 2007) (appointing guardian *ad litem* to avoid forcing a ten-year-old and seven-year-old to testify for either parent). Obtaining the child's testimony out of court may also facilitate its usefulness. Kelly notes that "judges are not trained in child interviewing skills, and generally lack knowledge about developmental differences in cognitive, language, and emotional capacities. Thus, it is hard for even the most experienced judge to place children's responses in an appropriate context and evaluate the weight that should be given to their wishes." Kelly, *supra* note 251, at 154 (citation omitted).

273. ABA *Standards of Practice*, *supra* note 230, at 154 (VI.A.2 Commentary).



monitor whether the order's execution is unnecessarily harmful to the child. As Professor Bucher suggests, the child should not be denied contact with the abductor if authorities could supervise their continued contact.<sup>274</sup> Nor should authorities enforcing the order "inflict upon the child suffering that seriously endangers his or her physical and mental state."<sup>275</sup> Professor Bucher gives the following examples:

the use of physical force on the child (physical violence, other corporal punishment, detention, use of drugs that impair consciousness and willpower), refusing to let the child say goodbye to the [abductor], the child not being taken charge of and accompanied by personnel trained in child psychology in order to take care of the child in such extreme and difficult circumstances.<sup>276</sup>

If the child resists the return order, the judge can best address the situation, which might require enforcing its order against the child, if the child has counsel. Children subject to a return order sometimes refuse to board planes<sup>277</sup> or threaten suicide.<sup>278</sup> If a child's opposition causes a ruckus, the pilot might not let the child board. If the child was not a participant in the Hague proceeding, at least through representation,<sup>279</sup> the child's due process rights arguably preclude the court from enforcing its order against the child directly.

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274. Bucher, *supra* note 2, at 152.

275. *Id.* at 153. Professor Bucher, in discussing the Swiss Act, suggests that the Article 13(b) "grave risk of harm" defense should be used to assess enforcement measures. *Id.*

276. *Id.* The Swiss Act addresses the enforcement of return orders. It requires a court to consider whether its decision can be executed, *see* Swiss Federal Act, art. 10(2), and requires a court to give specific instructions for the execution of a return order. *Id.* art. 11(1). Those executing the order must "take account of the best interests of the child and endeavour to obtain the voluntary execution of the decision." *Id.* art. 12(2). The court also has the ability to stop the execution of its order. *Id.* art. 13.

277. BEAUMONT & MCELEAVY, *supra* note 61, at 152 (discussing a case in which a child had twice refused to board a plane).

278. *See* Garcia v. Angarita, 440 F. Supp. 2d 1364, 1373, 1382 (S.D. Fla. 2006) (reporting that a week after the filing of the petition, an eleven-year-old threatened suicide if forced to return). The court, however, found that the parent had not met the burden of "clear and convincing evidence that the risk [was] sufficiently grave to warrant a denial of return[.]" given the doctor's report that the child had no real intention of harming himself. *Id.* Further, the court stated that the abducting parent must not be "permitted to thwart a return by causing, or refusing to ameliorate, psychological harm to the child" by not returning with child. *Id.* at 1382-83.

279. *See* State *ex rel.* Partlow v. Law, 692 P.2d 863, 865 (Wash. Ct. App. 1984) (holding that trial court had jurisdiction in paternity and child support action under Uniform Parentage Act when child had a guardian *ad litem* who was an attorney and participated in proceedings, although child was not made party to the action).

At the point of resistance, the child's counsel could seek a modification of the order, if necessary, especially if enough time has passed that a modification would be appropriate for that reason alone. In *In re F (Hague Convention: Child's Objections)*,<sup>280</sup> the order was not executed for approximately eighteen months, due in part to the child's refusal to board the plane. The mother successfully asked the court to set aside the original orders based on the child's objections.<sup>281</sup> Not all abductors will act like the mother in *In re F* and seek modification, especially if the abductor has been ordered to pay the left-behind parent's attorney's fees<sup>282</sup> and fears being penalized for the child's resistance.<sup>283</sup> However, the child's representative could ask the court to reexamine the order if execution becomes a grave risk to the child's physical or psychological well-being or otherwise places the child in an intolerable situation.

Two facts make all of the reasons cited above for appointing a representative even more compelling. First, many Hague cases are adjudicated in federal court, where judges often have little experience with cases that so profoundly affect children's well-being. Second, no matter whether the case is heard in state or federal court, the judge is unlikely to have adjudicated a Hague Convention case before. The novelty of these cases means that the judicial process and decision-making would benefit from a lawyer advocating for the child. The judge would certainly sleep better at night knowing that his or her decision, which may profoundly impact a child's safety and well-being, was based on the best evidence and argument. As Baroness Hale of Richmond, of the English House of Lords, stated in *In re D (A Child) (Abduction Rights of Custody)*: "[W]henver it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented."<sup>284</sup>

#### B. *An Example: Mendez-Lynch v. Pizzutello*

The previous section discussed the reasons why courts should appoint representatives for children in Hague Abduction Convention

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280. (2006) FamCA 685 ¶¶ 25, 26, 82 (Austl.); see also *In re HB (Abduction: Children's Objections)* (No. 2), [1998] 1 FLR 564 (Hale, J.) (Eng.).

281. *In re F*, at ¶¶ 25, 26, 82. The federal police used some physical force to try to get the child to board. *Id.* ¶ 26.

282. See International Child Abduction Remedies Act, 42 U.S.C. § 11607 (2006).

283. See *supra* note 249 (discussion of *Re J*).

284. *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619, 642 (H.L.) (appeal taken from Eng.) (U.K.).

proceedings. The importance of doing so becomes even more obvious when one analyzes particular cases. For example, the *Mendez-Lynch v. Pizzutello*<sup>285</sup> decision in 2008 demonstrates the advantage of the Swiss approach.

The Mendez-Lynch children were abducted twice; both abductions resulted in litigation.<sup>286</sup> The first proceeding occurred when the children were nine and six years old.<sup>287</sup> At that time, the mother raised an Article 13(b) defense, alleging that she and the children's father had many physical confrontations.<sup>288</sup> The mother said that he "slammed a door into her, held her down, spit on her, placed his hands around her neck, pushed and 'smacked' her, and threw things at her."<sup>289</sup> The father denied any physical contact.<sup>290</sup> The court never resolved the conflicting testimony, but concluded that the respondent had not met her burden of showing by clear and convincing evidence that the "grave risk of harm" defense was made out because there had been no direct abuse of the children.<sup>291</sup> The court said, "[t]he assessment focuses upon the children, and it does not matter if the Respondent is the better parent in the long run, had good reason to leave her home in Argentina and terminate her marriage, or whether she will suffer if the children are returned to Argentina."<sup>292</sup>

The court also considered whether it should deny return because nine-year-old Dylan gave "uncontradicted" testimony that he "wants to stay in the United States and does not want to go to Argentina."<sup>293</sup> The parties stipulated that six-year-old Brandon had "not attained an age or degree of maturity to make it appropriate to take his views into account."<sup>294</sup> The court felt that Dylan had attained the requisite age and degree of maturity,<sup>295</sup> but exercised its discretion and ordered Dylan to return nevertheless.<sup>296</sup> It noted that his memories of Argentina were those of a six-year-old, since he had been in the exclusive custody of his mother and away from Argentina since the abduction, and that his mother's views had probably influenced his

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285. No. 2:08-CV-0008-RWS, 2008 WL 416934 (N.D.Ga. Feb. 13, 2008).

286. *Mendez-Lynch*, 2008 WL 416934, at \*1.

287. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1350 (M.D. Fl. 2002).

288. *Id.* at 1350.

289. *Id.*

290. *Id.*

291. *Id.* at 1366.

292. *Id.* at 1364.

293. *Id.* at 1362.

294. *Id.* at 1361-62.

295. *Id.* at 1362.

296. *Id.*

own views.<sup>297</sup> The court concluded that the “return of Dylan . . . would further the aims of the Hague Convention,” and ordered his return despite his contrary wishes.<sup>298</sup>

In the second Hague abduction proceeding involving these children, many years later, the court again rejected a “grave risk of harm” defense and ignored both children’s views.<sup>299</sup> The mother alleged that after she and the children returned to Argentina following the first abduction hearing, the petitioner verbally abused her and physically abused the children.<sup>300</sup> These allegations, which the mother claims were supported by affidavits signed by the minor children,<sup>301</sup> led the Argentinean court to award temporary custody to the mother and to suspend the father’s visitation.<sup>302</sup> In 2005, the mother and children traveled to the United States with the permission of the Argentinean courts, but did not return when ordered to do so.<sup>303</sup> The father again brought a Hague petition for the children’s return.<sup>304</sup>

When the Hague petition was heard in 2008, the children were fourteen and twelve years old.<sup>305</sup> The respondent’s trial memorandum stated that the children “have expressed the desire to remain here in school, with their church, friends and extended family.”<sup>306</sup> During the hearing, the judge spoke with the children in his chambers for ten minutes.<sup>307</sup> After the meeting, the court expressed “concern about what might befall the children during any efforts they might undertake to avoid being returned to Argentina.”<sup>308</sup>

Nonetheless, the court ordered the children’s return.<sup>309</sup> As for the alleged abuse, the court held that the respondent had failed to make

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297. *Id.*

298. *Id.*

299. *See Mendez-Lynch v. Pizzutello*, No. 2:08-CV-0008-RWS, 2008 WL 416934, at \*4 (N.D. Ga. Feb. 13, 2008) (stating the rights of the father overrode the desires of the children).

300. Brief of Respondent at \*2, *Mendez-Lynch*, 2008 WL 416934.

301. *Id.* at \*5.

302. *Id.* at \*1–2. The mother indicates that there were two police reports that discuss the beatings of one of the children, although the date and content of those reports is unclear. *See* e-mail from Cathleen Pizzutello to Merle Weiner (May 12, 2008) (on file with author). The father has not been contacted so it is unknown whether he would verify or refute the mother’s assertions.

303. *See Mendez-Lynch*, 2008 WL 416934, at \*1.

304. *Id.* at \*2.

305. Brief of Respondent at \*5, *Mendez-Lynch*, 2008 WL 416934.

306. *Id.*

307. *See* e-mail from Cathleen Pizzutello to Merle Weiner (Aug. 11, 2008) (on file with author).

308. *Mendez-Lynch*, 2008 WL 416934, at \*3.

309. *Id.* at 4.

out the Article 13(b) defense.<sup>310</sup> Regarding the children's wishes, the court noted that, "[b]oth children adamantly stated their opposition to returning to Argentina. They like the Gilmer County community and the schools they are attending."<sup>311</sup> The court "recognize[d]" that "being uprooted from this community is distressing to the children."<sup>312</sup> The court then said, "[w]hile the Court is sympathetic with their feelings, the Court finds that their desires do not override their father's rights."<sup>313</sup> Regarding the children's threats to take certain action if they were forced to return, the court was unmoved. The court refused to allow the process "to be manipulated by the threats of affected children."<sup>314</sup> Nonetheless, the judge's order contained a footnote that suggests he found the children's testimony troubling:

[I]n light of the concerns raised by the children in their interviews with the Court, the Court urges the parties to allow the children to remain in the actual physical custody of Respondent upon the return to Argentina until the proper court in Argentina can address this issue.<sup>315</sup>

The court's footnote meant nothing to the eventual outcome, however. The children were returned to Argentina and placed with their father. The children's mother was unable to return to Argentina with them because her passport was not current and she feared criminal prosecution for child abduction.<sup>316</sup>

According to the mother, who eventually traveled to Argentina, the children have not fared well upon their return to Argentina. The mother reports that the U.S. Embassy in Argentina tried to follow up with the children, but the father would not permit it without a court order.<sup>317</sup> Then, an Argentinean court, apparently without seeing the children,<sup>318</sup> gave custody to the father and entered an injunction

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310. *See id.* (noting respondent failed to provide the requisite level of proof of "physical and emotional abuse").

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at \*3. The nature of the danger is undisclosed.

315. *Id.* at \*4 n.6.

316. There was no requirement imposed by the court that criminal charges against her in Argentina be dropped, as had been done in the first case, so that she could in fact return with the children. *Compare* Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1366 (M.D. Fl. 2002) (criminal charges ordered dropped), *with* Mendez-Lynch, 2008 WL 416934, at \*4 (no order to drop criminal charges). The latter opinion does not reflect whether her counsel made such a request.

317. *See* e-mail from Cathleen Pizzutello to Merle Weiner (Apr. 4, 2008) (on file with author).

318. *See* e-mail from Cathleen Pizzutello to Merle Weiner (May 14, 2008) (on file with author).

against the mother forbidding her from seeing them.<sup>319</sup> The children claim that their life with their father has been unbearable. The children's allegations against their father are detailed in a newspaper article written by an Argentinean reporter who has examined the court files.<sup>320</sup> The mother also provided me with a letter Dylan apparently wrote months after his return to Argentina to Judge Story, the U.S. district court judge who entered the return order.<sup>321</sup> Judge Story refuses to confirm or deny the existence of the letter, and it is not contained in the court file. Assuming the letter is legitimate, it also paints a horrific picture of the children's situation and clearly asks the judge for help.<sup>322</sup> Subsequently, after many months of living with their father, an Argentinean court finally placed the children with a temporary guardian.<sup>323</sup> At the time of publication, the fate of the children is unclear.

What is clear is that the children were not represented at either the first or second Hague proceeding in the United States. "[T]he Court endeavored to make guardians-ad-litem available for the children during [the 2008] proceeding,"<sup>324</sup> but the children never received a guardian because the parties could not agree on an individual.<sup>325</sup> The court could have, and should have, appointed a representative for the children when the parties could not agree on a specific person.

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319. See e-mail from Cathleen Pizzutello to Merle Weiner (May 12, 2008) (on file with author). In other cases, a custody proceeding may never occur in the child's habitual residence after return, especially if legal aid is not available for the abducting parent. See Freeman & Hutchinson, *supra* note 254, at 179.

320. Guillermo Háskel, *U.S. Mother Fights for Sons' Custody*, BUENOS AIRES HERALD, Nov. 15, 2008, at 2.

The files are also full with [the boys'] allegations that their father beats them and kicks them, threatens to burn their faces in the stove, frightens them with reckless driving changing lanes and telling them "you want to commit suicide," prevents them from seeing their mother, walks naked around the house urging the children to do the same, shows them porno magazines, leaves them locked and in-communicated when going away, and sleeps with a machete and a rifle besides [sic] his bed.

*Id.* According to the article, "Teófilo Méndez Lynch has only admitted to some disciplinary spanking of his sons." *Id.*

321. Letter from Dylan Mendez-Lynch to Judge Story (undated) (on file with author).

322. Letter from Dylan Mendez-Lynch to Judge Story (undated) (on file with author).

323. E-mail from Cathleen Pizzutello to Merle H. Weiner (Sept. 9, 2008) (on file with author). The judge stated, "I am obliged to adopt some measures...to stop violence against Brandon and Dylan. That is a crime against the minors." Háskel, *supra* note 320.

324. *Mendez-Lynch v. Pizzutello*, No. 2:08-CV-0008-RWS, 2008 WL 416934, at \*3 n.4 (N.D. Ga. Feb. 13, 2008).

325. See e-mail from Cathleen Pizzutello to Merle Weiner (Aug. 11, 2008) (on file with author).

A representative for Dylan and Brandon might have made a difference in so many ways. For example, the attorney could have zealously advocated during the proceedings for their voices to be heard, and for an assurance of their safety and well-being if they were to be returned. The attorney could have built a better case for the children given the facts underlying the alleged abuse. The attorney could have argued vigorously that considerable weight should be given to their views. After all, the sole rationale given by the court for disregarding the children's views—that their views did not outweigh their father's rights<sup>326</sup>—was an error. Such reasoning would always defeat the defense. The attorney also could have argued against the ridiculous position articulated in the petitioner's post trial brief: "Allowing threats made by the children of self-inflicted bodily harm, if they are returned to Argentina, as the motivating factor for denying the return would open the floodgates in future Hague Convention cases to suicide threats."<sup>327</sup> An attorney focused on the children undoubtedly would have explored whether the mother could in fact return with them to Argentina and would have suggested an appropriate placement for them until the Argentine courts could evaluate the allegations of abuse. The attorney for the children could have asked the U.S. Court of Appeals for the Eleventh Circuit for a stay when the district court rejected the mother's request, pointing out that once the children were returned the appeal was moot in the Eleventh Circuit.<sup>328</sup> If the children had an attorney, the letter apparently written by Dylan to Judge Story could have been appended to a Rule 60 Motion<sup>329</sup> or used as the basis for other advocacy on the children's behalf. An attorney for the children could have served as another resource to help ensure that the appropriate Argentinean authorities addressed the children's

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326. See *Mendez-Lynch*, 2008 WL 416934, at \*4.

327. Post Trial Brief at 1–2, *Mendez-Lynch*, No. 2:08-CV-0008-RWS, 2008 WL 416934. The argument is ridiculous because it makes all such threats irrelevant, no matter how likely it is that the threat will be carried out. The children's attorney could have also rebutted the petitioner's assertion that the children's "maturity" should not be relied upon given the inherent instability in the Respondent's ability to provide a stable environment for the children." Trial Brief Supporting Petitioner's Request for Removal at 22, *Mendez-Lynch*, No. 2:08-CV-0008-RWS, 2008 WL 416934.

328. Courts differ on whether the children's return renders an appeal moot. Compare, e.g., *Whiting v. Krassner*, 391 F.3d 540, 546 (3d Cir. 2004) (case not moot), and *Fawcett v. McRoberts*, 326 F.3d 491, 497 (4th Cir. 2003) (case not moot), with *Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir. 2001) (case moot). For all practical purposes, however, even if the litigation is not moot, the litigation is often over if a stay is not granted because the abductor's attention is redirected towards proceedings in the child's habitual residence.

329. FED. R. CIV. P. 60.

situation expeditiously and that the U.S. authorities were doing everything possible to protect these children.

*C. Are There Reasons Not to Appoint Counsel for Children?*

Some scholars claim that courts should not appoint attorneys for children because such appointments can change the nature of the proceedings.<sup>330</sup> For example, Professor Linda Silberman has called “expert testimony,” “independent representation,” and even consideration of the child’s views “trappings” that “should not be imposed on a Hague proceeding because it is not a custody case.”<sup>331</sup> Similarly, the National Center for Missing and Exploited Children has suggested that a guardian *ad litem* will investigate concerns that really go to the merits of the custody issue.<sup>332</sup> Whether for these reasons or others, only a handful of the signatories to the Hague Convention appear to appoint counsel for children in Hague Convention proceedings.<sup>333</sup>

A Hague proceeding is not designed to adjudicate the merits of custody. That said, children’s views are relevant to many of the issues that are explicitly part of a Hague Convention proceeding. In addition, as discussed above, counsel for the child serves various functions apart from bringing forth evidence and argument. Nonetheless, courts may be reluctant to appoint representation for

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330. See BEAUMONT & MCELEAVY, *supra* note 61, at 187 (citing increased complications and a threat to the summary nature of the proceedings).

331. Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT’L L. & POL. 221, 244 (2000).

332. LITIGATING INTERNATIONAL CHILD ABDUCTION CASES, *supra* note 219, at 71.

333. Answers to a questionnaire disseminated in anticipation of the last Special Session appeared to suggest that courts in only the following countries had the discretion to appoint counsel for children, and the frequency of such appointments was either not indicated or varied widely: Argentina; Canada; New Zealand; Panama; South Africa; United Kingdom (Scotland); England/Wales; United States. See *Collated Responses*, *supra* note 88, at Question #9. Yet, admittedly, not all countries answered the question. In addition, a country may, in fact, make counsel for children an option even if it was not mentioned in the answer because the question was open-ended. *Id.* In fact, research by others suggests that the answers to the questionnaire did not capture all countries that provide counsel for children in Hague cases. See, e.g., Schuz, *supra* note 223, at 432 n.175 (mentioning New Zealand “appoints a separate representative whenever the grave harm or child objection risk is raised, and France, which appoints a children’s lawyer whenever the children are old enough to have their wishes taken into account”). But see *id.* at 432 (“It seems that most courts have adopted an extremely narrow approach to ordering separate representation.”); *id.* at 432–33 (mentioning one case in Israel and a few cases in England); see also William J. Keough, *The Separate Representation of Children in Australian Family Law—Effective Practice or Mere Rhetoric?*, 19 CAN. J. FAM. L. 371, 403–04 (2002) (explaining that the *Family Law Amendment Act 2000 (Cth)* states that there must be “exceptional circumstances” to justify the appointment of an attorney in Hague Convention cases).



the child if more evidence and argument will come before the court; Hague proceedings are meant to be expeditious. However, it helps no one (and it can affirmatively hurt a child) for a court to make a wrong decision quickly. As the High Court of Australia once said when determining that it was appropriate for children to have a representative, “[p]rompt listing for hearing is one thing; an over-hasty and insufficient hearing is another.”<sup>334</sup> If courts focus the parties and their counsel on what is relevant under the Convention and exclude evidence that only goes to the merits of custody, then delay should not occur. In fact, the Australian court concluded, “[t]he presence of separate representation should not hinder, and indeed should assist, the prompt disposition of Convention applications.”<sup>335</sup> In short, fear that counsel may try to introduce irrelevant evidence should not stop the appointment of counsel since counsel facilitate the consideration of relevant evidence, do so in an efficient manner, and help achieve other important goals.

Undeniably, representation for children increases the costs of these proceedings.<sup>336</sup> The costs must either be born by the parties<sup>337</sup>

334. *See* De L v. Director-General (1996) 187 C.L.R. 640, 660 (Austl.).

335. *Id.*; *see also* Schuz, *supra* note 223, at 431 (“There is no good reason why appointing an independent representative for the child should necessarily delay the proceedings.”).

336. The AAML mentions that “representatives for children may delay the proceedings and tax the resources both of the parties and the courts.” *Representing Children: Standards for Attorneys, supra* note 222, at 3, § 1 cmt.

337. A court can allocate the cost of the representation, as appropriate, pursuant to the cost provision in the International Child Abduction Remedies Act. *See* 42 U.S.C. § 11607(b) (2006) (awarding costs to a prevailing petitioner unless “clearly inappropriate”); *see also* Kufner v. Kufner, No. 07-46S, 2007 U.S. Dist. LEXIS 37435, at \*8–10 (D. R.I. May 23, 2007) (ordering respondent to reimburse petitioner’s fees, including \$13,340 for the court-appointed representative for the child); *cf.* Gaddis v. United States, 381 F.3d 444, 454–55 (5th Cir. 2004) (finding express statutory authority in Federal Rule of Civil Procedure 17, as required by *Crawford Fitting*, to provide district courts with the power and discretion to tax guardian *ad litem* fees as costs). The court might find such an award “clearly inappropriate,” however, if the respondent is indigent. *See* Berendsen v. Nichols, 938 F. Supp. 737, 738–39 (D. Kan. 1996) (reducing award under 42 U.S.C. § 11607 because of respondent’s financial condition and need to support his children). An interesting question, which goes beyond the scope of this Article, is whether the petitioner could be taxed the costs of the guardian *ad litem* when the respondent is the prevailing party. This is suggested by ICARA, International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006), which indicates that costs are generally to be born by the petitioner, unless the petitioner prevails and the cost-shifting provision of 42 U.S.C. § 11607(b)(3) applies. 42 U.S.C. § 11607(b)(1),(2) (2006). This would also be consistent with Federal Rule of Civil Procedure 54(d), which embodies a presumption that costs should be awarded to the prevailing party unless such an award is “unjust,” although that rule has arguably been supplanted by the provision on costs in ICARA. *Id.*; FED. R. CIV. P. 54(d). For a list of state statutory and case law authorities for the provision of compensation to attorneys and guardians *ad litem* that represent children, *see* REPRESENTING CHILDREN WORLDWIDE: 250 JURISDICTIONS IN 2005: HOW CHILDREN’S VOICES ARE HEARD IN CHILD PROTECTIVE PROCEEDINGS, U.S. COMPENSATION SCHEME

or the public if the parties are indigent.<sup>338</sup> However, the cost of the representation is a negligible consideration when the parents agree to the representation and bearing its costs. It seems highly likely that parents will consent to representation for the child when asked by the court to do so (especially when the court emphasizes its importance for the child and the court's inclination to appoint a representative regardless of the parties' consent). Nonetheless, the cost of representation becomes a real consideration when it is imposed on an unwilling parent or the public at large.

The cost of representation becomes less of an obstacle to an appointment, however, if parents have a moral obligation to pay for their child's representation. There are many lenses through which one might examine the parents' moral obligations, and Professor Loken, in his article *Gratitude and the Map of Moral Duties Toward Children*, thoroughly canvases them all.<sup>339</sup> While it is beyond the scope of this Article to make the argument that parents have a moral duty to pay for a representative under one or more of the various theories, it appears that such an argument can be made. The moral obligation of the parent arguably arises if one is a consequentialist and seeking the best outcomes, or a Kantian bound by the categorical imperatives (including that human beings are ends and not means), or a contractarian like Rawls, who emphasizes the social contract established by those behind a veil of ignorance. Loken's own theory for imposing moral obligations—gratitude—also supports a parental obligation to pay for the child's representation.<sup>340</sup> Children who are in the midst of an abduction dispute have experienced and dealt with hardship, whether from the underlying parental dispute, the abduction, or the proceedings. The child is therefore owed “a debt that ought to be consistently acknowledged and, when later circumstances permit, repaid by appropriate beneficence.”<sup>341</sup> The parents would satisfy their debt, at least partially, by providing their child with a representative to guard his or her interests during the proceedings. As Judge Wall stated in *Re S*, “[t]hat [expense] factor . . . is outweighed by the critical importance of this issue to the

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CHART (Jean Koh Peters, Supervisor 2006), <http://www.law.yale.edu/rcw/rcw/summary.htm> (last visited Aug. 30, 2008).

338. See, e.g., CAL. FAM. CODE § 3153(b) (West 2004) (“[T]he portion of the cost of that counsel which the court finds the parties are unable to pay shall be paid by the county.”).

339. See generally Gregory A. Loken, *Gratitude and the Map of Moral Duties Toward Children*, 31 ARIZ. ST. L.J. 1121 (1999).

340. See generally *id.*

341. *Id.* at 1185 (giving as an example a child living in a house with a severely impaired sibling).

children and for the need for their fully independent voice to be heard in the proceedings.<sup>342</sup> Others concur.<sup>343</sup>

Assuming parents are morally obligated to provide their children with counsel in Hague proceedings, then the government should step in when they are unable to pay, if for no other reason than to assure children's equal access to justice in Hague proceedings. The government, in its *parens patriae* role, arguably also has an obligation to shoulder the expense when the parents cannot, since representation is potentially necessary to avoid harm to the child.<sup>344</sup> Similarly, representation is important despite its cost if a court takes seriously the rights of children as set forth in the U.N. Convention on the Rights of the Child.<sup>345</sup> For example, the South African Constitution, which is heavily influenced by international human rights instruments including the Convention on the Rights of the Child, protects the child's right to legal representation at state expense.<sup>346</sup>

A more difficult issue from the court's perspective is what type of counsel to appoint for a child in a Hague proceeding. The court must decide whether to appoint a guardian *ad litem*, an attorney for the child's expressed interest, or both. Sometimes a statute will resolve this question, but it may not. There are advocates for the various positions,<sup>347</sup> although there seems to be an emerging

342. *Re S (Abduction: Children: Separate Representation)*, [1997] 1 FLR 486, 495 (Eng.) (finding potential for conflict between the mother's views and the children's views and interests).

343. See Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 205 (2005) (recognizing the additional costs to parents if children have counsel, but saying "in some circumstances the cost may be justified by the benefit to the child and the court in having a separate advocate for the child's voice"); cf. *Wendland v. Wendland*, 138 N.W.2d 185, 191 (Wis. 1965) ("Inevitably [appointing a guardian *ad litem* to represent the interests of the children in a custody fight] will add to the expense of the divorce proceedings. But such expense will be rewarding if the interests of the children are better served.").

344. See generally Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381 (2000) (explaining the "modern" doctrine of *parens patriae*, and explaining that the government's role has become too large in some instances).

345. Convention on the Rights of the Child, *supra* note 23, art. 12. The United States is not a party to this Convention, but the United States should be influenced by it because our treaty partners are parties to it and the Hague Abduction Convention should be interpreted uniformly throughout the world.

346. See S. AFR. CONST. 1996, § 28(1)(h), available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#28> (last visited July 24, 2008) (giving every child the right "to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result").

347. See, e.g., Judge Debra H. Lehrmann, *Who are We Protecting?*, 63 TEX. B.J. 123, 126 (2000) (disagreeing with the approach in the ABA Standards of Practice for

“consensus” in the legal community that an advocate for the child’s expressed interests is the proper role for an attorney, primarily because “even specially trained attorneys are not equipped to determine what is in the child’s best interests.”<sup>348</sup> The ABA Standards of Practice for Lawyers Representing Children in Custody Cases<sup>349</sup> and the American Academy of Matrimonial Lawyers’ Standards for Attorneys and Guardians *ad Litem* Representing Children in Custody or Visitation Proceedings<sup>350</sup> provide guidelines for courts considering this issue.<sup>351</sup> While a court’s decision may be informed by the age of the child, some advocates recommend a “child-focused assessment of the child’s needs” even when the child cannot articulate a view.<sup>352</sup> Other authors have discussed the options, and it is beyond the scope of this Article to consider the merits of each position.<sup>353</sup> The only point worth emphasizing here is that the court must select a lawyer trained in representing children<sup>354</sup> and knowledgeable about the dynamics of family violence.<sup>355</sup>

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Lawyers who Represent Children in Abuse and Neglect Cases and the American Academy of Matrimonial Lawyers Standards for Attorneys and Guardians *Ad Litem* in Custody or Visitation Proceedings, as both prefer the lawyer act as an attorney for the child so long as the child is old enough).

348. Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 *HAMLINE J. PUB. L. & POL’Y* 177, 179 (2006) (describing the major efforts to address this issue by the ABA, AAML, and others). *But see* Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 *FAM. L.Q.* 441 (2000) (“Trying to define a single lawyer role for children of all ages and all capacities is an impossible task.”).

349. *See ABA Standards of Practice*, *supra* note 230, at 152 (describing the duties of the “child’s attorney” and the “best interests attorney”).

350. *Representing Children: Standards for Attorneys*, *supra* note 222, § 2, at 8; *id.* § 3, at 27.

351. For a helpful overview of the various reform initiatives, *see generally* Atwood, *supra* note 343, at 183.

352. Elrod, *supra* note 227, at 894.

353. For an excellent review of the topic, *see id.* at 869 (summarizing authors’ positions). *See also* Volume 42 of the *FAMILY LAW QUARTERLY*, which contains several articles discussing the NCCUSL’s and the ABA’s model acts. 42 *FAM. L.Q.* (2008). Jurisdictions differ on whether a “child’s attorney” (who is required to advocate the child’s views), a “best interests representative” (who is required in some states to express the child’s views), or both are required. For a very interesting overview of the relevant laws in child protective proceedings in nations around the world, including the United States, *see REPRESENTING CHILDREN WORLDWIDE: 250 JURISDICTIONS IN 2005: HOW CHILDREN’S VOICES ARE HEARD IN CHILD PROTECTIVE PROCEEDINGS, JURISDICTION RESEARCH* (Jean Koh Peters, Supervisor 2006), *available at* [http://www.law.yale.edu/rcw/rcw/juris\\_main.htm](http://www.law.yale.edu/rcw/rcw/juris_main.htm).

354. *See ABA Standards of Practice*, *supra* note 230, VI.B, at 156–57 (setting forth training that lawyers representing children in custody cases should have); LINDA ELROD, *CHILD CUSTODY PRACTICE & PROCEDURE*, 2008 CUMULATIVE SUPPLEMENT § 12:13 (2007) (“To give the child effective representation, the child needs an experienced attorney who has special training in meeting the legal needs of children.”); Elrod, *supra* note 231, at 919 (“Lawyers for children . . . need to know how to talk to children and have training in child development, child advocacy, and

## CONCLUSION

Parties to a multilateral convention can learn from their treaty partners about ways to implement the convention better. Courts in the United States would be well served to consider the Swiss legislation that seeks to improve the application of the Hague Abduction Convention by defining “intolerable situations” and requiring the appointment of counsel for children. The U.S. Executive Branch is itself unlikely to seek an amendment to the U.S. implementing legislation to incorporate these types of changes, or any changes for that matter.<sup>356</sup> Consequently, courts in the United States must take the initiative to follow Switzerland’s approach, assuming the Swiss reforms are worthy of emulation. For the reasons expressed in this Article, I believe the Swiss reforms are very beneficial and hopefully judges adjudicating these cases in the United States will agree.

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child welfare.”); *Representing Children: Standards for Attorneys*, *supra* note 222, § 1.2 cmt., at 5–6 (discussing the training children’s advocates should have).

355. See *ABA Standards of Practice*, *supra* note 230, at VI.B.8-9, at 153 (setting forth training in child abuse, neglect, and domestic violence as topics on which lawyers representing children must be trained); Nancy Ver Steegh, *The Silent Victims: Children and Domestic Violence*, 26 WM. MITCHELL L. REV. 775, 803 (2000) (“The effectiveness of either [a guardian *ad litem* or counsel for the child] depends upon that person’s knowledge of the impact of domestic violence on children and his or her familiarity with available services.”).

356. The International Child Abduction Remedies Act (ICARA) implements the United States’s treaty obligations in the United States. 42 U.S.C. §§ 11601-11611 (2006). The State Department is reluctant to amend ICARA for any reason because opening ICARA to amendments might result in provisions that are inconsistent with the United States’s treaty obligations. See Weiner, *supra* note 27, at 272 n.274.