

**Eight Letters Submitted to the United States Department of State and the
Permanent Bureau of the Hague Conference on Private International Law about a Draft
Guide for Article 13(1)*b*) and Related Draft Documents that were circulated
for comment prior to the October 2017 meeting of the Seventh Special Commission on the
1980 Hague Child Abduction Convention at The Hague**

**Letters to the U.S. State Department Commenting on the Draft
Guide to Good Practice on Article 13(1)b) of the Hague
Convention on the Civil Aspects of International Child Abduction**

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**Letter from Dr. Adrienne Barnett, Lecturer in Law, Director of Undergraduate
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12th September 2017

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Dear Mr Coffee,

Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on International Child Abduction – a perspective from England and Wales

Thank you for the opportunity to make observations on the Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on International Child Abduction (‘the draft Guide’). The observations in this letter are made from a UK perspective (England and Wales), which I hope will be pertinent to the US Department of State. As an international instrument dealing with the cross-border movement of children, the way in which the courts in England and Wales (and in other EU states) manage Hague Convention proceedings may affect US children and parents; conversely, UK children and parents may be affected by US Hague Convention proceedings.

My observations will focus on the issue of domestic violence, which was the main reason for the initiation of the draft Guide, more specifically, concern that domestic violence is not being given sufficient or appropriate recognition or weight, and is not being dealt with appropriately, when it is raised as a defence to a return application under the Hague Convention. This was made clear by the Permanent Bureau in May 2011:

‘The issue of domestic violence within the context of the operation of the Hague Convention...and more particularly in relation to the Article 13(1)(b) “grave risk” exception, has been raised as a matter in need of investigation and attention in a number of spheres. Contracting State and expert feedback...have flagged issues involved at various junctures.

There have also been a number of articles written on the topic, citing perceived problems or difficulties across a number of jurisdictions, in *The Judges' Newsletter on International Child Protection* published by the Permanent Bureau, in academic journals, and in recent research.¹ Such concerns include: '(1) extent of or consistency in some judicial investigations into allegations of domestic violence; (2) extent to which some judicial actors are sensitive to and take allegations of domestic violence seriously; (3) extent of awareness of and sensitivity to domestic violence dynamics by lawyers representing abducting and/or left behind parents; (4) insufficient recognition of the harmful effects of domestic or family violence on children, even when directed primarily or wholly at a parent; (5) lack of awareness of social science evidence of links between spousal and child abuse; (6) potential risks to the life or safety of the returning parent and/or the child following return orders; (7) appropriate use of protective measures ordered in conjunction with return orders, including the effectiveness or enforceability of voluntary undertakings or other conditions linked to return orders; (8) lack of adequate domestic violence legislation and social or governmental support for victims of domestic violence in the requesting or requested jurisdiction; and (9) lack of family, social and economic support (including legal aid/access to justice) for the returning parent in the requesting jurisdiction when she or he has been a victim of domestic violence.'²

The text of this excerpt from the Permanent Bureau paper has been set out in full because it encapsulates the reasons why the Guide was initiated; yet nowhere is it articulated in the draft Guide itself. The question is whether the draft Guide has struck the correct balance between expedition and safety, and it is my view that it has not. The list set out above does *not* record any concerns that courts of contracting States are not applying Article 13(1)(b) strictly enough and that proceedings are not being concluded promptly enough. Yet the tenor and substance of the draft Guide is to emphasise a narrow interpretation of Article 13(1)(b) and the speedy resolution of return proceedings as if these were the ills which the Guide was intended to remedy. In doing so, it prioritises swift return over the safety and wellbeing of children and victims of domestic abuse, and thus directly against the spirit in which the draft Guide was initiated.

A fundamental objective of the Guide is to promote consistency in the application and interpretation of Article 13(1)(b).³ Consistency per se has no intrinsic merit, and could even be detrimental if courts consistently apply the Convention in a way that puts children at grave risk of harm. The only reasonable objective of the draft Guide, therefore, can be the promotion of consistently good practice that protects the safety and wellbeing of children. For the reasons discussed below, unfortunately the draft Guide falls short in promoting both good practice and consistency.

¹ Permanent Bureau, *Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* (Hague Conference on Private International Law, May 2011) at pg. 3.

² Ibid, pg. 4

³ Draft Guide, Para 15

These observations will comment on the following main problem areas relevant to domestic violence as a basis for an Article 13(1)(b) defence: (1) understanding domestic violence and its effects on victims and children; (2) interpreting Article 13(1)(b) in a restrictive fashion; (3) the emphasis on swift return; (4) the perception that allegations of domestic violence are made tactically; (5) proving domestic violence; (6) inadequate risk assessment; (7) over-reliance on protective measures.

1. Understanding domestic violence and its effects on victims and children

At the heart of the Article 13(1)(b) ‘grave risk’ defence is the assessment of risk. Yet this is barely mentioned in the draft Guide. The only references to the assessment of risk are in Paragraph 173 (in relation to expert opinion/evidence) and Appendix 3. In order to be able to assess risk effectively, judges require a proper understanding of domestic violence and its effects on victims and children.

There are a number of positive aspects of the draft Guide with respect to defining domestic violence and recognising its dynamics and effects on victims and children. However, these are relegated to the Case Scenarios/Fact Patterns, the Glossary of Terms, and Annex 3. This means that these important issues are not properly integrated into the substantive content of the Guide and do not, therefore, translate into effective guidance; indeed, other than in Paragraphs 12 and 53, they are largely ignored. A comprehensive explanation of domestic violence, its dynamics, and effects on victims and children should be at the beginning and forefront of the draft Guide, and properly taken into account throughout. Additionally, although the recognition of coercive control (albeit only in the Case Scenarios/Fact Patterns and Annex 3) is welcome, this does not go far enough. Research undertaken in England and Wales over the past 20 years, as well as research undertaken by the Permanent Bureau in 2011,⁴ and country reports prepared by EU member states for the European Parliament’s 2015 report on ‘Cross-border parental child abduction in the European Union’ (‘the EP Report’),⁵ reveal that many judges and legal professionals in England and Wales and in other parties to the Hague Convention do not properly understand the nature and dynamics of domestic violence, particularly of coercive control, nor its effects on victims and children.⁶

A number of studies in England and Wales found a marked difference between ‘legalistic’ understandings of domestic violence, focused on incidents of physical violence (largely held by judges and family lawyers) and social science understandings, which recognise its power and control dynamics.⁷ As one interview respondent to Coy et al’s study observed: ‘ “A lot of men might not be beating up women, but they’re very controlling. Courts don’t understand

⁴ Permanent Bureau, *Domestic and Family Violence and the Article 13 ‘Grave Risk’ Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* (Hague Conference on Private International Law, May 2011)

⁵ Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Cross-border parental child abduction in the European Union* (European Parliament, 2015)

⁶ The EP Report found that in some cases in the study sample, courts did not view harm to the primary caregiver as potentially giving rise to harm to the child.

⁷ Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013)

emotional abuse... Unless you're walking in with a black eye, trying to explain to the judge doesn't work. They're only concerned with physical violence – has he hit her, no, then you need to promote contact".⁸ For most judges and legal professionals in England and Wales, any form of abuse other than physical assault is not 'real' violence, with only 'serious' or 'severe' recent physical violence being relevant to child contact.⁹ A similar approach was applied by a number of European states in their country reports to the EP Report. Nine of the 16 country reports made no mention of domestic violence in the context of Article 13(1)(b); where domestic violence was mentioned, reference was invariably made to physical violence (eg, Hungary and Germany). Very few reports referred to other forms of abuse and none considered coercive control in the context of an Article 13(1)(b) defence.

A full explanation of domestic violence including coercive control should be at the start and forefront of the draft Guide. A number of studies 'provide compelling evidence that a majority of abusive relationships for which women seek help are characterized by the range of nonviolent harms identified with coercive control'.¹⁰ Judges adjudicating on Hague Convention cases need a proper understanding of entrapment by coercive control because flight from the jurisdiction of the abuser can be a legitimate and the only means of escaping that entrapment. While Annex 3 goes some way to explaining coercive control, and that the dynamics of domestic violence 'are more than just occurrences of physical violence',¹¹ it does not go far enough to enable a full and proper understanding. A full understanding of domestic violence and its effects on victims and children would also call into question the assumption made in the draft Guide that there may be situations where living with domestic violence would *not* have an impact on the child (eg, Para 53). This is based on the entirely unrealistic assumption of the physical incident model, that between 'incidents' of physical violence, 'normal' family life carries on.

Coercive control has been categorised by professionals working with abused women into four broad strategies – physical violence, intimidation, isolation and control – that in combination form 'a sustained pattern of behaviours'.¹² Physical violence may be, but is not always, used by perpetrators of coercive control as part of the abuser's repertoire of tactics, reinforcing

⁸ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at pg. 51

⁹ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Ravi Thiara and Aisha Gill, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children* (NSPCC, 2012); Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013); Adrienne Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) *Child and Family Law Quarterly* 439-462; Adrienne Barnett, ' "Greater than the mere sum of its parts": coercive control and the question of proof' (2017) *Child and Family Law Quarterly* (forthcoming)

¹⁰ Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007), p 275

¹¹ Annex 3, Para 15

¹² Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at p 22. See also E Pence and M Paymar, *Education Groups for Men Who Batter: The Duluth Model* (Springer, 1993); Peter Lehmann, C Simmons & VK Pillai, 'The validation of the checklist of controlling behaviours (CCB): assessing coercive control in abusive relationships' (2012) 18 *Violence Against Women* 913-933

other techniques of domination.¹³ Although some abusers may inflict severe violence, others employ frequent, low-level violence which becomes a routine part of everyday life, the cumulative effects of which are particularly devastating for victims.¹⁴ As discussed above, the dismissal of such violence as unimportant by courts and professionals means that patterns of coercive control may be missed and risk minimised. Abusers frequently isolate women, (which is particularly pertinent to Hague Convention cases) by preventing them from working, denying them access to transport and/or means of communication, forbidding calls or visits to family and friends, and preventing them from calling the police or accessing medical or other support.¹⁵ As Simmons notes: ‘When a woman is living abroad in her partner’s country, away from her friends and family, she may be subjected to an even greater degree of coercive behaviour.’¹⁶ At the centre of the abuser’s strategy is control, ‘an array of tactics that directly install women’s subordination to an abusive partner’, by micromanaging their life and preventing resistance or escape.¹⁷ The combination of these strategies are experienced by women as entrapment, whereby abuse is embedded in the fabric of women’s everyday lives and parenting practices, and there is no clear beginning or end to the abuse.¹⁸ The Permanent Bureau study found a number of cases in which coercively controlling behaviour was in issue, such as preventing the mother leaving the house, hand-cuffing her to a bed, stalking and economic abuse.¹⁹

For this reason, it is important to understand that the entrapment and fear generated by coercive control are the cumulative effects of an ongoing course of conduct, experienced as chronic rather than episodic. Women may suffer a range of physical and psychological health problems, symptoms and disorders such as depression, chronic pain, sleep and appetite disorders, anxiety disorders, substance use and suicidal behaviour.²⁰ Of particular importance for Hague Convention cases is the fact that the deployment and effects of coercive control on migrant and refugee women can be particularly severe, as lack of support and information

¹³ Rosemary Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 734-776.

¹⁴ Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007)

¹⁵ Ibid at pg. 262. See also Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweeddale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Women’s Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016)

¹⁶ Jennie Simmons, ‘The Hague Convention’s Unforeseen Development: Perpetuating the Subordination of Domestic Violence Victims’ (undated, published online at <https://www.yumpu.com/en/document/view/11314040/the-hague-conventions-unforeseen-development-nacle>)

¹⁷ Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at pg. 271. See also Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweeddale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework* (Home Office, 2015)

¹⁸ A Morris, ‘Gendered dynamics of abuse and violence in families: considering the abusive household gendered regime’ (2009) 18(6) *Child Abuse Review* 414-487 at p 414.

¹⁹ Permanent Bureau, *Domestic and Family Violence and the Article 13 ‘Grave Risk’ Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* (Hague Conference on Private International Law, May 2011)

²⁰ Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007); G Dillon, R Hussain, D Loxton and S Rahman, ‘Mental and physical health and intimate partner violence against women: a review of the literature’ (2013) *International Journal of Family Medicine* 1–15.

and language barriers ‘give their abusive husbands total power to define their world’.²¹ There is a significant body of research evidence which reveals that psychological, emotional and verbal abuse can have even more detrimental effects on women and children than physical violence.²² Women interviewed by Coy et al described a broad range of abusive, controlling behaviours which were experienced by many of them as more frightening and debilitating than the physical violence.²³

Living with domestic abuse can be extremely harmful to children. This is, to some extent, recognised and explained by the draft Guide. However, it is concerning that the emphasis is on domestic violence affecting only children who ‘witness’; whether they are physically present or not, all children are affected by living with domestic violence, although some may have better coping strategies than others. The devastating physical, psychological, emotional and developmental harm that children living with domestic violence can suffer is well documented in research, social science and clinical studies (as the draft Guide notes). In England and Wales, it is reflected not only in the definition of harm in the Children Act 1989,²⁴ but also in Paragraph 5 of Practice Direction 12J, which states that:

‘Domestic violence and abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to violence or abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which violence or abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with violence or abuse, and may also suffer harm indirectly where the violence or abuse impairs the parenting capacity of either or both of their parents.’²⁵

An increasing body of research reveals that the most devastating harms to children may arise out of living with coercive control. This is one of the reasons why the draft Guide’s assumption that children may be harmed only by ‘witnessing’ domestic violence fails to encapsulate their experiences of living in abusive household regimes. Children whose fathers coercively control their mothers may be exposed to the constant abuse of their mothers and suffer from economic and physical deprivation and social isolation, thereby experiencing entrapment themselves, which can contribute to a range of emotional and behavioural problems.²⁶ Coercive control may also have a serious impact on children’s relationships with

²¹ Rosemary Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 734-776 at p 745. See also Sundari Anitha, ‘No recourse, no support: State policy and practice towards South Asian women facing domestic violence in England’ (2010) 40(2) *British Journal of Social Work* 462-479

²² Emerson R Dobash and Russell P Dobash, *Women, Violence and Social Change* (Routledge, 1992); Gill Hague and Ellen Malos, *Domestic Violence: Action for Change* (New Clarion Press, 1993)

²³ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweeddale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012)

²⁴ Children Act 1989, s 31(9)

²⁵ Practice Direction 12J is contained in the Family Proceedings Rules 2010 and stipulates best practice for courts in child arrangements cases where allegations of domestic violence are made.

²⁶ Stephanie Holt, Helen Buckley & Sadhbh Whelan, ‘The impact of exposure to domestic violence on children and young people: a literature review’ (2008) 32 *Child Abuse & Neglect* 797-810; Emma Katz, ‘Beyond the

their mothers, as a common tactic of coercive controllers is to manipulate, undermine and distort the mother/child relationship by, for example, demeaning and belittling women in front of children, encouraging children to participate in the abuse, preventing mother and child spending time together, and involving them in secrecy about the abuse.²⁷

2. Interpreting Article 13(1)(b) in a restrictive fashion

In the context of the damaging consequences and effects of domestic violence on victims and children, the repeated invocation in the draft Guide to ‘interpret and apply the Article 13(1)(b) exception in a restrictive manner’ could cause untold harm to children and victims.²⁸ Emphasising the ‘exceptional’ nature of the defence encourages courts to minimise, normalise and ignore allegations of domestic violence, thereby colluding with the abuser.²⁹ By promoting a restrictive approach, the draft Guide disregards the increased knowledge and awareness about the effects of domestic violence on victims and children, which the draft Guide itself articulates.

Promoting a restrictive approach also ignores the reality of situations of international child abduction. A narrow approach undoubtedly made sense to the drafters of the Hague Convention in the 1970s, when ‘the paradigm case was that of the father who became so frustrated with being denied access to his child or children after the court had granted sole custody to the mother, that he stole the child, went abroad, and then underground’.³⁰ However, as the draft Guide itself recognises, the most prevalent international parental child abductions involve sole or joint primary carers.³¹ This means that the assumption on which the Convention was based, as recorded in the draft Guide, that ‘the wrongful removal or retention of a child is generally prejudicial to the child’s welfare and that, in the majority of cases, it will be in the best interests of the child to return to the State of habitual residence’, no longer stands unchallenged.³² As the EP Report observes: ‘the negative values of an illegal change of residence by his/her primary caregiver, on the one hand, and a change of residence contextual to the deprivation of his or her primary caregiver, on the other hand, are

Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control’ (2015) *Child Abuse Review* (Wiley Online Library)

²⁷ Fiona Buchanan, ‘Addressing the Impact of Domestic Violence on Mothers’ Relationships With Their Infants’ (2014) 6(3) *Family and Intimate Partner Violence Quarterly* 41-46; Clare Sturge and Danya Glaser, ‘Contact and Domestic Violence: The Experts’ Court Report (2000) 30 *Family Law* 615-629; Lundy Bancroft, Jay G Silverman and D Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2nd edn, London: Sage, 2012); Ravi Thiara and Catherine Humphreys, ‘Absent presence: the ongoing impact of men’s violence on the mother-child relationship’ (2015) *Child and Family Social Work* (published online)

²⁸ Para 77; see also Paras 44, 46, 58

²⁹ Miranda Kaye, ‘The Hague Convention and the flight from domestic violence: How Women and Children are being returned by coach and four’ (1993) 13 *International Journal of Law, Policy and the Family* 197

³⁰ Paul R Beaumont and Peter E McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) at pg. 9

³¹ See Nigel Lowe and Victoria Stephens, ‘Global Trends in the Operation of the 1980 Hague Abduction Convention’ (2012) 46(1) *Family Law Quarterly* 41-85; *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, per Lady Hale at [6]

³² Para 35

different.’³³ Additionally, the assumption that a strict approach discourages forum-shopping ignores the fact that most primary carer abductors return to their state of nationality rather than seek a jurisdiction that may be favourable to their case.³⁴

Basing the draft Guide on an outdated perception of abduction situations also ignores the prevalence of domestic violence as a reason for flight from the requesting state, something that was, again, unforeseen by the drafters of the Convention (as reflected in the fact that the Convention itself and the Explanatory Note make no reference to domestic violence, as the draft Guide itself notes). By 1993, however, it was reported that in at least half of abduction cases, domestic violence was a relevant factor, and this was likely to be an under-representation.³⁵ More recent studies estimate this prevalence as even higher.³⁶

Current studies reveal that the majority of States parties to the Convention already apply Article 13(1)(b) in a restrictive manner, as the draft Guide notes.³⁷ As a consequence, ‘judicial decisions for the non-return of a child based on Article 13(1)(b) are relatively rare in practice’.³⁸ Promoting a restrictive approach could, therefore, further encourage member States to downgrade or ignore domestic violence allegations, thereby undermining the increased awareness of the nature and effects of domestic violence that the draft Guide ostensibly encourages. Indeed, in the context of domestic violence, the primary way in which courts could, and do, apply a narrow interpretation of Article 13(1)(b) is to downgrade its relevance and effects. For example, in *DT v LBT (Abduction: Domestic Abuse)* [2011] 1 FLR 1215, the Court of Appeal in England and Wales held that only in rare cases would domestic violence be so severe as to meet the Article 13(1)(b) defence, which leads to the ludicrous conclusion that there is an acceptable or benign level of domestic violence.

The country reports prepared for the EP Report merit some scrutiny. Most EU states adopt an extremely restrictive approach. For example, the Irish report states that the Irish courts ‘have also demonstrated a reluctance to stretch the defence of grave risk to incorporate grave risk to the respondent parent’.³⁹ The Spanish report states that: ‘Such exceptions are to be evaluated restrictively and can only operate when it is proven that the removal of the children can place

³³ Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Cross-border parental child abduction in the European Union* (European Parliament, 2015) at pg. 55

³⁴ Paul Beaumont, Lara Walker and Jayne Holliday, ‘Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU’ (2016) 12(2) *Journal of Private International Law* 211-260. See also EP Report, which recorded that in about 60% of cases, the taking parent is destined for their country of citizenship.

³⁵ Geoffrey L Greif and Rebecca L. Hegar, *When Parents Kidnap: The Families Behind the Headlines* (Free Press, 1993). See also David Maclean, ‘International child abduction – some recent trends’ (1997) 9(4) *Child and Family Law Quarterly* 387-399

³⁶ Nigel Lowe and Victoria Stephens, ‘Global Trends in the Operation of the 1980 Hague Abduction Convention’ (2012) 46(1) *Family Law Quarterly* 41-85

³⁷ See, eg, para 58.

³⁸ Draft Guide para 2

³⁹ Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Cross-border parental child abduction in the European Union* (European Parliament, 2015) at pg. 172

them at serious risk.’⁴⁰ According to their reports, France and the Netherlands have, in the past 10 to 15 years, applied a more restrictive approach to the Article 13(1)(b) defence than they did before. ‘In particular, the courts have refused to consider that violence or psychological instability of the parent victim of the abduction could constitute a sufficient reason to refuse the return of the child, whenever there is no evidence (i) of the reality of such violence; (ii) that such violence could be directed to the child; (iii) that such violence could be repeated once the child is back.’⁴¹

Jurisprudence in the United States shows that in recent years, the courts have moved away from what Chief Justice Gleeson in the High Court of Australia described as the ‘grudging’ approach to Article 13(1)(b).⁴² Although decisions are still variable, cases such as *Walsh v Walsh*, *Van de Sande v Van de Sande* and *Blondin v Dubois* demonstrate a broader understanding of domestic violence as a valid basis for an Article 13(1)(b) defence.

The promotion of a restrictive approach in the draft Guide is, therefore, a retrograde step that may encourage EU states to apply Article 13(1)(b) even more strictly than they do at present, and discourage US courts from developing a safer, more protective jurisprudence. It is worth emphasising two recent decisions of the Supreme Court in England and Wales, where it was held that there is no need for Article 13(1)(b) to be narrowly construed because, by its terms, it is of restricted application, and the words ‘are quite plain and need no further elaboration or “gloss”’.⁴³ Emphasising the narrow approach undermines what is at the heart of Hague Convention proceedings – the safety, protection and wellbeing of the child, and is contrary to best practices of risk assessment. On the contrary, what is needed in the interests of consistency and safety is a broader interpretation and application of Article 13(1)(b) if children and victim parents are not to suffer the consequences of domestic violence articulated in the draft Guide itself and the studies and literature discussed in this submission.

3. The emphasis on swift return

The draft Guide suggests, by way of good practice, ‘the need to balance the objectives of the Convention...by ensuring the prompt return of the child to the State of habitual residence...and, on the other hand, recognise that there may be circumstances where returning a child to his or her State could pose a grave risk’.⁴⁴ The question is whether the draft Guide has struck the right balance, and it is my view that it has not.

I am certainly not arguing against prompt and expeditious practice per se, and it is recognised that the draft Guide contains a number of helpful and beneficial suggestions such as continuity in judicial case management; the use of standardised procedures (in part); close

⁴⁰ Ibid at pg. 175. See also German report at pg. 160

⁴¹ Ibid France country report at pg. 203

⁴² *DV v Commonwealth Central Authority and JLM v Director General, NSW Department of Community Services*, 206 C.L.R. 401 (2001)

⁴³ *Re E (Children)* [2011] UKSC 27 per Lady Hale at [31]; see also *Re S (Abduction: Intolerable Situation)* [2012] UKSCA 10

⁴⁴ Para 77

cooperation with all parties including Central Authorities. However, speed should not take priority over the proper assessment of risk and consideration of the safety and wellbeing of the child and the taking parent. As discussed above, the ‘prompt return’ provisions and ethos of the Convention made sense when it was perceived that abductors were non-resident parents who kidnapped children from primary carers and abducted them as a way to punish that parent. But as a remedy for abductions by primary carers, particularly those fleeing domestic violence, it strikes a wrong note.⁴⁵ The EP Report reveals that most EU states that are parties to the Hague Convention already adopt the view that ‘the first aim of the Hague Convention on Child Abduction...is to return the child to his country of residence’.⁴⁶ Many EU states consider a restrictive approach to Article 13(1)(b) as furthering the aim of prompt return, and in so doing, significantly limit the scope of domestic violence as a basis for a defence. Despite the judgment in *Neulinger and Shuruk v Switzerland* (Application No 41615/07), in which the European Court of Human Rights held that orders for return should not be made ‘automatically and mechanically’ (as recognised by the draft Guide at para 47), a number of EU states appear to view prompt return as the main and only goal of the Convention. France, for example, specifically refuses to follow the *Neulinger* approach.⁴⁷ The emphasis throughout the draft Guide on speed and limiting the court’s enquiry may well encourage an automatic and mechanical approach. The draft Guide needs to take into account the jurisprudence of the European Court of Human Rights because its rulings are applicable to a significant number of contracting parties to the Hague Convention. In this respect, the judgment of Judge Pinto De Albuquerque in *X v Latvia* (ECHR, 26 November 2013, App no 27853/09) merits consideration:

‘Taking human rights seriously requires that the Hague Convention operates not only in the best interests of children and the long-term, general objective of preventing international child abduction, but also in the short-term, best interests of each individual child who is subject to Hague return proceedings. Justice for children, even summary and provisional justice, can only be done with a view to the entirety of every tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or “effective” evaluation of the child’s situation in the specific context of the return application can provide such justice. In layman’s terms, *Neulinger and Shuruk* is alive and well. It was and remains a decision laying down valid legal principles, not an ephemeral and capricious act of “judicial compassion”.’

An over-emphasis on speedy return at the expense of ‘effective evaluation’ of the child’s situation runs the risk of contradicting ECHR jurisprudence and exposing the child and parent with care to harm. An important reason why swift return may jeopardise the safety of children and victims of domestic violence who flee their abusers is that it may place them ‘at

⁴⁵ See further Merle H Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ (2000)69 *Fordham L. Rev.* 593

⁴⁶ Spain country report at pg. 191; see also country reports from, eg, Germany, Ireland, France

⁴⁷ See France country report to the EP Report at pg. 206. The United Kingdom, on the other hand, has approved the *Neulinger* approach set out above (see UK country report at pg. 389).

a higher risk of separation violence if they return quickly after their separation.’⁴⁸ The draft Guide itself recognises that ‘directly after leaving a seriously abusive situation, the risk of serious or lethal injuries to the taking parent by the abusive parent increases’.⁴⁹ For victims of coercive control, the swift return to the jurisdiction of the abuser may increase the likelihood of the victim being ‘dragged back into the orbit’ of the abuser before she has had an opportunity to recover and regain autonomy.⁵⁰

4. The perception that allegations of domestic violence are made tactically

Before going on to consider the issue of proving allegations of domestic violence, it is important to highlight a concerning assertion in the draft Guide, namely, that: ‘Some Central Authority officials and caseworkers dealing with international child abduction matters have noted anecdotally that allegations of domestic violence may be on the increase as a litigation or delay tactic on the part of taking parents, due to the limited exceptions available under the Convention.’⁵¹

Such an assertion, based on ‘anecdotes’ from unnamed officials and caseworkers, with no evidence base, should have no place in a guide of this importance and should be removed. It also works directly against the interests of children by encouraging a culture of suspicion against mothers who raise allegations of domestic violence. The same culture of suspicion has been evident amongst judges and legal professionals in England and Wales for the past 20 years, at the cost of children’s safety and wellbeing.⁵² Research in England and Wales found that women who raised allegations of domestic violence in the family courts were viewed with suspicion and disbelieved, as judges and legal professionals viewed such complaints as a delaying tactic and/or designed to disrupt the other party’s relationship with the child.⁵³ Yet when family courts in England and Wales have held fact-finding hearings on disputed allegations of domestic violence, the most common outcomes are for some or all of

⁴⁸ Brian Quillen, ‘The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction’ (2014) *Texas International Law Journal* 621-643

⁴⁹ Draft Guide, Case Scenarios/Fact Patterns at pg. 75; see also Annex 3 at para 19

⁵⁰ Ibid

⁵¹ Draft Guide At Pg. 2 Footnote 11; repeated in Annex 3 Para 5

⁵² See Lorraine Radford and Marianne Hester, *Domestic Violence and Child contact Arrangements in England and Denmark* (The Policy Press, 1996); Adrienne Barnett, ‘Contact and Domestic Violence: The Ideological Divide’, in Jo Bridgeman and Daniel Monk (eds) *Feminist Perspectives on Child Law* (Cavendish, 2000); Joan Hunt and Alison Macleod, *Outcomes of Applications to Court for Contact Orders After Parental Separation or Divorce* (Ministry of Justice, 2008); Adrienne Barnett, ‘Contact at all costs? Domestic violence and children’s welfare’ (2014) 26(4) *Child and Family Law Quarterly* 439-462; Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013)

⁵³ Her Majesty’s Inspectorate of Court Administration, *Domestic Violence, Safety and Family Proceedings* (HMICA, 2005); Maria Eriksson and Marianne Hester, ‘Violent men as good-enough fathers? A look at England and Sweden’ (2001) 7(7) *Violence Against Women* 779-798; Christine Harrison, ‘Implacably hostile or appropriately protective?: women managing child contact in the context of domestic violence’ (2008) 14 *Violence Against Women* 381

the allegations to be found proved.⁵⁴ No support has been found empirically for the assertion that women make allegations of domestic violence to gain tactical advantage. This culture of disbelief can exacerbate the difficulties victims of domestic violence already experience in proving the abuse they have sustained.

5. Proving domestic violence

Determining whether domestic violence is a factor is essential for the assessment of risk. States parties to the Hague Convention adopt different procedures and standards of proof when it comes to adjudicating on disputed allegations raised as a basis for an Article 13(1)(b) defence. This area is likely to be where the greatest inconsistencies lie. It is therefore disappointing that the draft Guide has left it to individual member states to determine their own procedures and burdens of proof, thereby failing to achieve its stated primary objective – consistent application of Article 13(1)(b), and continuing to lead to a ‘jurisdictional lottery’. The suggested good practices set out at Paragraph 172 will not offset this problem.

The first issue on which there is no uniformity amongst contracting states is whether disputed allegations of domestic violence need to be determined. The Permanent Bureau study found that in some jurisdictions, judges refused to make any determination of the truth of the allegations, stating that this was the role of the court of habitual residence. Other jurisdictions considered it necessary to make findings in order to assess risk. The EP Report reveals that some states’ courts (such as Hungary) rarely permit the Article 13(1)(b) exception to be raised because ‘they are unable to check whether the issues raised by a party are valid’.⁵⁵ The draft Guide should make it clear that, if allegations of domestic violence are disputed, they need to be adjudicated on rather than sidelined, ignored or relegated to another jurisdiction. Without determining whether domestic violence is present, it is difficult to see how ‘grave risk’ could be assessed.

As far as the burden of proof is concerned, while some states apply the general civil standard (eg, ‘balance of probabilities’), others require the defence to be proved to a higher standard, eg, ‘clear and convincing evidence’ (the US); ‘clear and compelling evidence’ (the UK); ‘conclusive evidence’ (Belgium). The evidential burden on victims of domestic violence in proving the abuse they have sustained is already immense (see further below). It is concerning to see that the report prepared by Belgium for the EP Report states that the Article 13(1)(b) exception ‘has rarely been successfully raised before Belgian courts. This can be explained by the fact that it can be difficult to provide to the tribunal conclusive evidence as to the possibility of a danger’.⁵⁶ It is difficult enough for victims of domestic violence to prove the abuse on the ordinary civil standard.⁵⁷ A higher standard of proof raises an almost

⁵⁴ Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013)

⁵⁵ Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Cross-border parental child abduction in the European Union* (European Parliament, 2015) at pg. 267

⁵⁶ *Ibid* at pg. 115

⁵⁷ See, eg, Netherlands country report to the EP Report which states that ‘[i]n the vast majority of cases, this ground is pleaded but not proven.’ (at pg. 288)

insurmountable burden for victims of domestic violence and should be strongly discouraged by the draft Guide, which should suggest the general civil standard as good practice.

There is also no uniformity in practice or procedure. While some states disallow oral hearings (or hold them only exceptionally) and decide on the basis of written submissions in summary proceedings only (such as the US and England and Wales), oral hearings are the norm in other states. Summary proceedings without oral evidence may be problematic in many cases, particularly where parents with care and children are the victims of coercively controlling abusers, as many victims will not have any extrinsic evidence of the type set out in Paragraph 172 of the draft Guide. This is of particular concern because the Permanent Bureau study found that in some courts, the absence of corroborating evidence was fatal to the alleged victim's case. Similarly in private law Children Act proceedings in England and Wales, research has found that for some courts and professionals, the lack of 'independent' evidence was itself proof that domestic violence had not happened, courts may avoid fact-finding hearings if there is no 'independent' evidence, or allegations of domestic violence may not be taken seriously if there is no external evidence to corroborate the mother's account.⁵⁸

Accordingly, the draft Guidance needs to suggest, as good practice, that judges should be alive to the enormous difficulties victims of domestic violence may experience in providing corroborative, extrinsic evidence. This issue was highlighted in the UK when the restrictions on legal aid stipulated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) were debated. Contemporaneous research found that the majority of women who have sustained domestic violence do not report the abuse to the police or seek injunctive relief.⁵⁹ One interview respondent said: ‘‘I have no evidence, it's emotional and financial abuse. I can't see a way to prove this.’’⁶⁰ BME women may experience particular problems in this respect because of, for example, under-reporting abuse to the police or other agencies, sometimes as a consequence of threats by the abuser and his family.⁶¹ Judges have particular difficulty determining 'the truth' where coercive control is in issue as it 'lacks the fungibility of violence' and, frequently, the only evidence available is the parties' oral testimony.⁶² For these reasons, the draft Guide should make clear the difficulties women face in obtaining corroborating evidence of abuse; that absence of extrinsic evidence does not reflect on the veracity of the victim's allegations; that lack of extrinsic evidence is not a good reason to avoid determining disputes allegations of domestic violence; that in most cases, the victim's oral testimony (and, if appropriate, the child's testimony) is the best evidence on which risk

⁵⁸ Rosemary Aris and Christine Harrison, *Domestic Violence and the Supplemental Information Form C1A* (Ministry of Justice, 2007); Christine Harrison, 'Implacably hostile or appropriately protective?: women managing child contact in the context of domestic violence' (2008) 14 *Violence Against Women* 381; Adrienne Barnett, '“Like Gold Dust These Days”: Domestic Violence Fact-Finding Hearings in Child Contact Cases' (2015) 23(1) *Feminist Legal Studies* 47-78

⁵⁹ Rights of Women, *Women's Access to Justice: a research report* (ROW, 2011)

⁶⁰ Written evidence from Rights of Women to the House of Commons Select Committee LASPO Enquiry, at para 11

⁶¹ Ravi Thiara and Aisha Gill, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children, Executive Summary* (NSPCC, 2011)

⁶² Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at pg. 372

can be assessed because they alone have first-hand experience of the abuse; and that accordingly, oral evidence should be encouraged unless the court is confident that grave risk of harm can be properly assessed without it. Alternatively, the suggestion by domestic violence experts (noted in a footnote in the section on expert opinion/evidence) could be adopted as good practice on the issue of proving domestic violence, namely, ‘that victim service centres, domestic violence shelters or other bodies that regularly serve victims of violence may be helpful to screen, in the first instance, individuals raising issues of domestic violence, providing expertise in assessing the veracity and seriousness of any allegations’.⁶³

A further burden placed on women who seek to prove allegations of domestic violence in Hague Convention proceedings is the suspicion and disbelief with which the allegations may be met (as indicated by the ‘anecdotal’ reports of officials and case workers discussed above). Similarly, research undertaken in the UK into private law Children Act proceedings found that the mother’s uncorroborated oral testimony may be viewed with suspicion and discounted as not ‘real’ evidence because of the inability of many courts and professionals to understand the effects of domestic violence on women.⁶⁴ For example, there is a perception that mothers who are credible in their testimony should be able to provide a coherent narrative. However, the assumption that domestic violence emerges and is accounted for in a rational, chronological way demonstrates a failure to understand the effects of abuse on women, whose coping strategies can include ‘dissociating themselves from the violence, “forgetting” about abuse, retaining vague and sketchy memories of violent incidents, [and] minimising the seriousness of the violence’.⁶⁵ The problem is likely to be compounded for women involved in Hague Convention proceedings because, as Schuz observes, ‘the fact that the abducting parent is perceived to be the guilty party is liable to affect the way in which the court treats the abductor’s arguments in relation to the child’s interests.’⁶⁶

The emphasis in the suggested good practices (at Paragraph 172) and in the Case Scenarios/Fact Patterns on encouraging expedition and a restrictive approach to Article 13(1)(b) when dealing with disputed allegations is very worrying, as it may well encourage courts to minimise, ignore or relegate allegations of domestic violence rather than determining them, leaving an unassessed risk of harm. For example, by suggesting that it may not be necessary to resolve factual issues where ‘an attempt to solve factual issues may cause undue delay in the proceedings’ may well lead to speed taking priority over assessment of risk and safety.⁶⁷ Additionally, and as discussed further below, it is extremely concerning that the draft Guide suggests, as good practice, considering ‘the availability of adequate and effective protective measures’ as an alternative to determining disputed facts. Without

⁶³ Footnote 203

⁶⁴ Adrienne Barnett, ‘“Like Gold Dust These Days”: Domestic Violence Fact-Finding Hearings in Child Contact Cases’ (2015) 23(1) *Feminist Legal Studies* 47-78

⁶⁵ Rosemary Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 734-776 at p 742. See also Hoegger

⁶⁶ Rhona Schuz, ‘The Influence of the CRC on the implementation of the Hague Child Abduction Convention’ (2010) 1(3) *Journal of Family Law and Practice* 45-49 at pg. 47

⁶⁷ At para 164

knowing the existence and extent of the abuse, the risk posed by the alleged perpetrator to which ‘protective measures’ would be directed, is unclear.

Finally, the suggestion in Paragraph 172 that ‘it may be possible to swiftly resolve a case on the basis of undisputed facts or assertions’ should be approached cautiously. The practice that has developed in the family courts in England and Wales in private law Children Act cases for courts to ‘carve up’ disputes on the basis of limited admissions, or restrict the fact-finding hearing to a few ‘sample’ incidents, has meant that ‘the full extent of the risk posed to the mother and child is minimised or even invisible’.⁶⁸

6. Inadequate risk assessment

As noted above, in a guide to the interpretation and application of the ‘grave risk’ defence, it is surprising how little guidance is given on the assessment of risk. It is positive that the draft Guide approves the use of expert opinion/evidence to assess whether there is a grave risk of harm or an intolerable situation.⁶⁹ However, the assessment of risk should be reflected in the entirety of the Guide, and should take precedence, both sequentially and substantively, over the continuous promotion of ‘protective measures’ (discussed below).

Additionally, in light of the draft Guide’s recognition of the nature and effects of coercive control, it is disappointing that the only risk assessment tool referred to is that used in some jurisdictions ‘to assist in assessing the risk of serious injury or lethality where domestic violence has been found to be a factor’.⁷⁰ Again, this encourages a focus on incidents of physical violence rather than the broader forms of abuse which may be equally, if not more, detrimental to victims of abuse. It is suggested that more appropriate tools may be those like the ‘SafeLives DASH Risk Checklist for the identification of high risk cases of domestic abuse, stalking and ‘honour-based violence’ developed in the UK by Cafcass, Respect and the Association of Chief Police Officers, amongst others.

In order to respond appropriately and protectively to the experiences of victims and children, we need to place risk at the forefront and heart of the proceedings by focusing on the totality of the abuse and on the strategies and patterns of behaviour of abusers. It first needs to be recognised that, far from the abuse diminishing when partners separate, women are most at risk, particularly from controlling abusers, when they leave the family home or have recourse to the legal system. Coercive control can persist and even escalate after victim and perpetrator have separated, because a primary aim of coercively controlling men is to keep the relationship going at all costs, and children are frequently the nexus to enable them to do

⁶⁸ Adrienne Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014) at pg. 258; see also Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013)

⁶⁹ Para 173

⁷⁰ Appendix 3, para 36

so.⁷¹ This explains why a history of coercive and controlling behaviour has been found to be a key predictor of post-separation abuse, and the risk of severe or fatal injury increases on separation, as the abuser tries to regain his power and control over the woman.⁷² Numerous research studies and statistics demonstrate that the risks of domestic violence are particularly high on or after relationship breakdown, when it may escalate by intensifying and increasing in severity.⁷³ At the most serious level, coercive control has been highlighted as a particular risk factor in child homicides that have occurred during post-separation contact.⁷⁴ A history of coercive and controlling behaviour has been found to be a key predictor of post-separation abuse.⁷⁵ Professionals may also fail to understand the way in which ‘the legal system may quickly become another avenue and arena through which her abuser may perpetrate abuse’.⁷⁶ The draft Guide acknowledges, in Appendix 3, that ‘abusive spouses or partners may use legal proceedings as another way to seek control of and undermine an intimate partner, initiating and continuing, for example, drawn-out custody, access or other legal proceedings,’⁷⁷ including Hague return proceedings.⁷⁸ Yet this has not translated into the substantive content of the draft Guide, as there is no recognition that courts, including those adjudicating on Hague Convention cases, ‘could be seen as a further tool of the abuser for exercising power and control over women and children’.⁷⁹

Risk can be under-estimated or discounted because research in the UK has found that many judges and professionals fail to understand the way in which coercively controlling men may portray themselves as charming, reasonable and benign, so that they may ‘be convinced by

⁷¹ Ibid at p 57. Similar findings were made by C Godsey and R Ribonson, ‘Post-Separation Abuse Featured in the New Duluth Power and Control Wheel’ (2013) *Family & Intimate Partner Violence Quarterly* 101-105; R Thiara, C Harrison and University of Warwick, *Safe not sorry: Supporting the campaign for safer child contact* (Women’s Aid, 2016); Peter Jaffe et al, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Sage, 2003)

⁷² B Featherstone & S Peckover, ‘Letting them get away with it: Fathers, domestic violence and child welfare’ (2007) 27(2) *Critical Social Policy* 181-202; P Ornstein & J Rickne, ‘When does intimate partner violence continue after separation?’ (2013) 19(3) *Violence Against Women* 617-633

⁷³ See, eg, Buchanan et al 2001; Humphreys and Thiara 2002; Cowan and Hodgson 2007; Humphreys 2006, 2007; Harrison 2008

⁷⁴ M Brandon, P Belderson, C Warren et al, *Analysing child deaths and serious injury through abuse and neglect: what can we learn? Research Report RR023* (DCSF, 2008); S Vincent, *Child death and serious case review processes in the UK Research Brief No. 5* (University of Edinburgh 2009); Women’s Aid, *Nineteen Child Homicides. What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016)

⁷⁵ Petra Ornstein and Johanna Rickne, ‘When Does Intimate Partner Violence Continue After Separation?’ (2013) 19(5) *Violence Against Women* 617-633

⁷⁶ Laurel Watson and Julie Ancis, ‘Power and Control in the Legal System: From Marriage/Relationship to Divorce and Custody’ (2013) 19(2) *Violence Against Women* 166-186

⁷⁷ Para 18, drawing on the Permanent Bureau study (2011)

⁷⁸ Permanent Bureau, *Domestic and Family Violence and the Article 13 ‘Grave Risk’ Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* (Hague Conference on Private International Law, May 2011)

⁷⁹ Miranda Kaye, ‘Domestic violence, Contact and Residence’ (1996) 8(4) *Child and Family Law Quarterly* 285-296

men's presentation as Dr Jekyll and miss the Mr Hyde of behind closed doors'.⁸⁰ On the other hand, it was found that those judges and professionals who understood coercive control, its effects on women and children, and the strategies of perpetrators were more likely to understand and appreciate the full extent of the risks.⁸¹ Additionally, Barnett's research found that, in private law Children Act proceedings in England and Wales, whether the perpetrator accepted findings made against him was seen by most interview respondents as a key indicator of risk. Fathers who remain in denial after findings are made are generally seen by courts and professionals as 'high risk'. However, some respondents indicated that acceptance of findings is rare and perpetrators tend to deny allegations in the first place, which suggests that most perpetrators are 'high risk'.⁸² An important aspect of risk assessment in Article 13(1)(b) cases, therefore, which should be included in the Guide, is an enquiry after findings have been made of whether the perpetrator truly accepts the findings and acknowledges fully the abuse and its effects on the victim and children.

7. Over-reliance on protective measures

It is only after the full extent of domestic violence and its effects on the victim and children have been determined, and risk has been properly assessed that consideration should be given, if appropriate, to 'protective measures'. For this reason, although the issue of 'protective measures' is one of the most problematic aspects of the draft Guide, this topic is considered at the end of these submissions, as it should have been in the draft Guide.

While the draft Guide promotes a restrictive interpretation of the Article 13(1)(b) defence and prompt return on the basis that these underlie the substance and intentions of the Convention, 'protective measures' are also given a central role in the draft Guide, even though there is nothing in the Hague Convention or its Explanatory Note about the use of 'protective measures'. This inconsistency can lead to only one conclusion - that the intention of the draft Guide is to limit, as far as possible, reliance on domestic violence as a basis for an Article 13(1)(b) defence. If that is not the intention of the draft Guide, it is certainly its consequence, a result that is far removed from the originating reasons for the Guide, as discussed above. The way in which Article 11 of Brussels II Revised has been applied by EU member states supports this observation. The Irish country report to the EP Report states that: 'If undertakings can be given and circumstances created to protect children prior to the court hearings in the country of their habitual residence, the Irish judiciary will normally make an order for return, in accordance with the policy of the Convention.'⁸³ The Netherlands country report goes so far as to state that since Brussels II Revised came into force, 'Article 13(1)(b)

⁸⁰ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweeddale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at pg. 58

⁸¹ Adrienne Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014)

⁸² Adrienne Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) CFLQ 439-462. This was confirmed by Hunter and Barnett's research as well as the reported case law.

⁸³ Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Cross-border parental child abduction in the European Union* (European Parliament, 2015) at pg. 175. See also Lithuania's report at pg. 240

has since this date never been successfully pleaded within the context of a return order within the European Union solely on the grounds of Article 13(1)(b).’⁸⁴

The draft Guide sets out two approaches adopted by courts of states that are parties to the Convention, and suggests, as good practice, that courts should ‘[s]elect the approach which, depending on the facts of the Article 13(1)(b) case and on national practices or procedures, is most suitable for deciding on the return of the child...’.⁸⁵ Before considering these approaches, it is suggested that leaving it to individual states to decide on which approach to adopt promotes, rather than avoids, inconsistency. If the aim of the draft Guide is to promote consistency, one approach should be recommended.

The first approach involves courts considering ‘the availability of adequate and effective protective measures before or at the same time as examining whether the taking parent has established that there is a grave risk’.⁸⁶ This is illogical and makes no sense, putting the cart before the horse, ie, it involves the consideration of protective measures to mitigate risk before that risk has been established and assessed. The second approach involves courts examining protective measures ‘as an exercise of discretion under Article 13(1)(b), in a step that is made after the court has found that a grave risk is established’.⁸⁷ Although the draft Guide states that whether one or the other approach is taken does not lead to a different outcome on return, this is manifestly incorrect, for the reasons discussed above in this submission. The draft Guide states that ‘the court may need to consider measures that are not only directed at protecting the child but also the taking parent’, for example, ‘where both the child and the taking parent suffer from the effects of domestic violence, there are threats by the left-behind parent during the return proceedings, and/or a fear of the continuance or recurrence of such behaviour in the event of a return to the requested State. In certain cases a child and a parent’s essential safety or well-being may be difficult to separate (in particular if that parent is a primary carer)... In some instances a court will find such protective measures directed toward an accompanying parent to be inadequate or ineffective to prevent a grave risk of harm to a child, and thus will have to consider non-return.’⁸⁸ It is difficult to see how courts could conduct this evaluation without, first, a full consideration of the factual situation and an assessment of risk. For the avoidance of doubt, it is submitted that the second approach is the only sensible and safe one and is closer to the substance and intention of the Convention, because the efficacy of protective measures can only be considered after the factual nexus is known and risk is assessed. It should also be noted that, in the context of domestic violence, protective measures directed only at the child and not at the taking parent make no sense.

Even if the second approach is adopted, it is suggested that, once a grave risk of harm or intolerable situation is found, the onus should be on the perpetrator to establish that the risk

⁸⁴ Ibid at pg. 291

⁸⁵ Para 122

⁸⁶ Para 56

⁸⁷ Para 56

⁸⁸ Para 145

can be eliminated by the implementation of protective measures, otherwise the taking parent has an extremely onerous burden – to prove ‘not only that there is a grave risk of psychological and physical harm but also that there are not mitigating measures that can be taken in the country of habitual residence to reduce that risk’.⁸⁹

It is positive that the draft Guide recognises that undertakings are not effective and should not be used in domestic violence cases, although this important point should be highlighted in the Guide rather than buried in a footnote.⁹⁰ On the other hand, it is very concerning that the draft Guide suggests, as good practice, that protective measures should not ‘overburden’ the left-behind parent ‘as it is the taking parent that, by wrongfully removing or retaining the child, created an unlawful factual situation that the 1980 Convention seeks to address by restoring the *status quo ante*.’⁹¹ This is an extraordinary recommendation, bearing in mind that protective measures are ostensibly aimed at preventing harm to the child from the left-behind parent, and is another example of the draft Guide portraying victims of domestic violence in a negative light and appeasing abusers. Additionally, as discussed above, the consideration of protective measures as a means to avoid factual inquiry into allegations of domestic violence is a high risk strategy that could jeopardise the safety and wellbeing of children and primary carer victims of domestic violence.

Even if protective measures are implemented by way of mirror orders or safe harbour orders, there is no guarantee that they will be enforced in the requesting state. There may be ‘a potential disconnect between how a country’s laws appear on paper and how its laws operate in practice.’⁹² Additionally, research into the outcomes of return orders conducted by Edleson et al revealed that mothers and children experienced ‘high levels of hardship’ after return, and almost half of the mothers and children were ‘victims of renewed violence or threats by the fathers.’⁹³ ‘Mothers reported that none of the court ordered or voluntary undertakings aimed at protecting them and/or their children upon return to the other country were implemented.’⁹⁴

Above all, however, if the authors of the draft Guide had a full understanding of the nature, dynamics and effects of domestic violence, and in particular, the increased dangers of post-separation violence and abuse, they would appreciate that the ‘adequate and effective measures’ suggested, such as ‘stay-away and no-contact orders, non-molestation orders...separate and safe housing’ are generally ineffective against an abuser who is

⁸⁹ Brian Quillen, ‘The New Face of International Child Abduction: Domestic-violence Victims and their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction’ (2014) 49(3) *Texas International Law Journal* 621-643 at pg. 630

⁹⁰ See Footnote 148

⁹¹ Para 141

⁹² Brian Quillen, ‘The New Face of International Child Abduction: Domestic-violence Victims and their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction’ (2014) 49(3) *Texas International Law Journal* 621-643 at pg. 631

⁹³ JL Edleson, T Lindhorst, G Mehrotra, W Vesneski, L Lopez and S Shetty, *Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases* (Final Report, National Institute for Justice, 2010) at x.

⁹⁴ *Ibid* at x.

determined to regain control over or seek retaliation against his ex-partner.⁹⁵ In particular, to send victims of coercive control back to the location of their entrapment can not only expose them to further isolation, control, intimidation and violence but exacerbate the harmful effects of the original abuse by their continued isolation, away from family and social support. Victims may find themselves back in the situation they left, without transport, family or social support, means of communication, and financially reliant on their abuser. They may not speak the language of the requesting state ‘or know how to navigate the institutions. Victims who return to these situations are often vulnerable to being abused again. Batterers can easily isolate and take advantage of victims’ marginalised status.’⁹⁶ Some victims of abuse may encounter particular difficulties in enforcing protective measures or seeking official protection generally. Thiara and Gill found that notions of family honour and shame ‘were central to contact battles in the context of domestic violence across all South Asian groups [and that for] African-Caribbean women, too, the sense of shame and stigma was powerful in shaping their responses’, which worked to silence women through, for example, pressure not to go to court⁹⁷. By enforcing return on the basis of ‘protective measures’, courts could be colluding with the abuser and ‘unwittingly enable batterers to control their victims more effectively’.⁹⁸

Finally, it should be noted that the conclusion of the EP Report was that the phrase in Brussels II Revised Article 11(4) – ‘if adequate arrangements have been made to secure the protection of the child after his or her return’ – does not provide appropriate safeguards in cases of domestic violence and should therefore be amended.⁹⁹

Conclusions

Weiner observes that ‘if member states want to avoid sending the message that flight from domestic violence is more objectionable than the domestic violence itself, then courts must not expeditiously return children in the face of serious allegations of domestic violence.’¹⁰⁰

A first step to ensuring that ‘the Hague Convention, which was designed to protect children from harm, should not become an instrument for causing them harm’ is to promote a better understanding amongst courts and professionals of the nature, dynamics and effects of domestic violence, including coercive control.¹⁰¹ Continuous and compulsory training on domestic abuse for judges involved in Hague Convention proceedings delivered by specialist domestic violence services, should go some way to enabling them to understand, identify and

⁹⁵ Case Scenarios/Fact Patterns at pg. 73

⁹⁶ Merle H Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ (2000)69 *Fordham L. Rev.* 593

⁹⁷ Ravi Thiara and Aisha Gill, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children, Executive Summary* (NSPCC, 2011) at pg. 4

⁹⁸ Merle H Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ (2000)69 *Fordham L. Rev.* 593

⁹⁹ EP Report at pg. 20

¹⁰⁰ Merle H Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ (2000)69 *Fordham L. Rev.* 593 at pg. 703

¹⁰¹ *Re D* [2006] UKHL 51 per Baroness Hale at pg. 52

respond appropriately to domestic violence. However, this alone may not be sufficient to achieve a genuine transformation in the way in which judges respond to domestic abuse in Hague Convention cases, if the prompt return of children to the state of habitual residence is seen as a greater priority than their safety, protection and welfare.

Guidelines will only assist in promoting change if accompanied by genuine cultural transformation, as the experience of England and Wales reveals. In 2000 the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law¹⁰² and the Court of Appeal in *Re L, V, M, H (Contact: Domestic Violence)* [2000] 2 FLR 334 laid down 'good practice' guidelines for the approach to be taken when domestic violence is put forward as a reason for denying or limiting parental contact. Monitoring of the guidelines by the Lord Chancellor's Department and research initiated by the Family Justice Council found that the guidelines were frequently ignored and that issues of safety were frequently not addressed.¹⁰³ As a consequence, the FJC called for a 'cultural change... with a move away from "contact is always the appropriate way forward" to "contact that is safe and positive for the child is always the appropriate way forward"'.¹⁰⁴ A similar cultural shift is needed in the interpretation and application of Article 13(1)(b). The proposed Guide could play an important role in this, but in its current form, this is unlikely. It is hoped that the suggestions made in these observations will be considered carefully so that the Guide does not become a missed opportunity for promoting real change. Currently, the extreme circumstances that warrant acceptance of domestic violence as the basis for an Article 13(1)(b) defence suggest that there is an 'acceptable' level of abuse that mothers should be prepared to tolerate and that that bar is being increasingly raised to the point where the father has to be practically a monster for his conduct to be seen by courts as permitting a no-return order. Unfortunately, the draft Guide is unlikely to lower that bar.

With best wishes,

Yours sincerely,

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¹⁰² CASC, *Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence* (TSO, 2001)

¹⁰³ Jane Craig, 'Everybody's business: applications for contact orders by consent' (2007) Fam Law 26

¹⁰⁴ Ibid at pg. 27

**Letter from Pamela Brown, Director, Bi-National Project on Family Violence, Texas
RioGrande Legal Aid, Inc.**

and

**Joan Meier, Esq., Founder and Legal Director, Domestic Violence Legal Empowerment
and Appeals Project (DV LEAP).**



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By Email

August 31, 2017

Mr. Michael Coffee
Attorney Advisor
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U.S. Department of State
Washington, D.C.

Re: Comments on Draft Guide to Article 13b

Dear Mr. Coffee:

Thank you again for the opportunity to comment on the Draft Guide to Good Practices on the Application of Article 13b of The Hague Abduction Convention (hereinafter 'Guide'). We are also grateful to have had the chance to provide oral comments at the August 8, 2017 stakeholders' meeting. We are writing to reiterate some of the points we made at the meeting and to introduce some additional areas of concern. We also want to express our wholehearted endorsement of the views and recommendations expressed in comments submitted by Legal Momentum, Americans Overseas Domestic Violence Hotline, Professors Jeff Edleson, Sudha Shetty, and Merle Weiner.

First, we recognize the significant effort invested in producing this Guide, particularly given the challenge in balancing diverse views on the application of Article 13b. We are, however, troubled that those who fear broad application of 13b appear to believe it has virtually no legitimate applications at all – and seem to believe that children's only interests in such cases are to be returned to the country from which they were removed. The fact is that the Convention incorporates numerous provisions to protect children's interests in different ways. As Dame Brenda Hale has powerfully articulated in a recent article, "Taking Flight—Domestic Violence and Child Abduction,"¹ the Convention is aimed at maximizing *children's welfare*, and one way it does that is to provide an exception to return where children face a "grave risk." To suggest that this should be almost never applied is to violate the Convention's own purpose – protection of children from harm.

We appreciate some signs of progress in the Draft Guide. Most importantly, the Guide states that past intimate partner violence is relevant to future child safety, which is a significant step forward, given many courts' failures - to date - to understand this. In addition, the inclusion of longstanding, well-established knowledge about domestic violence and its impact on children

¹ *Current Legal Problems*, cux001, <https://doi.org/10.1093/clp/cux001>,

in Annex 3 is helpful – although we would like to see its contents referenced in the text’s analyses of the law, to demonstrate its relevance to the legal issues courts must determine.

On balance, however, in company with other experts on domestic violence and the Hague Convention around the globe, particularly those who work with survivors of domestic violence and mothers who seek to keep their children safe, we fear that the Guide is may make it even more difficult than it already is for such families to invoke Article 13b *as it was intended*. We come to our views in large part from our practice experience: One of us has, over the past fifteen years, directed the Bi-National Project on Family Violence at Texas RioGrande Legal Aid, which has handled more than 50 Hague cases between the U.S. and Mexico at the trial level²; the other, as Professor of Clinical Law, and founder and Legal Director of the Domestic Violence Legal Empowerment and Advocacy Project (“DV LEAP”)³, has been involved in several appeals – including in the Supreme Court - of Hague Convention cases in which the interpretation of Article 13b was at issue. We are thus both aware of horrifying and tragic cases in which young children have been removed from their protective and attachment parent, in order to return them to an abusive, unloving and non-nurturing parent in another country, where the protective parent has little or no ability to live a reasonable – let alone safe - life. We are also aware that in the vast majority of returns of this sort, courts of the habitual residence do not objectively weigh the safety of the child and/or the abducting parent – rather there is often a profound hostility toward the abducting parent. In our experience, child safety has virtually no place in these post-return adjudications. Our concerns for the impact of the Guide, therefore, come from our painful experience with cases and outcomes that have been disastrous for children, and by extension, their loving parents. If the damage caused by the Convention to children is ever to be reduced, Article 13b and the Convention’s over-arching intention to further children’s well-being must be given more weight.

In addition, it is our understanding based on data provided at prior Special Commission meetings and information provided by the U.S. State Department that the vast majority of Hague cases are between the United States and Mexico. It appears to us that the majority of these cases involve low income litigants. If this is true, many of the proposed procedures in the Guide are even less realistic, with no attorneys to facilitate or oppose or advocate for fairness.

That said, we again embrace the opportunity to provide constructive criticism as follows:

Introduction and Interpretive Background:

As Dame Brenda Hale and the Supreme Court of the United Kingdom have emphasized, “the fact that the best interests of the child are not expressly made a primary consideration . . . does not mean that they are not at the forefront of the whole exercise. . . [citations omitted]” Hale, *supra* at 6-7. As just one example, the Preamble states that “the interests of children are of paramount importance in matters relating to their custody.” We therefore urge the drafters to

² TRLA’s Bi-National Project has represented both left behind parents and taking parents in U.S. courts and left behind parents in the courts of Mexico. The two common denominators in all of our cases is that the client is both low-income and a victim of domestic violence.

³ DV LEAP has a fifteen year history of advancing the interests of domestic violence survivors and their children by providing expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the U.S. Supreme Court. See www.dvleap.org.

revise the assertion that in Paragraph 52 that “it is the situation of the child that should be the *primary* focus of the inquiry” to state that the child should be the *exclusive* focus of the inquiry.

While we accept that the Convention was also negotiated to prevent abductions, provide redress to wronged parents, and to advance international comity, we believe the Convention was fundamentally fueled and justified by a commitment to children, and therefore their “situation” should have primacy. Children’s situations and needs are already marginalized in most 13b cases.

Similarly, we believe that in addition to recognizing the goals and impact of the Convention on the Rights of the Child on the Abduction Convention, the Guide must also acknowledge other public law instruments of which many member states are signatories. These instruments emphasize that freedom from violence is a human right, and therefore also a child’s right. For example, the International Covenant on Civil and Political Rights, states in Article 6 that “everyone has the right to life, liberty and security of person,” (identical to Article 3 of the Universal Declaration of Human Rights); The Convention on the Elimination of All forms of Discrimination Against Women (“CEDAW”), provides in Article 16(1) that “state parties shall take all measures to eliminate discrimination against women in all matters relating to marriage and family relations . . . in all cases the interests of the children shall be paramount”; and the Inter-American Convention on the Prevention Punishment and Eradication of Violence Against Women (known as Belem Do Parras declares in Article 3 that “[e]very woman has the right to be free from violence in both the public and private spheres.”).⁴

Part II: Protective Measures

The idea of assuring a child’s protection after return is an understandably attractive one. However, given the realities of adjudications of child safety in custody litigation in most if not all countries, we believe the Guide’s emphasis on protective measures in the requesting country is largely wishful thinking. First, most Central Authorities do not have the capacity to even attempt to initiate protective measures – nor do they control the courts or law enforcement agencies that would be needed for such purposes. More fundamentally, a growing body of empirical research documents that even United States state courts are remarkably *non-protective* of children’s safety where children and mothers report a father’s abuse.⁵ From our wide exposure to domestic violence experts around the world, we are aware that they face similar problems. Given that the United States is generally seen as a leader in protections for violence against women and children, it is thus implausible to expect that other countries’ courts will do better than our own. We believe it is irresponsible to subject children to known grave risks in the hope that they will. In short, the tantalizing idea of “protective measures” provides courts a snake oil solution to their discomfort at sending children back to situations of known danger. While it may provide a salve to judges’ concerns, it is highly unlikely to actually protect the children who are forced to endure the outcomes.⁶

⁴ Note that only two countries among 35 member states of Organization of American States have not signed or ratified the Belem Do Parras Convention-Canada and the United States; moreover, these countries are still free to uphold the principles contained therein.

⁵ Joan Meier and Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation*, 35 J. Law & Inequality 311 (2017)

⁶ Longitudinal research tracking outcomes for returned children is clearly needed; but in its absence, mere hope or inaccurate beliefs that custody courts will protect children – is an insufficient basis for forcing them back into danger.

Finally, in our experience, it is attorneys who are relied on by courts to draft, implement, and even enforce protective measures in other countries. But attorneys are even less well positioned than Central Authorities to accomplish such a thing. This is especially true given that this requires them to take actions that are contrary to their own clients' wishes and arguably, interests. Moreover, the State Department's pro bono network attorneys often possess limited resources, both in terms of time and money. They have little incentive to ensure their clients adhere to promises or legal commitments in the requesting country. Finally, even attorneys who want to and ethically pursue such "measures" have no power to ensure their enforcement. As the Eleventh Circuit Court of Appeals has stated, "[t]o require a respondent to adduce evidence regarding the condition of the legal and social service systems in a country she has fled creates difficult problems of proof, and appears not to have been contemplated by the Convention." *Baran v. Beatty*, 526 F.3d 1340, 1348 (11th Circuit 2008).

Part II: The "Two Approaches" (pages 28-29 of Draft Guide)

We strongly object to the inclusion in the Guide of a structural analysis for Article 13b that adopts new doctrines and approaches that are nowhere in the Convention itself, and, as discussed above, are likely to exacerbate the already distressing level of harm – including death – the Convention is now inflicting on children and adult victims of domestic violence.⁷ These two proposed approaches are both unsupported and dangerous.

The first approach is particularly concerning. First, as described in detail above, we believe the inquiry into and reliance on protective measures is entirely fanciful. Critically, the mere existence of protective laws or child welfare agencies guarantees nothing, as U.S. experience has demonstrated.⁸ In our experience, the practices of most legal systems are entirely inadequate to keep children safe in custody battles between their parents. And even if some courts or some agencies which are more protective than the global norm could be identified, how is this information to be ascertained? We have no doubt that any judge, child welfare worker, and most family law attorneys who are asked, will report a plethora of protective laws and agencies in their country. As noted above, this kind of information – even if it is possible to obtain – is meaningless when it comes to what can practically be anticipated with regard to individual children in actual cases. Will there be opportunity to challenge such assertions, or will such a challenge merely prolong cases that are already under enormous time pressure?

Indeed, we believe civil society organizations offer more accurate assessments of the situation on the ground than judges or other government authorities (e.g., Central Authorities) are likely to offer, precisely because they look beneath the laws and agencies to assess cultural,

⁷ See Sandra Leville, *Woman's Murder could have been Prevented, Says Jury*, available at <https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence> "In the weeks leading up to her death Hasanovic had told her family: "I know he is going to kill me," and was "unravelling with fear", the inquest heard. She had previously fled to Australia with their two young children to escape his violence, but was forced to return to the UK in December 2007 after her husband went to court accusing her of kidnapping their children. On her return her husband was made to sign an undertaking not to approach his wife or contact her."

⁸ See Meier and Dickson, *supra* n. 5. The undersigned (Professor Meier) is aware that many of the cases surveyed in this study and reviewed in her practice also involve child protective agencies, who almost never over-ride an evaluator's or court's "parental alienation" label which is used to discount reported abuse and to instead treat the reporting parent as the bad parent.

social, and media norms, which shape common practices in courts and elsewhere. The most recent CEDAW Committee's final report on Italy's treatment of discrimination against women notes that despite nominal efforts, the country retains "[e]ntrenched stereotypes concerning the roles and responsibilities of women and men in the family and in society, perpetuating traditional roles of women as mothers and housewives . . ." and the tendency toward "impunity for perpetrators" and "limited access to civil courts" for victims of abuse. *Concluding observations on the seventh periodic report of Italy*, Advance Unedited Version (July 21, 2017)(on file with the undersigned). A Shadow Report specifically points out that, despite a high court's rejection of parental alienation syndrome, which is routinely used to deny true abuse, as "science," the courts still rely extensively on PAS to the detriment of children from abusive homes:

Despite the growing number of gender-sensitive training organized by ADMI to sensitize the judiciary about women's rights and non-discrimination principles, the number of judgment using sexist stereotypes to legitimize or minimize violence is still remarkable. . . Although, after the 2011 CEDAW recommendations, this theory [PAS] has been repudiated by the Italian psychology society (SPI), as well as by the Italian Department of Health, it still constitutes the basis of psychological reports in the proceedings before the Juvenile Court and for separation or divorce. . . The lobbies which are promoting this ideology enjoy strong political and media support, and managed to affirm a portrayal of women and mothers in course of separation or divorce as malicious, manipulating persons . . . [The media] contribute[s] to reinforce stereotypes against women and mothers in course of separation or divorce, causing their persistent re-victimization by both courts and social services, and forces children to meet their fathers, even when abusive.

CEDAW ALTERNATIVE REPORT – ITALY Article 2 and article 5 | 08/06/2017, pp. 18-19, available at http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ITA/INT_CEDAW_NGO_ITA_27687_E.pdf

Our view of the Guide's wishful thinking about "protective measures" is best summed up by the Eleventh Circuit Court in *Baran v. Beaty*: "Although a court is not barred from considering evidence that a home country can protect an at-risk child, *neither the Convention nor ICARA require it to do so* [emphasis added]." The Court continues:

[T]o define the issue not as whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregards the language of the Convention and its implementing statute; for they say nothing about the laws in the petitioning parent's country. The omission to mention them does not seem to have been an accident-the kind of slip in draftsmanship that courts sometimes correct in the exercise of their interpretive authority. If handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some non-negligible probability injure the child, the child should not be handed over, however severely the law of the

parent's country might punish such behavior.”(citing *Van De Sande v. Van De Sande*, 431 F.3d 567, 571 (7th Circuit 2005))

Baran v. Beaty, *supra*, 526 F.3d at 1348. Moreover, as noted by the Eleventh Circuit, the Convention *balances* the goals of protecting children and ensuring their speedy return, as evidenced by the official commentary to the Convention, which states “[T]he interest of the child in not being removed from its habitual residence . . . 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.” Elisa Prez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Actes et Documents de la Quatorzieme Session 426 (1980) (“Perez-Vera Report”), ¶ 29. The Court goes on to note that “[t]he commentary says nothing about a reviewing court's duty to assess the home country's ability to protect a child from harm—it says only that return need not be ordered when the risk of grave harm exists. . . .” *Id.*, 1348-1349.

In short, since it does nothing to enhance children’s well-being, and is more likely to increase their suffering, this emphasis on protective measures has no place in a Guide to good practices.

Part II Judicial Communications

We harbor similar concerns about the increasing emphasis in Hague circles on “judicial communications.” As with protective measures, direct communications are, in most cases, merely fanciful. In addition to the obvious barriers of language and lack of understanding of the other country’s legal system, there are very real practical obstacles. In most countries and especially the United States, case loads are high. In our experience, most courts don’t have the inclination, let alone the resources, to contemplate contacting a counterpart in another country to inquire as to how safety might be provided in another foreign jurisdiction.

We are also concerned that such communications are unlikely to provide real value. For instance, it is hard to imagine that American judges would tell other countries’ judges that American courts frequently fail to protect child safety – indeed, this fact which is widely known among those who work with abuse survivors – is not known by judges or other populations. Rather, most judges would answer such a question by reference to what the law provides or what they believe courts do or should do.

Equally concerning is the fact that such communications threaten due process insofar as they supplant parties’ ability to present evidence or challenge another judge’s assertion about protective measures’ potential effectiveness in a particular case. These due process concerns are likely to give rise to substantial legal challenges if adopted in any large degree.

Finally, while we appreciate the Guide’s trust in the capacity of International Hague Network Judges and Central Authorities to navigate these matters, we fear it may be overstated. In our experience, INHJ judges tend to be trained to treat return as a virtually universal requirement – they appear predisposed to promote return notwithstanding safety concerns. There is no reason to believe that these judges, either by virtue of their particular training on the Convention or their particular judicial experience, have any particular expertise or knowledge regarding the safety concerns of a parent and child fleeing an abusive parent, or the ability and will of the country from which they escaped to seriously address those concerns should the child

be returned. Therefore, reliance on this network for interpretations of article 13b is not appropriate.

Similarly, the Guide places too much confidence on Central Authorities' ability to facilitate communications between judges and courts in individual cases. Most Central Authorities struggle to administer the Convention cases they receive. It seems entirely unrealistic to us to suggest that these entities have the capability, and sometimes the will, to convey objective information between courts or to assume any expanded role in individual cases. Indeed, if Central Authorities were to weigh in on specific cases, we suspect it would be unfair and potentially violative of due process – because judges can be expected to give dominant weight to Central Authorities' declarations and opinions.

Additional General Comments:

- Access to Counsel – We would like to see the Guide expand discussion on the critical importance of member states ensuring that *both abducting and left-behind* parties have access to counsel. To the extent that parties are without competent counsel, they are unable to assert their rights or protect their children.⁹ Indeed, it is in those cases where taking parents are unrepresented that the most egregious results can be expected to occur. Publications of Guides such as these, will do little to change those outcomes without also

⁹ A recent case experience is sadly emblematic of many cases the Bi-National Project has encountered over the years. The client applied for TRLA's assistance nearly six months after a Texas state court had returned her 8 year old son to his father in Mexico; she wanted to know if there was any way for her to recover him. The client recounted that in January 2017 a police officer called her to inform her that her son was in the County Courthouse because her ex- her ex-husband, who was also at the courthouse, had initiated a proceeding to return the child to Mexico. He further stated that she should go immediately to the courthouse, which she did, accompanied by her new husband and new baby. A 'hearing' was held, during which the judge asked the client if she had taken the child out of Mexico in spite of the Mexican court order that prohibited from doing so. The client, a mono-lingual Spanish speaker, who was without benefit of counsel, responded that she had, but she hastened to add that she did so 1) with the consent of her ex-husband and 2) in order to get away from his repeated manipulations and threats to harm her and her son. She testified that her ex-husband had been very violent towards her in the child's presence. She pointed out that the Mexican court order provided her primary custody of the child. Her current husband noted that before this day he had never been aware of any proceeding or seen any documents. He also requested that the court interview the child. To this the judge responded that "the documents seem clear that the Mexican authorities have asked the courts of Texas to return the child to Mexico in accordance with the Hague Convention, which both countries are signatories to." He also stated that he had read the Mexican court order and "it seems pretty clear that the child should not have been taken out of Mexico without agreement of the father or some other court order from Mexico." The judge noted that "[i]t's a difficult situation...but I don't see any way around it...he's going back with his dad. ... [T]here's going to be a good-bye here, and then I suppose, that's going to be it."

The child was returned to Mexico that day. Since then, the facts of the mother and child's situation, so summarily dismissed by the court on that January day, have proven to be much more horrific than she was able to describe. As it turns out, the client had been a victim of international sex-trafficking by her ex-husband, who had routinely used the child as leverage (threatening to harm him) should the client not report to various addresses to be picked up for pre-arranged sexual encounters. Her claims in this regard have been verified by U.S. Immigration, Customs and Enforcement officials based on information she has been able to provide them that conforms to their knowledge of confirmed traffickers.

While some might consider this case an outlier, sadly, it is not. At a conference on the operation of the Convention held in San Diego, California, a California state court judge bragged about how in his court the child is picked up by law enforcement at school in the morning, while the taking parent is served with process. The judge said he conducts a hearing that same afternoon and the child is on a bus to Mexico that very evening.

Unfortunately, most state court cases in the United States go unreported and therefore these realities for poor people are rarely considered when policy is being developed. Given how routinely basic due process principles are ignored in these cases, we question the assumptions on which the Guide is based.

ensuring that survivors have access to attorneys. Thus the Guide should include a recommendation to Courts that taking parents be appointed counsel when they have established their indigence and have articulated concerns for their child's welfare should s/he be returned. Should review of protective measures remain a recommendation of this Guide, we hope it will highlight the need to ensure that the taking parent be provided meaningful access to counsel to help her challenge any unsupported assertions from the country from which she fled, about her and her child's experiences with efforts to obtain protection, and to assert her interests and those of her children in any custody proceedings in the habitual residence country.¹⁰

- Criminal Charges (Part III, Section ix(b)) – It is important that the Guide acknowledges the role of criminal charges against taking parents has in unnecessarily harming not only adults who flee, but their children, after a return. However, our litigation experience teaches that it is difficult, if not impossible, for anyone to ascertain or guarantee any particular measures with regard to pending criminal charges. As in the U.S., criminal authorities and courts make their own decisions. Inquiries and suggestions cannot overcome that authority. A more realistic approach would be to encourage courts to include an inquiry as to the status of any criminal charges as part of their analysis of whether a return should be considered, notwithstanding a finding of grave risk.
- Case scenarios – We understand the impulse to include case scenarios, but these seem biased toward return to an extent we believe distorts the Convention's purpose of protecting children. Moreover, including such case examples in the Guide is inherently problematic in that they may be treated as a kind of "precedent," and may undermine courts' focus on the particular facts of the cases in front of them.

In sum, we had hoped that such a Guide, which was initiated after much advocacy from the domestic violence field, would assist courts in taking domestic violence and risks to children more seriously. As stated above, we do think the Draft has taken some steps forward in advancing the discussion of the intersection of abuse and the Convention. At the same time, it contains sufficient troubling provisions that our colleagues around the country and we find ourselves disappointed. Our experience teaches that these types of provisions (e.g., protective measures) will increase rather than decrease children's risks in these cases.

We appreciate the opportunity to submit both oral and written comments; we hope they contribute to making this Guide a more useful instrument in its final form.

Sincerely,



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LSC



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¹⁰ We believe that, at minimum, FN 284 should be contained in text.

**Letter from Carol S. Bruch, Esq., Distinguished Professor Emerita, University of
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September 7, 2017

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Via email to coffeems@state.gov

Re: 1980 Hague Child Abduction Convention and the Draft *Good Practice Guide on Article 13(1) (b)*, and related documents

Dear Mike:

From those who were with you, I have heard what a fruitful discussion you led on August 8th. Thank you. I regret that other obligations kept me from participating. Although they also limit what I can do now, a few important points deserve emphasis, and I hope these thoughts and resources will prove useful to all who are shaping the proposed Good Practice Guide and related documents. As you know, my senior colleague, the late Professor Brigitte Bodenheimer, was the academic member of the US delegation that took part in drafting the Abduction Convention, and I was privileged to discuss many proposals with her while they were under consideration. Then, as an official observer, I attended every Special Commission that has discussed the Convention,¹ and my research has addressed a broad range of Convention topics.²

Those now charged with the Convention's implementation at the State Department and the Permanent Bureau are, of course, newer than I to the Convention. I therefore want to bring their attention to the setting in which it was negotiated and to fundamental features of its design that were brilliant when drafted and – if heeded now – can alleviate many of the problems that have developed which are relevant to the documents that are now being considered.

¹ At Special Commissions 1 through 5, I observed on behalf of the International Society of Family Law. Although I did not attend Part I of the 6th Special Commission, I observed Part II on behalf of the International Law Association.

² For your convenience, I attach a list. Most of the recent articles are available for download from the publications list that is linked at my faculty page, <https://law.ucdavis.edu/faculty/bruch/>.

In 1980, a typical international child abduction case involved a young child who was removed from the parent who had provided most of its day-to-day care by the other parent.³ Although domestic violence, child abuse and battered women's shelters were not even on the radar screen, several of the most influential Convention drafters, Professor Bodenheimer among them, were talented family law experts. They knew a great deal about family dynamics and what harms children, even without the use of these labels and long before brain scans could illuminate the reasons. For convenience, I will refer to those who attended the sessions that produced the Convention as drafters and will refer to those who attend Special Commissions as delegates, employing expert instead as the word is usually understood.

Brigitte Bodenheimer was formally trained in both the Civil Law and the Common Law traditions and had served as Reporter for this country's groundbreaking Uniform Child Custody Jurisdiction Act (UCCJA). At The Hague, she used this knowledge of American and foreign legal systems to distinguish rules that were suited to an international instrument from those that made sense only within the uniform legal tradition of this country. As I consider problems that have arisen in Convention practice, I am reminded of her lament that American attorneys often fail to consult the language of a written law (whether statute or Convention) once a single case has been decided under it.

Let me then begin by recalling important features of the Convention as written:

- The Convention's preamble states that a child's interests are paramount in matters affecting its custody, then announces the Convention's desire to remove the harmful effects of a wrongful abduction by returning the child to its former habitual residence and to protect access (visitation) rights. Not surprisingly, the Convention became known for providing an abducted child's prompt return.
- Yet the remedies the drafters crafted demonstrate a somewhat more concrete and nuanced goal.
- To reunite abducted children with their former caregivers who were left behind at the habitual residence, the Convention gives these parents a right to their children's prompt return.
- But when primary caregivers are the abductors, whether or not their actions are wrongful under the law of their former habitual residence, visiting parents who are left behind are granted no such right to their children's return.
- Instead, Article 21 gives these parents assistance from the Central Authority in facilitating or securing visitation, including assistance in instituting a non-Convention proceeding to that end.
- Taken together, these provisions make clear that the Convention does not always call for a child's return. Rather, it always protects the child's residence (hence relationship) with its primary caregiver.

³ For convenience, I will use American terminology, calling those who provide most of a child's day-to-day care "primary caregivers" and calling the other parents "visiting parents," not distinguishing whether they shared an intact household until the child was taken abroad. I will usually also not distinguish a visiting parent who removes a child from one who retains it following an authorized visit abroad. As in other child custody proceedings, most of the children were not yet 6 years old.

- Any request by the visiting parent for a change of custody must take place outside the Convention, typically, where the child and its primary caretaker now reside, or, if jurisdictional rules permit, at their former habitual residence.⁴
- This scheme minimizes relocations by the child and its primary caretaker in Hague proceedings, during any subsequent litigation, and following the entry of a decision on the merits.⁵
- Some delegations nevertheless feared that when a visiting parent abducted and the primary caregiver was left behind, courts might resist entering return orders and justify their refusals by invoking broad notions of “public policy.” But others made clear that they would not join a Convention unless it protected a child from a return that would expose it to danger, e.g., if the primary caregiver was abusive or lived with someone who was. Vigorous debates led to several protections for children, including the enumerated exceptions to return that are found in Article 13.
- In addition, the drafters’ deep concerns about countries that did not permit their citizens to travel freely and about those that apply religious law to child custody cases produced the Article 20 human rights exception and the procedure that requires every country but those that were already members of the Hague Conference to accede to the Convention rather than ratify it.⁶

Had the Convention’s language and structure been followed faithfully, several unfortunate developments might have been avoided. Although we cannot undo history, perhaps the proposed *Good Practice Guide on Article 13(1) (b)* – if its adoption, language and use comport with international treaty law --can facilitate much-needed improvements⁷.

In that endeavor, I commend to you the analysis Lynn Hecht Schafran of Legal Momentum sent to you on August 21st and that of Professor Merle Weiner, dated September 2nd. They are outstanding in every detail. In addition, the August 31st letter from Pamela Brown, Director of Texas Riogrande Legal Aid’s Bi-National Family Violence Project, and Professor Joan Meier shares powerful insights from practice that should shape all Convention documents and, more fundamentally, dictate whether contemplated documents should be pursued at all. Finally, your August 4th letter from Deans Sudha Shetty and Jeffrey Edleson is extremely important. It carefully details the draft Guide’s erroneous assumptions and assertions, each of which must certainly be corrected. Most notable among them is a surprising assertion that every taking is

⁴ Whether it makes sense to pursue a custody change in the habitual residence, even if jurisdiction exists there, of course, depends on whether an order from that court will be recognized and enforced at the child’s new residence. The same issue arises if another jurisdictional ground, for example, nationality, exists elsewhere.

⁵ The drafters surely anticipated that the courts of countries entitled to ratify the Convention (those currently members of the Hague Conference) would award custody to competent primary caregivers. At the time, punitive custody transfers (i.e., those designed to punish a parent rather than to serve a child’s interests) were virtually unknown outside the United States. Professor Bodenheimer had already indicated her strong disapproval of them when such orders first appeared in UCCJA cases. See Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978, 1003-09 (1977).

⁶ See my article, *Religious Law, Secular Practices, and Children’s Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, 33 N.Y.U. Journal of International Law and Policy 49 (2000)

⁷ As expanded upon below in the text, my reference is to the Vienna Convention on the Law of Treaties. Although the United States signed this United Nations treaty on April 24, 1970, the U.S. Senate has not given its advice and consent. The United States nevertheless considers many of its provisions customary and therefore controlling international law. And many other States Parties to the Abduction Convention have already ratified it. Conformity with it is therefore obligatory in their countries. As a practical matter, then, if the measures now being considered are to have a broad impact, they must comply with the Vienna Convention.

harmful to children. Shetty and Edleson are entirely correct, too, when they point out that the Convention's credibility is damaged if – by ignoring the Convention as written – the Guide encourages judges to turn a blind eye to endangered children and those who protect them. Given our current knowledge, it is simply unacceptable for the Guide to suggest that allegations of abuse must be met with suspicion.

In that connection, I reiterate the importance of the Convention and its remedies as drafted. Because the Convention decreased abductions by visiting parents (who were almost exclusively fathers), most abductions are now made by caregivers (who are almost exclusively mothers). Many of them are fleeing violence, and most of them are returning to their families and countries of origin. It is essential, of course, that the Convention operate properly for them and their children.⁸

Let me highlight a few points that merit your special attention.

1. Brain scans now reveal why adverse childhood experiences (ACEs) often cause life-long damage

Important U.S. research with a database of more than 17,000 subjects reveals the likelihood of seriously harmful impacts over a child's life span if it is exposed to stressful or traumatic adverse childhood experiences. ACE is now a term of art that refers to specific situations, for example, a household with alcohol or drug abuse, mental illness, a battered mother or other parental discord, or exposure to psychological, physical or sexual abuse. The effects of ACEs range from increased health problems such as heart disease, cancer, and chronic lung disease to a shortened life span, with a sobering range of additional harms if the child is exposed to more than 1 adverse experience.⁹ To be harmed by the tensions that household violence produces, a child need not be a direct witness to abuse nor even be aware that it is happening. And now, developments in brain imagining permit neuroscientists (1) to show how such exposures affect a child's developing brain and (2) to predict, in light of the changes, the likely consequences over the child's lifespan. These include, for example, such profound harms as a reduced IQ and the inability to form and maintain intimate relationships. Although partial recovery through the development of new neural pathways may be possible (as when stroke patients recover), success is uneven, and research suggests that a young child's best chances exist when optimal experiences are preserved or restored as quickly as possible.

The drafters' prescience is clear. By protecting the child's residence with its primary caretaker in both wrongful taking and wrongful retention cases and encouraging courts to avoid subjecting the child to danger, the Convention minimizes adverse brain development. And, if the child has already been exposed to adverse experiences, this scheme optimizes the child's chances to

⁸ A qualification is necessary. The exceptions to return are intended to prevent return of a child to a left behind primary caregiver when doing so would expose the child to a grave risk of harm, for example, if she or someone else in the household is abusive. In these cases, the Convention leaves the child with the visiting parent abductor pending trial on the merits of custody. Although relatively unusual, of course this fact pattern sometimes arises.

⁹ See, e.g., ROBERT ANDA, *THE HEALTH AND SOCIAL IMPACT OF GROWING UP WITH ADVERSE CHILDHOOD EXPERIENCES THE HUMAN AND ECONOMIC COSTS OF THE STATUS QUO* (2007), available at http://www.theannainstitute.org/ACE%20folder%20for%20website/50%20Review_of_ACE_Study_with_references_summary_table_2_.pdf (reporting that "stressful or traumatic childhood experiences are a common pathway to social, emotional, and cognitive impairments that lead to increased risk of unhealthy behaviors, risk of violence or re-victimization, disease, disability and premature mortality," probably due to disruptions in neurodevelopment that can have lasting effects on brain structure and function).

recover in the home of its primary caregiver. The time has surely come for every judge who may hear a Convention return petition to learn of the neuroscience findings and to be encouraged to take the authorized exceptions to return seriously.

2. Some countries have lost sight of children's well-being as they emphasize high rates of return

The need for this revised emphasis exists because the drafters' concern for children's welfare has been undercut by a simplistic effort to ensure that returns are granted in a very high percentage of cases. An early British case led the way, claiming that honoring the hard-won exceptions to return would "drive a coach and four" through the Convention, a fear that is repeated even now in the draft Guide. In an effort to show how faithfully their courts adhere to the Convention, some countries (including our own) became anxious to report "high batting scores" – i.e., high percentages of return orders in the cases that had been heard in their courts.

The consequence, much to the detriment of children and their caregiving parents, was a concerted effort by governments to persuade judges to deal parsimoniously with fundamental matters of Convention structure and language. In the United States, this included an implementing statute that raises the burden of proof to clear and convincing evidence for a taking parent who seeks to rely on an Article 13(b) or Article 21 exception to return, thereby hampering access to the protections the drafters intended.¹⁰ Further, even when an enumerated defense to return is established by clear and convincing evidence (whether under our statute or the similar burden that early British case law developed), courts were urged to exercise their discretion to return the child anyway. In far too many cases, these developments have turned the Convention, which sought to protect children, into an engine of harm.

Because in 1980 drafters realized that mothers were their children's primary caregivers in virtually every case, and the Convention directed that a child who was taken abroad by that caregiver would not be returned, I believe they perceived no need to provide a specific defense to return for mothers. Nevertheless, Article 13(b) lists a defense to return that protects these caregivers and took on importance once courts began to order returns that the Convention did not require: the exception to a return that would place the child in an intolerable situation. Some courts now understand this language to prevent returning a child and its mother into hiding. They are clearly correct, both as a matter of common sense and as a matter of neuroscience. The stress for a child who lives hidden with someone who fears for her life is, indeed, intolerable, and the constant vigilance it requires causes physical harm to the child's developing brain.

Unfortunately, as research by Deans Shetty and Edleson makes clear, efforts by our government and others to promote returns produces devastating consequences for children and their caregiving parents. I refer to our implementing statutes, which makes it difficult to establish danger, to judicial training courses, and also to direct intervention in cases by the federal government (for example, in *Blondin* and *Abbott*) that urge return orders when the Convention does not require them and no one could reasonably expect that the petitioning parent will make an adequate interim caregiver or is likely to receive custody in a trial on the merits.¹¹ Indeed,

¹⁰ 22 USC §§ 9001(b) (1); 9003(e) (2) (A), effective April 29, 1988.

¹¹ There is yet another way the State Department can promote interpretations of the Convention that may or may not be faithful to it. Long ago, the Department sent packets containing a cover letter, the Convention and our implementing statute (ICARA), to the presiding judge at every court in which it knew of a pending Abduction

when a child's return is into the supposedly temporary care of an abusive parent, it is unlikely that a trial on the merits will ever take place. Certainly the abuser has no incentive to institute one, and the primary caregiver may well be unable or afraid to litigate there.

Children's interests and the Convention as drafted have suffered further as the State Department continues to promote the use of undertakings, judicial roles the Convention does not authorize, travel restrictions (*ne exeat* provisions), and more. I address these below.

One of my articles, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases" reports decisions across the globe that, like the U.S. cases in Dean Edleson's initial NIH study, reveal the gratuitous harm these assaults on Article 13(b) cause. "Unmet Needs" received unsolicited recognition from the American Bar Association as the best family law article it published in 2004 and was included in collections for international audiences that were published in France and England. More than a decade ago, these events signaled that others, too, had already begun to realize that Convention cases were not working as they should for endangered children and their mothers.¹²

3. Undertakings and judicial roles that the Convention does not authorize cause harm

Lynn Schafran's letter for Legal Momentum includes a powerful and well-founded indictment of one of the particularly harmful developments that I want to highlight: the use of "undertakings" – i.e., promises a petitioner makes when attempting to convince a court to exercise its discretion to return a child to the former habitual residence after the court has found that a return is not required, because it would expose the child to a grave risk of harm.¹³

This creature of English law promotes a naïve belief that a parent the Convention says is not entitled to a return order (usually because of a history of abuse) should receive it anyway, because he promises that the child (and often its caregiver parent as well) will be safe and adequately provided for pending a custody determination on the merits.¹⁴ There is often ample reason on the facts of the case to predict that he will not honor his promises, even in the unlikely event that he is obligated to keep them. Simply put, these supposed promises allow judges ordering return when grave risk of danger has been established to sleep well, although there is no objective reason to think the risk of danger to the child has been reduced. Further, the caregiving parent, whom the Convention intends to remain in the state of refuge with the child pending any custody determination on the merits, must, as a practical matter, return with the

Convention case. It has been many years since I saw that packet, so I do not know whether it still exists or, if it does, what information it now contains.

¹² See my article, [The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases](#), 38 Family Law Quarterly 529 (2004); revised and expanded from earlier version with the same title in *Les Enlèvements d'Enfants à Travers les frontières* (Hugues Fulchiron ed. 2004); abridged in GPSolo Sept. 2005, at 14 (Issue: Best Articles Published by the ABA); reprinted at Domestic Violence 475 (Michael Freeman ed., Ashgate Publishing 2008) (The Family, Law and Society Series)

¹³ These petitioners may be able to establish a preliminary right to return, although they have never provided their children's day-to-day care. This may occur, for example, when a petitioner holds joint custody rights that are technically considered custody rights under the Convention, yet return would place the child with someone who is, de facto, a visiting parent. Particularly on these facts, it is difficult to understand the appeal to the judge hearing the case of undertakings.

¹⁴ I use the masculine for convenience, because this person is almost always the father.

child in order to protect it, often endangering both herself and the child, sometimes with devastating consequences.¹⁵

Fortunately, some courts have rejected the use of undertakings, and others have turned away from an equally baseless presumption that the country to which an endangered child's return is requested both can and will protect it and its mother. However noble a country's intentions may be, they will probably fall short, making the presumption foolhardy. Two examples make the point. Statistics invariably show that orders which direct abusers to stay away from their would-be victims are frequently ignored, to the detriment of those the orders aim to protect. And Lynn Schafran's example of a Contra Costa County, California battered women's shelter makes clear that even seemingly ample social services may be unavailable to help the vast majority of those who need them. A more realistic view of a country's ability to protect those who are returned in the face of proven danger would be that there is many a slip between the cup and the lip.

More fundamentally, one of the documents now being reviewed concerns two extra-legal roles for judges that lie outside the Convention and an entire organization dedicated to encouraging them. Both case-specific judicial roles violate the Convention and the U.S. Constitution's procedural due process protections. Quite probably they also violate the constitutions of many of our sister states and also the fundamental laws of many States Parties to the Convention.

Each of these roles requires its own discussion. First, countries are encouraged to appoint judges with experience presiding over one or more Hague return petitions (implicitly, of course, in ways the national government approves) to serve as what have become known as "liaison" judges. These purported experts on the Convention are then supposed to advise sitting judges in pending cases on the proper interpretation and application of the Convention. There are at least two important flaws in this scheme. Unlike the situation in countries that now hear return petitions in only one or a limited number of courts, in the United States, a return petition may be heard in any state or federal trial court in which jurisdiction and venue lie. In the American setting, it is therefore highly unlikely that a judge will ever hear even two Hague cases. And one case does not an expert make, as colleagues and I have witnessed. Upon occasion, we have heard one or another of this country's "liaison judges" confuse the UCCJA's rules that have no application to Convention cases with those of the Abduction Convention.¹⁶ Further, a liaison judge is never appointed by a court in which a petition is pending to sit on the case. A liaison judge who discusses the case with the judge who is assigned to hear it therefore acts *ex parte*, probably violating the parties' statutory and Constitutional rights to procedural due process. This flaw is not cured by the theory that a liaison judge discusses only matters of Convention interpretation and application, never the merits of the pending case. Simply put, does anyone actually believe that the liaison and trial judges will not discuss the facts?

The second extra-legal behavior concerns an inquiry directly from a judge who is hearing a Convention petition for return in only country to a judge in the country to which the child's return is being considered, typically that of the petitioner's habitual residence. It is entirely distinct from contacts between judges in this country's sister states that are authorized by our uniform laws,

¹⁵ Their impoverishment when undertakings for support or housing are not honored has been reported by reunite (the British child find organization). And the death by stabbing of one mother as she tried to reach a battered women's shelter is described graphically at <https://www.brisbanetimes.com.au/world/young-mother-fled-to-sydney-to-save-her-life-20090501-aq5z.html>.

¹⁶ This is an example of the tendency by those who learn one statutory scheme to apply it to issues that require an entirely different policy analysis.

the UCCJA and UCCJEA, to decide, for example, a venue question. It is instead an international judge-to-judge contact that is completely without foundation in the Child Abduction Convention and, if approved, will be exacerbated by the roles and procedures the current proposed document contemplates.

The Convention is our only treaty (i.e., controlling law) on point. It directs a judge's inquiries about conditions that relate to a child's return to Central Authorities and only to them. Article 7 charges these official offices with functions specifically related to ensuring safe returns and to providing information about the country's domestic law (including, for example, whether orders can be entered in the receiving state in anticipation of a child's return). In addition, Central Authorities must be able to communicate in at least French or English, the Convention's official languages. There is no reason to think that direct judge-to-judge contact will provide information that matches or exceeds what is available through these offices. The process that the International Hague Network of Judges proposes instead is enormously complicated. More fundamentally, it puts a group of friends and colleagues in charge of an extra-legal scheme and relies on them to operate it.¹⁷ To the extent that contact between judges is appropriate, the Central Authority is the appropriate party to facilitate and supervise it.

The eminent comparative law experts who attended the Convention's drafting sessions, including, for example, Brigitte Bodenheimer of the United States, Wolfram Mueller-Freienfels of Germany and Matti Savolainen of Finland (all of whom surely knew about the UCCJA) were far too sophisticated to imagine that direct inter-judicial contact could work well in the international treaty they were drafting. What possible use could a call be from a sitting judge in one country to a judge in another who knows nothing about the case, has no authority to take part in its resolution, and may well not speak a common language, operate in the same legal tradition, or have access to similar social services? They chose instead to establish Central Authorities with carefully delineated powers and functions. As noted, these bodies can meet legitimate case needs. Extensive efforts to facilitate the return of children despite proven danger are misconceived.

4. The proposed travel consent form should be discarded as an improper travel restriction

Most nations spoke out forcefully against a consent to travel form when it was first proposed at Part II of the 6th Special Commission. They objected that (1) it was an effort to impose a substantive change (travel restrictions, also known as *ne exeat* provisions) on the domestic law of many member States that do not have them, and (2) it was contrary to the agreed functions of the Hague Conference, which are solely to develop conflict of laws (private international law) conventions and exclude the promulgation of international substantive law. As I reported to the International Law Association, during the discussion of this topic at Part II, it became clear that no consent requirement exists in the domestic family law of a great many countries. In addition, even if countries had wanted this rule and had accepted the intrusion, many official observers foresaw numerous practical issues that would complicate international travel for children, both in cases where caretaking parents are fleeing domestic violence and also in the great majority of

¹⁷ These "Network judges" see each other from time to time at meetings that receive support from donors, including the Permanent Bureau. Properly seen they belong to a private professional organization, not a governmental entity.

international trips, where there is no danger of abduction. Although the Permanent Bureau wanted to move forward with developing a form, the Contracting States decided otherwise.¹⁸

Yet those who seek to expand the power of visiting parents over their former partners did not accept that result. Instead, they now continue their effort to prescribe domestic family law. If it succeeds, it will distort both the Abduction Convention and the role of the Hague Conference itself. As already noted, the Convention protects those who have provided the child's day-to-day care by giving them a right to a child's return, but gives no such right to visiting parents. By requiring the consent of a visiting parent to a child's international travel these rules make no change in the amount of time either parent devotes to the child – they merely guarantee local visits and permit visiting parents to exert control over primary caregivers. The gender implications are not lost on observers.

In this context, our government has focused on visiting parents' rights (i.e., fathers' rights) rather than those of the child. Its support for travel restrictions asks courts to place the rights of a visiting parent who benefits from a travel restriction above the child's interests, which the Convention makes paramount. It is then in direct contravention to the Convention. The State Department accomplishes its result by sleight of hand, reasoning that travel restrictions convert visitation into a custody right that entitles the visiting parent to a Convention return order. Sadly, in *Abbott v. Abbott*, the U.S. Supreme Court ignored the Convention as written to conclude, as the State Department urged, that a travel restriction confers a right of custody. It did so despite an amicus brief from 3 Convention drafters (two of whom served on our own delegation and a Finnish ministry official who sat on the Convention's 5-member drafting committee) and one that I drafted for 11 US family law and conflicts scholars.¹⁹ The Drafters' Brief made absolutely clear that *ne exeat* orders were well known by the drafters, but were not considered custody rights. Further, it pointed out that a vote of 19-3 by the drafting delegations had rejected a Canadian proposal that the Convention should provide return to a visiting parent if the custodial parent removed the child in violation of a court order that prohibited the child's removal unless the visiting parent consented to it. The Professors' Brief gave the history and policies of the Convention, which showed that *ne exeat* orders were never agreed to and that ordering a child's return to a visiting parent because of a travel restriction flies in the face of the Convention's concern for maintaining a child in the care of its primary caregiver (the person in *Abbott* held a sole custody order).

Although *Abbott* controls domestically unless Congress or a Supreme Court decision revises it, our own country's distortion of the Convention neither requires nor justifies continuing efforts by the United States to promote it abroad, given the harm it causes to children and their caregiving parents.

¹⁸ Concl. and Recs. No 17 (final [92]). The Conclusions and Recommendations of Part II of the 6th Special Commission were to be renumbered in their final form to follow on from the 75 Conclusions and Recommendations of Part I, which were set forth in Prel. Doc. No 14 of November 2011, presumably as Nos 83-85. The anticipated new numbers for other Part II draft Conclusions and Recommendations, which were set forth in Work. Doc. No 10, are indicated here in brackets. I have not consulted the final document.

¹⁹ See Brief of Drafters Lawrence H. Stotter and Matti Savolainen in *Abbott v. Abbott*, at 18-20 (and agreed to by Drafter Jamison Selby Borek at p.4,fn. 1), *available at* https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_645_RespondentAmCu2Delegates.authcheckdam.pdf; Brief of Eleven Law Professors in *Abbott v. Abbott*, *available at* https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_645_RespondentAmCu11LawProfs.authcheckdam.pdf

5 The Vienna Law of Treaties should be honored by insisting that the documents now under review are consistent with the Abduction Convention as it was promulgated

If the proposed Good Practice Guide brings uniformity into what is now unsettled judicial interpretation and application of Article 13(b) (its stated goal), but in a manner that deviates from the treaty that was negotiated, or if a consent to travel form creates substantive rights that the Convention does not, or if a document establishes roles for judges that do not appear in the Convention, the result could become a binding interpretation that amends the Convention. As Justice Shireen Avis Fisher, representing the International Association of Women Judges, warned at Part II of the 6th Special Commission, if these adoptions take place at a Special Commission, not at a Plenary Session that has the power to promulgate Conventions and therefore omits a ratification process, the amendments would occur "without any [of the] discussion, negotiation, consent or ratification" that international law requires.²⁰ "[S]oft law," as Justice Fisher pointed out, "can become hard law simply by virtue of judges applying it, either because they agree with it or are under the mistaken belief that they are obligated to do so."

6. The Permanent Bureau seeks to expand its role in family law far beyond its authority

There were dramatic irregularities at Part II of the 6th Special Commission, some of which continue to be pursued now. They are seen, for example, in the current proposals (1) to establish a consent to travel form and (2) to regularize the involvement of judges in the resolution of a return petition although no court has assigned them to hear it. To assist your evaluation of the documents before you and the procedures that are being followed, I am attaching the report I made to the International Law Association (ILA) following Part II, which details the astonishing developments. These events were accompanied by an effort to constrain or even eliminate the role of Official Observers, apparently at the urging of the United States, and apparently with the aim of keeping observers (many of whom are experts on Convention law or practice) from bringing irregularities or poorly analyzed proposals to the attention of national delegations.

In my ILA report, I explain that the Permanent Bureau believes that its extensive involvement in the family law Conventions is necessary because litigation arises under them in ways that do not occur under its other Conventions. But as an academic in the fields of family law and private international law, I find myself wondering whether these developments may reflect instead the fact that family law litigants and their lawyers are far less able to push back than international commercial litigators and their clients might be if similar initiatives occurred in areas of concern to them.

Would inaccuracies in a database of international commercial cases be excused, for example, because access to it was provided without cost, as were INCADAT's deficiencies at that Special Commission? Would the Permanent Bureau encourage nations to send delegations to discuss commercial law topics that included judges, but not also request that litigators and academics be included? Would it establish an international network of judges who hear commercial cases as a means of encouraging what it considers to be an appropriate application or interpretation of a Convention? Would it promote extra-legal roles for them?

²⁰ See Vienna Convention on the Law of Treaties, Jan. 27, 1969, Art. 31.3(b), 1155 U.N.T.S., 331.

I close by expressing my hope that those now charged with the Convention, both in Washington and at The Hague, will reflect carefully on the concerns I have raised here. At risk are children's welfare, the rule of law, the success of the Abduction Convention, and the future of the Hague Conference itself.

With best personal regards,

Carol

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Carol Bruch's Publications on the 1980 Hague Child Abduction Convention:

Neue Ansätze im Internationalen Privatrecht: Das interlokale und internationale elterliche Sorgerecht, in *Internationales Privatrecht, Internationales Wirtschaftsrecht* 405 (W. Holl & U. Klinke eds., Carl Heymanns 1985)

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Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention, 33 *N.Y.U. Journal of International Law and Policy* 49 (2000)

[The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases](#), 38 *Family Law Quarterly* 529 (2004); revised and expanded from the same title in *Les Enlèvements d'Enfants à Travers les frontières* (Hugues Fulchiron ed. 2004); abridged in *GPSolo* Sept. 2005, at 14 (Issue: Best Articles Published by the ABA); reprinted at *Domestic Violence* 475 (Michael Freeman ed., Ashgate Publishing 2008) (The Family, Law and Society Series)

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[Protecting Children Who Are Abducted by a Parent](#), Symposium, Summer 2012, at 7.

To: International Law Association

From: Carol Bruch, American Branch
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Date: March 12, 2012

Re: Observer's Report on the Sixth Meeting of the Special Commission to Review the practical operation of the 1980 Child Abduction Convention and the 1996 Hague Child Protection Convention (Part II), held at The Hague on January 25-31, 2012

I served as one of two ILA official observers to Part II of a two-part Special Commission meeting. Professor Shinichiro Hayakawa of the University of Tokyo, who had been ILA's sole observer at Part I in June 2011, also attended portions of Part II.

The meeting provided a window into trends on important family law topics at the Hague Conference and in many of the 86 countries that were Parties to the 1980 Convention as of January 2012 -- possible legal instruments to authorize direct judicial communication between judges from different countries in abduction cases and to provide enforcement of mediated and other consensual agreements that parties reach during return proceedings, the development of a consent to travel form for children who travel internationally by air, and possible non-binding documents as to family relocation law and as to domestic violence allegations in return proceedings.

The overriding concern that I wish to report, however, has less to do with these potentially important specifics than with changes in the operation and staff of the Permanent Bureau (the Conference's secretariat) and with significant new restrictions, even hostility, for international nongovernmental organizations (international NGOs). Although, of course, observers do not vote, for the three decades that I have served as an observer at every Special Commission on the Abduction Convention but Part I of this meeting, observers were fully integrated into the discussions. They were recognized in the order in which they asked for the floor, and members of national delegations often thanked me for my contributions (as happened again this time), an experience that I assume other observers also enjoyed.²¹ In 2006, however, at the last previous Special Commission on the Abduction and Child Protection Conventions, mild constraints were placed on participants²² if an agenda item threatened to exceed the time allocated to it.

The situation has, unfortunately, deteriorated since. Colleagues report that at Part I, observers were recognized only at the very end of a discussion, after all interested States had spoken and that this model is now also followed at other meetings. At Part II, the same procedure was announced on the first day.

²¹ At my first intervention, I noted that ILA had authorized me to share my views, which did not represent those of ILA nor of any other organization or entity (impliedly the International Society of Family Law, for which I had previously served as an observer, or my law school). Professor Hayakawa chose not to offer any interventions,

²² Participants, whether official observers or members of national delegations, are known as "experts" at Special Commission meetings. For convenience, I will refer to members of national delegations as "experts" and will use the term "observers" for those attend on behalf of authorized international NGOs.

These rules mean, of course, that whatever insights or expertise an observer has to offer will inevitably come too late -- only after decisions have been reached. Further, in the period since June 2011, the Permanent Bureau denied observer status to at least two prestigious organizations that wished to send observers with relevant expertise to Part II.

All of these developments are inconsistent with the Conference's Strategic Plan (April 2002), which notes increasingly complex international developments, states a goal of preparing conventions suitable for world-wide adoption, and calls for greater cooperation between the Permanent Bureau and international governmental and non-governmental groups as "an essential ingredient to the development and adoption of universally acceptable solutions." (*Id.* at ¶ 307.)

In fact, the Chair,²³ Judge Jacques Chamberland of Canada, proved to be less rigid than the announced procedure suggested. But, for the first time, observers were barred from speaking when the draft Conclusions and Recommendations were being considered. This rule prevented them from alerting experts, particularly those who were not native speakers of English or French, to inaccuracies.

These were not the only unusual procedures. In response to concerns that States had raised over many years, particularly with cases involving domestic violence, the Conference's governing body, the Council on General Affairs and Policy, directed that the Sixth Commission consider "the feasibility and desirability of a protocol to the 1980 Child Abduction Convention", and the topic was therefore scheduled for several days at Part II. In November 2011, however, the Permanent Bureau announced that achieving consensus on a protocol was unlikely, shortened the schedule for Part II, and proposed an agenda that focused on "soft law" (non-binding) documents. In Preliminary Document 13, released in December, it reported that its decision had been taken in light of informal consultations with four nations (out of more than 86 Contracting Parties); responses to a questionnaire that were received from fewer than a third of the Contracting Parties (and contained varying positions on the desirability of a protocol and its contents); and the implacable opposition of two countries to a binding instrument.

In response to an email from me that expressed my concerns over this step, the Secretary General, Hans van Loon, wrote that there had been additional "extensive consultations with an important number of Members of the Hague Conference [N.B., not Contracting Parties²⁴], both those that responded and those that did not respond to the questionnaire." I am, unfortunately, unable to corroborate this, but it is puzzling that such important inquiries would have been omitted from the reported decision-making process in Preliminary Document 13, which lists consultations (other than the questionnaire) with only a handful of named Contracting Parties.

²³ Although Justice Chamberland's formal title was President, the minutes and most experts referred to him as Chair, and I will use that shorter term here for convenience.

²⁴ Twenty-four (28%) of the 87 States that were Contracting Parties to the Abduction Convention or whose accessions were pending in January 2012, do not belong to the Conference. And 10 (12%) of the 71 States that are Conference members do not belong to the Abduction Convention. The EU is also a member, and its 27 members are included in the count of 71. If a vote is taken on a matter now within the EU's competence, it will cast all 27 votes. At Special Commissions, no State has thus far requested that the EU speak with only one voice, as the Statutes authorize, so -- unlike the rule for other federal system Contracting Parties -- both the EU and its member states may (and do) intervene to express EU positions.

Equally puzzling was Mr. van Loon's assertion that removing the topic was appropriate because Article 8(2) of the Conference's revised Statute, which was adopted in 2005, requires consensus rather than decisions by voting at all meetings except those on financial matters. Part II was never charged with drafting a binding instrument, a function that is reserved to diplomatic sessions, which this Special Commissions was not. The Commission was asked instead only to share its views with the Council on whether such an enterprise would be desirable and feasible, with the Council expressly reserving to itself the decision as to whether drafting of an instrument would be pursued.

More fundamentally, the Statute is not so harsh,²⁵ and does not specify which of the two common meanings of consensus is intended.²⁶ It is unlikely that it intends to impose a requirement of unanimity rather than that of general agreement.

Indeed, drafting the Abduction Convention itself involved split views throughout. Article 20, for example, was passed with 14 in favor, 6 opposed and 4 abstaining, a vote the Reporter termed "a comforting majority."²⁷ Thirty years later, more than 10% of the current members of the Hague Conference still do not belong to it -- an indication that it lacked unanimity both at its inception and also as one of the Conference's most widely adopted Conventions.

Given this history, it is perplexing that the Permanent Bureau justified its cancellation of the protocol discussion by the pre-meeting views of such a small number of the Convention's Contracting States. Equally puzzling is the Secretary General's apparent position that the pre-requisite for discussing the advisability and feasibility of a protocol at Part II required a pre-meeting likelihood that well over 80 Contracting States would achieve unanimity on their recommendations after a relatively short meeting.²⁸ An additional important question about the relevance of differing views exists. I do not know whether any Contracting State that does not belong to the Conference and therefore became a party to the Convention through accession rather than ratification would be involved (or in what capacity) in the drafting of a new instrument, but assume that the instrument would require promulgation by the Conference (including its member States that do not belong to the current Convention) and not by the larger and differing group of Contracting States. For the same reason, although their practical import is large, I do not know what formal role the views of non-member countries on the desirability and feasibility of a protocol had or should have had. No distinction was drawn in reporting protocol responses, and none has been made during Special Commission meetings.²⁹

²⁵ Article 8 (2) reads: "The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus."

²⁶ The Miriam Webster Dictionary, m-w.com, provides two preferred definitions: *a*: general agreement: unanimity, or *b*: the judgment arrived at by most of those concerned. The Permanent Bureau based its November decision on the first definition, while Part II was conducted according to the second.

²⁷ Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, ¶ 33. in *Acts and Documents of the Fourteenth Session (1980)*, tome III, *Child abduction*.

²⁸ The time devoted to negotiating a binding instrument is, of course, far greater. In fact, unanimity was not required at the Special Commission. Even clearly expressed opposition by Contracting States was sometimes simply ignored by the Chair and omitted from the Conclusions and Recommendations. This procedure may be called "consensus," but it actually allows a papering over of dissent in a way that voting does not. See, for example, the description below of States' views concerning a possible office in the Asia Pacific Region .

²⁹ These matters arise because accession is available to States that did not belong to the Conference on the date of the Convention's promulgation in 1980 and results in bilateral treaty obligations, not the multilateral obligations that apply to 1980 Conference members. See Abduction Convention arts 37-38. The procedure and the reasons for it are described in my article, "Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction Convention," 33 N.Y.U. J. Int'l Law & Policy 49, 49-51 (2000).

That issue aside, the apparent weight given to questionnaire responses in the decision to abort discussion was also surprising. (I am told that historically such responses have been used to prepare a background report for the meeting, but States have largely ignored them, because the views they express are submitted far in advance and are subject to change.) The European Union responded to this questionnaire, for example, but expressly withheld its position on a protocol, and there is no way to know how many countries that did not respond were also waiting for the Part II discussions before taking or finalizing their positions. Countries had no reason to anticipate that their responses would be treated like votes in an unannounced pre-meeting process, nor that a failure to respond might result in the loss of an opportunity to consider the Council's question. In any event, whatever the Special Commission might have concluded --- even unanimously -- would not have resolved the matter, because the Council had made clear that only it would decide whether to move forward with a protocol after receiving the Commission's thinking.

There was yet another reason to doubt the Permanent Bureau's explanation -- the different meaning of consensus that was applied at the Special Commission. As the discussion of each topic ended, the Chair provided a summary. Although he was unusually skilled in reflecting the tenor of even wide-ranging discussions, it is clear that unanimity was not required. Next, the Conclusions and Recommendations themselves were drafted by a committee that altered some decisions that had been reached on the floor and articulated by the Chair.³⁰

These Conclusions and Recommendations were then rammed through in a final session at which the Chair announced that observers would not be allowed to speak; directed that experts raise linguistic concerns with the Permanent Bureau -- not on the floor -- then called out each conclusion by number and announced "Agreed!" just 3 or 4 seconds later if no country raised its placard quickly enough to express substantive concerns or questions.³¹ This extraordinary process -- unlike anything I have previously encountered -- moved so quickly that participants had no time to refresh their memories by skimming the text that accompanied a number before adoption was announced. Particularly because many experts were not native English or French speakers (the languages in which the draft Conclusions and Recommendations were provided), and delegations had only 75 minutes to read and discuss them before a morning session, observers' comments could have been very useful in pointing out changes from the decisions that had been reached on the floor. Some of these will become apparent in the following summary.

Several topics dealt with substantive legal doctrines. The Permanent Bureau, which clearly wants to move in into substantive family law, encountered significant resistance from States that (1) defended the right of nations to determine their domestic laws and (2) challenged the propriety of substantive law proposals, given the Hague Conference's private-international-law mandate. Yet there was broad support for other steps the Permanent Bureau has taken that lie outside the Convention, such as creating the International Hague Network of [Liaison] Judges and instituting contact between them and with sitting judges while return cases are pending, and sponsoring judicial meetings and conferences to address substantive law. Some of these have also encountered resistance at the Council's Technical Assistance Working Group.³²

³⁰ I have no record of the countries that were represented on the committee that prepared the draft Conclusions and Recommendations, nor do I know how its membership was chosen.

³¹ By the time some countries raised their placards, "agreed" had already been announced, and their efforts, once recognized, to return to the former point had varying success.

³² See Report on The Meeting of The Technical Assistance Working Group 17-18 November 2011 (written by the Permanent Bureau) ¶¶ 19-25 and its Annex 1, Conclusions and Recommendations. The Permanent Bureau's rationale for its expanded range of activities had been set forth in a Background Document, included as Annex 4 to the Report.

Only observers, most notably Judge Shireen Avis Fisher, on behalf of the International Association of Women Judges, questioned the propriety of several of these proposals and activities. As to some, concerns were based in the parties' due process rights, including confrontation and the right to have a case decided only by those who are appointed to do so. These put into question proposals for judicial contact, whether directly between a judge hearing a return proceeding and a judge in a country to which a child might be returned, or between the sitting judge and a "liaison" judge who, in theory, is to provide information on Convention interpretation and operations or learn foreign legal rules and procedures from a fellow liaison judge or a trial judge in another country.

Further, a judge is bound to specific canons of construction when interpreting and applying a treaty. The proposed nonbinding "guides to good practice" that were proposed to the Commission as a means of standardizing treaty interpretation raise issues under the Vienna Convention on the Law of Treaties if the encouraged judicial interpretation produces a binding change in treaty terms that departs from the document that was negotiated by the country's executive branch.

The issues before Part II were addressed in this order:

Cross-border recognition and enforcement of mediated agreements: The discussion ranged widely. Several nations asked whether an enforcement problem exists that is serious enough to merit a new project that would divert attention and limited funds from more central Convention matters, some noted the widely divergent procedures that nations call mediation and the uneven qualifications of those who conduct the process, some thought all family law topics, or all settlements, or all forms of alternative dispute resolution should be addressed, and some were concerned by the dangers of supposedly consensual agreements.³³

The Permanent Bureau's suggestion for a free-standing instrument that would be compatible with the 1980 and 1996 Conventions and also apply to other family law issues, such as relocation, did not gain traction. The Chair's summary when the discussion ended was that countries should work amicably to carry out parties' agreements, and exploratory work should investigate whether an instrument is needed. A group of experts should conduct comparative law work to identify problems and proposals to resolve them, then assess whatever problems may be identified and whether there is any need for an instrument.

The recommendation that was adopted at the final session is far less skeptical about the need for an instrument, omits any mention of comparative law work and whether funds should be allocated to this project in light of funding constraints, and emphasizes attention to jurisdictional issues, a matter that was primarily of interest to the Permanent Bureau staff member who now provides support for the Convention (Professor Louise Ellen Teitz of the United States, who replaced Professor William Duncan of Ireland upon his retirement after Part I). Because the next Special Commission on the 1980 and 1996 Conventions is not anticipated for 4 or 5 years, this would place considerable power in an unknown entity. That problem is exacerbated by a major turn-over in Permanent Bureau personnel that has depleted the Bureau's former strengths in family law. Professor Teitz's expertise, for example, is in civil procedure, conflict of laws, and international law, and she is new to family law.³⁴

³³ Of particular concern was mediation when a party does not speak the local language, cases involving domestic violence, and other high conflict cases -- a category that probably includes most cases in which return petitions have been filed (i.e., disputed international relocation and abduction cases).

³⁴ Her scholarship has accordingly dealt exclusively with commercial fields when it addressed mediation.

Direct judicial communications: The agenda called for discussion of a possible legal instrument to authorize a judge who hears a return proceeding to speak to a "liaison" judge in his country or in the country to which return has been requested. Finding opposition to an instrument, yet support for the practice, notably from experts who were also "network judges," the final conclusions suggest "consideration [for providing such a basis in] any relevant future Hague Convention" and recommend that the Permanent Bureau promote the use of a document entitled "Emerging Guidance and General Principles on Judicial Communications" (available at the Conference's website), continue to encourage the expansion of the International Hague Network of Judges and maintain an inventory of domestic legal bases relating to direct judicial communications.

This acknowledgement that authority for direct communications must lie in domestic law is important, but Justice Fisher cautions that the Emerging Principles document does not distinguish between logistical matters that arguably might be discussed after a return has been ordered and case-specific communications on pending justiciable issues. My own views are more conservative, as I believe Article 7(h) of the Convention assigns return logistics to the Central Authority, not to a "liaison" network judge nor to a sitting judge in the former habitual residence.

The creation of "soft-law" (non-binding) instruments on domestic violence issues in return proceedings: This topic theoretically also included a decision on three proposals for working groups that had been raised in Part I,³⁵ but reserved for decision in Part II. The Part II discussions were, however, not couched in these terms.

Considerable concern was expressed for the protection of children and their caretaking parents when children are returned at the request of a violent petitioner, but these returns have become so common that discussion frequently touched on a perceived need to enforce protective orders or to use direct judicial contact to put protection in place. A few delegations expressed their concern for the safety of children and their carers and pointed out that courts are not bound to return children into danger, and some wanted information about what actually happens in these cases after children are returned.

Other than my remarks and those of other observers, no one questioned why children are being returned at the request of noncustodial parents, let alone violent noncustodial parents, given the Convention's terms. Its exclusive remedy for noncustodial parents in Convention proceedings is set forth in Article 21, which grants assistance for "organising or securing the effective exercise of rights of access," but not return, for these cases. A custody contest on the merits, in contrast, must be brought in a tribunal that has jurisdiction under non-Convention law, whether domestic law or some other regional or international agreement, such as the 1996 Protection of Minors Convention.

The ultimate Conclusions and Recommendations that deal with Article 13(b) [also known as Article 13(1)b) in systems that indicate unnumbered paragraphs] nevertheless contain three recommendations that appear to be updated, heavily edited versions of the three proposals from Part I and are, for that reason, revealing.

The first Recommendation, like Working Document No 1 (a proposal from 11 Latin American countries) emphasizes that the grave risk defenses in Article 13(b) and the weight given to evidence

³⁵ They were set forth then in Working Documents 1-3. Although the Conference does not post its Working Documents, these can be found as Annexes 2-4 of Prel. Doc. No 14 of November 2011, *available at* <http://www.hcch.net/upload/wop/abduct2012pd14e.pdf>.

are matters for the judge who hears the case. But the Part II Recommendation omits other language that appeared hostile to assertions of risk to the child or domestic violence, including an extravagant burden of proof and an unfortunately worded comparison between the need to consider defenses and the obligation to return. None of these matters were mentioned at Part II. Further, the first Recommendation on this topic omits the original Working Document's call for a Working Group.

The second Recommendation, which calls for "further work . . . to promote consistency in the interpretation and application of Article 13(1)*b*)," does not suggest how this might be achieved or by whom. A comparison with Working Document No 2 of Part I, however, may explain why this Recommendation was not simply folded into the third Recommendation, which proposes a Working Group to address Article 13(b) issues. Working Document No 2 of Part I was submitted by Canada. It recommended that a group of International Hague Network Judges study the need for an "appropriate tool" to assist judges in considering a grave risk of harm, assisted by Central Authority experts and experts on "the dynamics of domestic violence," and that the Permanent Bureau facilitate the work. It will be interesting to see just what the Network or the Permanent Bureau will make of this otherwise mysterious Recommendation -- one that was also not discussed on the floor in any approximation of its original form. Apparently the Network had decided not to press its desire to control the inquiry. Why its language that would have included experts in domestic violence was not moved into the Recommendation for a Working Group is unknown. Perhaps the drafting of the two proposals was undertaken by different constituencies who did not coordinate their work or who wished to report independent success.

The next and final Recommendation concerning Article 13(b) asks the Council to authorize a Working Group of judges, Central Authorities and "cross-disciplinary experts" to develop a Guide to Good Practice on the interpretation and application of Article 13b (including but not limited to matters of domestic and family violence) and to include guidance directed specifically to judicial authorities. Observers had sought an express requirement that experts in domestic violence be included in the Working Group and that consideration be given to domestic violence wherever it is relevant to abduction cases, not only in the context of Article 13(b) (defenses to return). Professor Merle Weiner of the International Society of Family Law and Pamela Brown, director of the Bi-National Family Violence Project of Texas RioGrande Legal Aid and an observer for the United States-Mexican Bar Association, led these efforts. What is to be made of the omission of an express requirement for domestic violence experts is unclear, but worrying.

The Conclusion's stated goal of influencing judges is troubling on several levels. With a lack of relevant expertise at the Permanent Bureau and a Working Group of unknown composition, excellent substantive content certainly cannot be assumed. Worse, the recommendation makes no mention of the usual vetting, followed by discussion and approval at a Special Commission. Indeed, if the Guide does bring uniformity into what is now unsettled judicial interpretation and application of Article 13(b) (its stated goal), but in a manner that deviates from the treaty that was negotiated, the consequence could be a binding interpretation that amends the Convention, as Justice Fisher warned the Special Commission, "without any discussion, negotiation, consent or ratification." (See Vienna Convention on the Law of Treaties, Jan. 27, 1969, Art. 31.3(b), 1155 U.N.T.S. 331.) "[S]oft law," as she has pointed out, "can become hard law simply by virtue of judges applying it, either because they agree with it or are under the mistaken belief that they are obligated to do so."

Given the clarity of the legal and policy concerns that were raised during the debates, it is deeply troubling that a blank check resulted. The apparent disregard for such serious matters is consistent with what I see as a decline in rigorous analysis at the Special Commissions. If the future seems

likely to follow along the path of extra-legal projects that the Permanent Bureau has sponsored over recent years, the time has come to separate matters of implementation, which should continue to be addressed to Central Authorities, from law reform efforts, which should be directed to people with the qualifications of the early experts, many of whom were ministry officials with significant experience in treaty negotiations, law reform commissioners, leading academics with dual expertise in the fields of family law and private international law, and judges known for their scholarship.

International family relocation: The agenda called for a discussion of a potential "soft-law" document on family relocation law. A Preliminary Document for Part II (No 11), released in January 2012, included a model relocation law, known as the Washington Declaration, that was produced by 50 invited judges and some other invitees in March 2010 at a 3-day meeting organized by the Hague Conference and the International Centre for Missing and Exploited Children, with the support of the US State Department. This effort to move into the unification of law, using family law as the entry point, was soundly rejected by the Special Commission.

During the discussion, many countries described their relocation laws doctrines, revealing rules that differ greatly, often within a single country (such as the US). Relocation for economic reasons was described as increasingly common, and relocation due to a change in life course was also mentioned. My remarks described gender disparities in some rules and in the application of others, and pointed out that the Convention's rule is that relocation by a custodial parent, even if wrongful under domestic law, does not authorize a return order upon the request of a visiting parent. I articulated the reasons for this rule and the implications of restrictive relocation rules for the poor and for the victims of domestic violence and their children.

I criticized the Washington Declaration for omitting from its list of relevant factors the adverse effects on children if they are cared for by a parent who becomes depressed or stressed if relocation is denied, a matter to which the English courts give significant weight and whose import is substantiated by recent child development research.³⁶ The Washington Declaration's leading architect, Justice Matthew Thorpe of the English Court of Appeal, who attended Part II on the United Kingdom's delegation, acknowledged the difficulty, saying that the Declaration is just a beginning, a first step -- neither more nor less -- that countries reviewing their domestic relocation law might consider as such.

The Chair's summary reprised Thorpe's description and expressed the Commission's support for further comparative research by scholars and for the 1996 Convention. Neither work on a binding instrument nor on non-binding principles was, however, supported.

Three points resulted in the draft Conclusions and Recommendations (Nos 8-10 [presumably final Nos 83-85]),³⁷ and each was adopted without discussion. The first, No 8 [final 83], however, differed significantly from the discussion and the Chair's summary. It calls the Washington Declaration a "valuable basis for further work and reflection"-- a significantly more laudatory description than that which the discussion at large or even its primary author had expressed. In addition, by failing to state the clear consensus that relocation law is and should remain purely a

³⁶ See the July 2011 symposium in *Family Court Review*, available free of charge at <http://onlinelibrary.wiley.com/doi/10.1111/fcre.2011.49.issue-3/issuetoc>.

³⁷ They will be renumbered in their final form to follow on from the 75 Conclusions and Recommendations of Part I, which are set forth in Prel. Doc. No 14 of November 2011, presumably as Nos 83-85. The anticipated new numbers for other Part II draft Concl. and Recs., which were set forth in Work. Doc. No 10, are indicated in brackets below as appropriate.

matter of domestic law, its language leaves room for (or even implies support for) "further work" *by the Conference*. The restriction that the discussion intended may nevertheless be discerned in No 9 [final 84], which speaks exclusively of gathering information on varying approaches "in relation to private international law issues and the application of the 1996 Convention," and omits mention of substantive relocation law. The final point, No 10 [final 85], simply encourages countries to join the 1996 Convention.

The "Malta Process": What has become known as "The Malta Process" has sought to develop a legal framework for matters of child protection, child abduction, access, child support and mediation between certain Hague Convention and non-Convention (Islamic) States. These cross-frontier family law issues were discussed at three judicial conferences, the first of which was held in Malta in 2004.³⁸ Information Document No 8 of January 2012 provided Part II participants with copies of the 3 resulting Malta Declarations, and portions of Prel. Doc. No 12 (on Permanent Bureau activities), describe the history and outline possible future steps (see ¶¶ 88-108). Of these, the Special Commission supported a Fourth Malta Conference, but also recommended, as Conclusion No 11[final 86] reflects, that emphasis be placed on "the involvement of government representatives in the process," a necessary evolution from the earlier judicial conferences if binding agreements are to be secured.

The role of the Permanent Bureau and the Hague Conference as to the 1980 and 1996

Conventions: The discussion of this agenda item approved some Permanent Bureau initiatives, but curtailed others. Renewed "focus on the promotion, implementation and effective practical operation of the 1980 and 1996 Conventions" was approved, as were regional activities such as conferences and training, but the Commission said requests for assistance in individual cases should be restricted to referrals to competent authorities -- an implied disapproval of the filing of amicus briefs by the Permanent Bureau. Conclusion and Recommendation No 12(d) [final 87(d)] also recommends that the Bureau "consider ways to enhance . . . the effectiveness" of Special Commission meetings on the 1980 and 1996 Conventions.

For an observer, countries' comments requesting improved effectiveness are difficult to interpret, although it is likely that greater detail has been communicated directly to the Permanent Bureau. Some may have been polite expressions of discontent with the Permanent Bureau's cancellation of the planned protocol discussion. Justice Thorpe, for example, remarked on the difficulties of modernizing Hague Conventions, contrasting what he called the Special Commissions' "talking shops, where nothing concrete emerges," to the EU's contemplated revision of its jurisdictional provisions in 2012. But Canada, which opposed a protocol, presumably did not have that concern in mind when its expert said that there "may be a need to look at how [Special Commission meetings] are prepared and conducted." Canada also said it would not support an extension of the Permanent Bureau's role in monitoring Convention compliance and pointedly suggested that the Permanent Bureau work "in compliance" with the Council and its priorities, a point that was also made by the Council's Technical Assistance Working Group.

Some discontent may have related to the extremely late release of several Preliminary Documents that likely hampered delegations' ability to read and discuss them before Part II began. States may also have intended to express concern about the use of consensus rather than voting or might have been concerned about the role of observers (perhaps wanting a return to their integration into the

³⁸ Some government officials, regional organizations (such as the EU and the Hague Conference), NGOs and academics also attended.

discussions or -- to the contrary -- the imposition of greater restrictions or perhaps even a complete ban on observer participation). I can only speculate.

Nevertheless, although the Secretary General outlined the Conference's severe funding constraints, he also successfully resisted a proposal that would have established mild funding priorities among the many projects for which the Permanent Bureau sought the Commission's support. Similarly, although Switzerland and Japan thought it inappropriate for the Special Commission to endorse the establishment of a Regional Office for the Asia Pacific Region (which had just been reviewed for the Council by its Technical Assistance Working Group), the Permanent Bureau wanted the Commission's support, probably hoping to use it before the Council to offset the Working Group's funding concerns.³⁹ It was successful: the Commission's Conclusion and Recommendation No 13 [final 88], expresses "*strong* support for . . . developing a Regional Office in the Asia Pacific region," the position expressed by several countries in the region and does not mention that there was a division of opinion.

Online Case Database (INCADAT): A Swiss expert pointed out that the Preliminary Documents failed to cite or address an article that alleged deficiencies in INCADAT, the Conference's Abduction Convention case law database.⁴⁰ The Permanent Bureau responded by noting that a revision of the website that began in 2010 and is still underway under the direction of an external consultant, Professor Peter McEleavy of the University of Dundee. But it defended inadequacies such as the site's failure to report subsequent histories, even those reversing or legislatively overruling decisions in the database, with the astonishing argument that this is acceptable *because the database is provided free of charge* and that, due to funding constraints, only one staff day per week is devoted to maintaining the resource.⁴¹ The Swiss expert noted that a portion of the UNIDROIT data base that was of undisputed quality was shut down last year by UNIDROIT's Governing Council, because it could not afford to maintain its quality, and lesser quality would affect the organization's reputation.⁴²

³⁹ The Working Group supported an Asia Pacific Regional Office, but noted concern about whether the Office would be self-sustaining over the long-term. See Report on The Meeting of The Technical Assistance Working Group 17-18 November 2011 (written by the Permanent Bureau) ¶ 57. The report of that meeting also includes (as Annex 4) a report produced by the Permanent Bureau that sets forth its activities in support of all Hague Conventions and provides funding details.

⁴⁰ See Carol S. Bruch and Margaret M. Durkin, "The Hague's Online Child Abduction Materials: A Trap for the Unwary," 44 Fam. L. Q. 65 (2010). *available at* <http://www.law.ucdavis.edu/faculty/Bruch/files/BruchFLQSpring2010.pdf>.

⁴¹ A German expert and former member of the Permanent Bureau's legal staff complained, for example, that none of the German opinions she forwarded over a 5-year period was ever posted and that she has now been asked to replicate her submissions, because they cannot be located. Countries were nevertheless urged to increase their submissions, but no potential sources of funds or changes in priorities were identified that might support adequate quality beyond the work of the external consultants, who do not maintain the website and whose time is necessarily limited by their academic duties.

⁴² See UNIDROIT Governing Council, 90th Session, May 9-11, 2011, Conclusions ¶¶ 25-26, *available at* <http://www.unidroit.org/english/documents/2011/contents.htm>:

25. . . . The Council confirmed . . . that UNIDROIT should provide text search, case law and bibliographical information on instruments prepared by the Institute, while treatment of instruments prepared by other organisations should be limited to the provision of links to websites that published their texts and status of implementation.

26. The Council also agreed that the level of information to be provided on instruments adopted by other organisations on the basis of work carried out by UNIDROIT (such as the Convention on the Contract for the International Carriage of Goods by Road-CMR) needed to be reconsidered and that, in view of its limited resources, UNIDROIT should no longer maintain the case law section in respect of the CMR.

A non-controversial expansion of the Hague website to include statistical materials (INCASTAT) was supported, should resources permit.

Consent to Travel Form: The final substantive topic was the possible development of a parental consent to travel form for use when a child travels internationally by air. The topic first arose in discussions about ways to prevent child abduction. The Fifth Special Commission, however, directed attention to the purpose and content of such a form, and specified that it must be neither binding nor obligatory and must not introduce any new substantive rules. In Prel. Doc. No 15, the Permanent Bureau reported on drafting issues and on its informal consultations with the International Civil Aviation Organisation (ICAO). The concerns noted in the Preliminary Document proved dispositive in the discussion, where it became clear that no consent requirements exist in a great many countries. Further, many experts foresaw a range of practical issues that would complicate international travel for children, both in cases where caretaking parents are fleeing domestic violence and also in the great majority of cases, where there is no danger of abduction. Although the Permanent Bureau wished to move forward with developing a form, either in collaboration with ICAO or by asking that ICAO pursue the matter on its own, the Contracting States decided otherwise. (Concl. and Rec. No 17 [final 92].)

Conclusion

Although the meeting endorsed several positions that I find troubling, it held the line on others. And some of the constraints it imposed are being echoed at the Council level, where it appears that a reassessment of Permanent Bureau functions is underway.

The Permanent Bureau believes that its extensive involvement in the family law Conventions is necessary because litigation arises under them in ways that do not occur under its other Conventions. But as an academic in the fields of family law and private international law, I find myself wondering whether these developments may reflect the fact that family law litigants and their lawyers are less able to push back than international commercial litigators and their clients might be if similar initiatives occurred in areas of concern to them.

Would inaccuracies in a database of international commercial cases be excused, for example, because access to it was provided without cost? Would the Permanent Bureau encourage nations to send delegations to discuss commercial law topics that included judges, but not also request that litigators and academics be included? Would it establish an international network of judges who hear commercial cases as a means of encouraging what it considered to be an appropriate application or interpretation of a Convention? Would it seek substantive reform of a commercial law field although no Permanent Bureau staff members had relevant expertise?

Turning to another major area of concern, I have tried to be fair in my assessment of procedures that struck me as unusual or unwise, but recognize that the information to which I had access was limited. I nevertheless trust that light now shines on practices that merit close attention. And I hope that recent developments affecting the role of observers will be reviewed by the Council and that it will be informed by the views of ILA and other international NGOs when it does so.

Finally and most importantly, I wish to express my sincere thanks to ILA for allowing me to attend the Special Commission as one of its observers. I hope my presence served it and children well.

Letter from Jacquelyn Graham (Abbott). Jacquelyn Graham was the taking (protective) parent in *Abbott v. Abbott*, in which the United States Supreme Court held that a *ne exeat* order establishes rights of custody.

September 5, 2017

Mr. Michael Coffee
Attorney-Adviser
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U.S. Department of State
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Via email to coffeems@state.gov

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RE: Hague Convention on the Civil Aspects of International Child Abduction – Draft
Good Practice Guide on Article 13(1(b))

Dear Mr. Coffee, Mr. Lortie, and Ms. Groff,

My name is Jacquelyn Graham (Abbott) and I'm sure you are familiar with my case heard by the U.S. Supreme Court, *Abbott v. Abbott*. As a mother with first-hand experience with the legal complications of the Hague Convention, I was very pleased to hear that a guide was being compiled for judges who find themselves presiding over cases like my own. This is sorely needed and I'm grateful for the effort and work being put into this project.

I have first-hand experience of the effect of the Hague Convention on parents and children as individuals and, for that reason, I am writing to provide you and your counsel with my thoughts and opinion regarding the content of the guide being prepared.

The original intent of the Hague Convention was to provide a mechanism by which children who had been abducted from their primary caregivers and custodians and taken to another country could be returned. Increasingly, as in my case, the Hague Convention has become a tool used by the perpetrators of domestic violence to continue abusing their victims and asserting control over the lives of those who have fled in fear. Our case was unusual only in that it went as far as the U.S. Supreme Court. Many women and children are being pursued by their abuser using the legal processes afforded to them by the Hague Convention.

I ask that you keep in mind we are people, not legal situations or intellectual conundrums. We are people who have suffered greatly at the hands of someone who

should have loved and protected us; suffered enough that running for our lives and the lives of our children was our only option. We are people who potentially will continue to suffer at the hands of the judiciary, which should protect us, if this guide does not include sufficient guidelines to help when domestic abuse is the primary cause of a desperate parent and child crossing international lines seeking safety. Please keep in mind that abusers see this process as an opportunity to modify their abuse with a new and sympathetic team to help them financially & emotionally abuse their victims.

When a parent flees to another country due to physical, emotional, and financial abuse, as well as fearing for her and her child's life, I can assure you this is not a decision taken lightly. To then be thrown into yet more years of financial and emotional abuse through the legal system of one's own country is terrifying and utterly disheartening. And, worse, to come back to where you believe you are safe and going through the trauma of yourself and your child potentially being shipped back into the reach of the abuser, is unconscionable. Abuse is about control and abusers are using the wide breadth of the Hague Convention and the lack of knowledge of the judiciary to continue to abuse spouses who have dared to simply say "No more."

When it became necessary to defend us in the courts here in the U.S., my attorney and I decided to stick with the legal points that seemed (at the time) were clearly on our side since my husband had no custody rights. Firstly, to keep the case as simple as possible, and secondly, because going over the years of abuse in front of strangers to the extent that would be necessary would be traumatizing for both myself and my son. Our court records, the police reports, and our medical records were mostly in Spanish and to get them certified and translated would have been a lengthy and expensive process. The pictures taken of me and the damage done to me after the last attack when I finally left with my son, I still can't look at, and certainly did not want to share them with anyone if I didn't have to do so. The abuse was mentioned, something I'm very grateful for as it helped us farther down the road, but we stuck to the fact that my husband had no custody rights. Because of this, many are only familiar with our case in so far as it applied to the law and for that reason I'm going to share some of my story with you now.

For years, I endured abuse at the hands of my husband, to the point where I felt I had no value as a human being. He told me if I ever left him that he would leave me with nothing, not even my child. We were kept in locations far from my family and whenever I made any friends in an area, we were moved away quickly to a new location where I knew no one. All of these places were also where I had no right to work to support myself and no access to our money beyond everyday necessities and all property was in his name alone. The physical abuse came in cycles and continued escalating until I was finally forced to make a small safe room for myself and my son in our home. It cost me once he had calmed down, because he would make me pay for hiding in other much

more personal ways when my son wasn't around, but it was the only way I could keep my son and me safe when my ex-husband went on one of his rampages.

The straw that broke the camel's back was when my husband attacked our son in front of me. He threw my son across a room onto a slate floor because my son had dared to open a door to the room where my husband was screaming at me. I will never forget the look on my son's face as he lay on the ground staring up at his father who was screaming down at him. What I could tolerate for myself, I couldn't tolerate for my child and that day in March of 2005 was when I finally found the courage to leave, but I had no idea it would be nearly ten years before I was finally free of my husband and able to get a divorce. There was no divorce in Chile at that time and I wasn't able to obtain a divorce from my husband until the Hague Convention issues had been finally concluded, as family law courts won't decide anything regarding a child's welfare if a Hague case is pending.

We couldn't leave Chile, because of the blanket *ne exeat* order and we would not have been allowed on a flight without a written letter from my husband saying I had the right to travel with our son, which he most certainly would not give under any circumstances. So, I had to find a way to survive there in a country where I couldn't work, who's legal system was vastly different from the one I'd grown up in, and where I had few rights.

My son's passport was taken from me by friends of my husband who came into my home and they refused to return it. I notified the Embassy and the Embassy forced these people to hand over my son's passport, but then they wouldn't return it to me either. It wasn't until I was granted full custody by the Chilean courts about a year and a half later that they finally agreed to return it to me.

The Observatory wouldn't let me live on the compound they have for families of employees for reasons of their own I still don't quite understand. They also directly refused to confirm my husband's salary amount for the Chilean family court, so it was more than a year and a half before I could get any kind of support order. Not that it made any difference once we had the order, since my husband paid what he wanted to, if anything at all. We were only able to obtain a firm order because my husband's attorney mistakenly filed a brief with the court listing what he would have to pay under the current law and calling it ridiculous. The court seized on the amount and issued an order. Unfortunately, my husband appealed this decision all the way to the Chilean Supreme Court, so the U.S. Supreme Court was actually the second time my family's matters were heard before the highest court in a country. He did lose his case before the Chilean Supreme Court and the order stood as written.

Once we had the order, though, getting him to pay was a completely different prospect. We had to go back to court to try and get more orders enforcing the amounts owed and

there were months when he would pay the equivalent of \$25, because in the Napoleonic law system, you have to be exact on how much has been paid or you have to start all over again. So, he would wait until the very day we were going to court for a hearing and deposit \$25 in my account to stop the hearing.

I couldn't sign a lease, because I had no job and had no real rights due to the visa I had, so the Observatory my husband worked for did force him to sign a lease for an apartment for us. However, this meant his name was on the lease and when he broke into my apartment using locksmiths to obtain a key, the police would do nothing because it was his apartment and I had no right to prosecute. As for what he did to me, I was told directly by more than one caribñero (the Chilean police force) that "that is a matter between a husband and wife" and no help was given to me from that quarter for any physical abuse I suffered. I lived in constant fear in my own home, because I never knew if he would be there when I came back from getting groceries or taking my son to school. I had no sanctuary, no place where I could hide and he never let me forget it.

My son was abducted twice by his father while we were in Chile. After the first time when he was missing for sixteen days, the court finally granted me full custody of our son. Evidenced by my husband's actions and violent outbursts, the court determined he was deserving of no custody rights, but did grant him visitation. That was when I, my attorney, and his family received our first anonymous death threats. After the second time he abducted our son and went to the southern part of Chile and was found there, the court told me that if he abducted him again they would think about taking away his visitation rights at that time, but they couldn't do anything after he had only done it twice.

Once I had full custody, I would have been able to leave Chile with my son without my husband's permission, however, we had asked for a *ne exeat* order from the family court specific to my son the first time my husband abducted him, since we were worried he would fly back to England with him somehow. In order to get that order removed, we would have had to go to request the court rescind the order, which would have notified my husband we were planning to leave the country and that would have put us in greater danger.

We were bombarded with legal demands from my husband's many lawyers over the two and a half years we were in Chile and I was lucky enough to find an attorney who was willing to work basically without pay, only on the promise that I would one day pay what I owed. Whenever my parents sent me money, I always made sure and gave something on account to my attorney because no one else was protecting us there.

I was subjected to death threats, threats from his attorney that he would fabricate and charge me with a crime in order to have me deported from the country without my child, constant phone and email harassment, constant fear in my own home, a terror of being

picked up off the street by hired thugs, a very real possibility, since I had to walk everywhere as we had no vehicle. My husband had come and taken our car from us and refused to allow us to use it, so I walked everywhere in a pair of old cowboy boots that were the sturdiest footwear I owned. I walked my son to school, walked to the grocery store, and had to walk practically every day to the courthouse downtown, as we had to keep close track of the actions being filed against me by my husband's attorney. I tried to do as much of the legwork as I could to help my attorney and help keep my legal costs down.

My parents had been sending us what money they could for us to live on, but there were many times I was cooking the last of the food in the house. I had to put newspaper and cardboard into my son's shoes to make them last just a little bit longer because I had no money to replace them, despite the soles being nearly worn through. I sew, thankfully, and was able to make clothes or remake old clothes to keep him warm and decent. My own clothes I cut apart and remade, as well. ***If I had taken a job and been caught, I would have been deported without my son as my visa explicitly forbade any member of the family of an astronomer working for the Observatory from accepting a salary in Chile.*** It was an agreement the Observatory had with the government that allowed entire families to move in with little complication, as only one salary would be involved, that of the Observatory employee.

To keep myself busy, I volunteered teaching English to people who wanted to learn and my husband and his attorney would send people around every now and then who were obviously plants trying to induce me to take money for my services. Once I made it clear to these people that I did it solely as a personal favor, not a job, I never heard from them again. If they had caught me taking money for teaching, they most certainly would have been able to have me deported. It was more than difficult knowing who to trust and in a situation like ours you tend to lean towards not trusting anyone at all.

We were lucky that my family was able to help to what extent they could, that we had friends who would bring us food from their *parcelas* and would gift my son with clothes when they could. There were many people who did what they could to help us and I'll always be grateful to my Chilean friends for their support during this terrible time.

The Observatory refused to help and the embassy couldn't help, but they monitored the situation closely over the two and a half years we were caught there, and when they informed me of death threats they finally believed were credible (they requested to be informed by the local police of any new developments) then they finally helped in a small way to get us out of the country. My son's new passport I received when it had to be renewed wasn't on record with Interpol and we were able to get out within a 24 hour window. My parents had sent me a credit card with orders to use it to purchase plane tickets, no matter the price, should an opportunity arise for us to leave. We bought the

last two tickets on a plane leaving the very next day once we got the go-ahead from our attorney that we should take our chances.

I'm sure you are aware this is a brief overview of everything we were subjected to and I hope you understand why I don't wish to go into more detail. While we both are healing and doing well, we still have issues relating to the damage done to us during that time, something I will feel guilty about for the rest of my life. I suffer from PTSD and while my symptoms continue to lessen, I can be thrown back into it by something as simple as seeing an abusive scene in a movie. I can assure you there is lasting damage whenever abuse has occurred and it is no less for any child who was a witness to the abuse of one of their parents, whether they were directly involved or no.

The man who abused me and my son for so long was able to pursue his claim all the way to the U.S. Supreme Court because he was able to obtain aid with legal fees and expenses (despite not being the primary caregiver, nor having any custody rights whatsoever) as the "injured party"; while we, a child and a single mother with full custody, were forced to bear the burden of an expensive legal defense alone. He stayed in Chile (even though none of us is Chilean and never had any intention of staying there permanently) because it was the only place where he had the legal option to try and force us back to him. If my son had been returned to him in Chile, my ex-husband would have, by default, obtained the custody that was denied him in the first place by a Chilean family law court. If I had been forced to go back, I most likely wouldn't be alive today to write you this letter. Rapid return is definitely not always protective of the interest of the child.

It is my firm belief that this guide needs to take into account the specific details of each individual case, particularly where there has been domestic violence and abuse on the part of the non-custodial parent. Parents defending themselves must be encouraged to speak up about the abuses they have suffered along with their children. Perhaps one solution might be appointing an advocate for the mother and child who could help speak for them before the court when it is necessary to give testimony recounting abuse. We have a program for abused children here in Texas called Texas Casa that performs this service. Given the traumatic nature of the court experience that most certainly exacerbates the damage already done, would it not make sense to give the mother or father a voice able to speak for them when she or he cannot?

To force an abused person and child to return to a country where the non-custodial parent has proven him or herself to be a danger to the custodial parent and child also contravenes the original intent of the Hague Convention. To potentially allow abusive parents to change custody orders that have been carefully thought out and issued by family law court judges in other parts of the world through this abuse of the Hague Convention must not continue.

You have an opportunity here to protect those who are the most vulnerable and at a point in their lives where they simply don't know whom to trust. Putting your life and the life of your child into the hands of complete strangers who haven't a clue what you've been put through behind closed doors is terrifying and humiliating, I can certainly attest to that. Having to recount what was done to you to complete strangers is traumatizing enough without having it discounted because your life and the life of your child could be viewed solely as an ivory tower issue and not an entirely, and sadly, human one.

Please, protect us and those who come after us from continuing abuse. Please, instruct the judges to take seriously accounts of abuse and don't leave us fighting the Sisyphean struggle of removing ourselves and our children from an abusive partnership alone. We go through the trauma of the abuse, then must go through the trauma of retelling and reliving it in front of complete strangers with the very real possibility of not being taken seriously or believed and that is an additional trauma added onto lives already damaged in ways no one would want to imagine.

Future generations are in your hands right now and, as someone who went through this process and was lucky enough to have good and kind judges who actually listened, I believe it is imperative to provide guidance for our judiciary that allows them the leeway to help us in our most desperate hour. I ask you to please remember that every parent and child who has suffered domestic violence and comes before the court are terrified, traumatized, but against all odds determinedly hopeful. They are hopeful that they will be heard, believed and, ultimately, kept safe.

I greatly appreciate the opportunity to present this statement and should you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read 'J. Graham', with a long, sweeping underline.

Jacquelyn Graham, formerly Abbott

Contact information:

Email: jackieduke2003@yahoo.com

**Letter from Paula Lucas, Founder and Executive Director, Americans Overseas Domestic
Violence Crisis Center.**



Americans Overseas Domestic Violence Crisis Center

August 31, 2017

Via E-mail

Mr. Michael S. Coffee, Esq.
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Washington, DC 20520

Mr. Philippe Lortie
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Ms. Maja Groff
Senior Legal Officer
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Re: Comments on Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Dear Michael, Philippe, and Maja,

Thank you for the invitation to submit comments of the draft *Guide to Good Practice on Article 13(1)(b)* (the “Guide”). We also greatly appreciated the opportunity to voice comments in person at the public meeting, and your willingness to hear from those of us working with victims of domestic violence who are directly impacted by Article 13(1)(b) decisions.

AODVC: Who we are and how what we do pertains to the Guide

I am writing on behalf of American Overseas Domestic Violence Crisis Center (AODVC) as its Founder and Executive Director. AODVC works with abused Americans in foreign countries to provide domestic violence and child abuse advocacy. We provide resources and tools so that victims can navigate the complicated jurisdictional, legal and social international landscapes, to be able to live their lives free of abuse. The services that we provide include case management,

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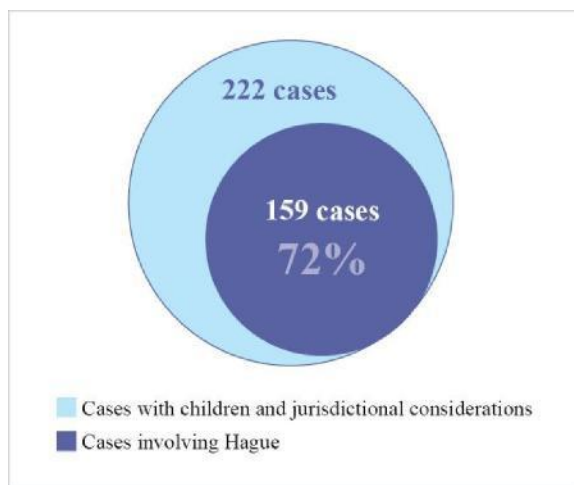
Website: www.866uswomen.org | www.sashaa.org

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legal advocacy, counseling, and relocation assistance. Pertinent to the Guide, we witness the hurdles survivors face as respondents in Article 13(1)(b) petitions after they have fled from abusive situations.

In 2016, AODVC's Domestic Violence Program provided long term case management to 557 victims through 14,605 communications (phone calls, chats, emails, etc.). Of the 557 victims, 222 had children and had jurisdictional considerations. Seventy two percent of those were Hague-involved cases.

2016 Jurisdictional Considerations Including Hague Involved Cases



Nearly 30 percent of the victims we served were Hague-involved. Some of those victims received legal counsel regarding the Hague that deterred them from leaving their abuser. In some cases, the children had to be left behind with the abuser as the mother was forced to leave the country alone because of the high threshold to prove a 13(1)(b) defense that would have allowed the children to stay with her. Other victims were not ready to speak with an attorney because they believed their safety or the safety of their children would be jeopardized, or they concluded they did not have the financial resources to defend a Hague petition. Six of the victims faced Hague proceedings. The children were sent back in all of those cases.

This illustrates, as recognized by the Guide (see §26), how rare it is for a 13(1)(b) defense to succeed. In practice, it shows an overly restrictive application of the 13(1)(b) defense that is undermining the Convention.

We believe these victims' experience with the Hague system, and specifically the children who are the central focus of Hague proceedings, should inform the Guide throughout. We trust the issues that their stories show will guide the drafting of the best practices as well as the application of the Guide by judges in 13(1)(b) cases.

The story of Adriana Vargas' Children

Adriana Vargas and her children are among the many victims who faced significant obstacles in defending a 13(1)(b) petition. AODVC worked with them for over three years. Adriana was physically and emotionally abused by her ex-husband for over two decades in Croatia. Throughout their lives, her children often witnessed this violence, and were also threatened by their father themselves when they attempted to intervene. One child was assaulted by his father after Adriana filed a police report for a previous violent incident and began divorce proceedings.

Adriana found that she did not have many resources to assist her in Croatia. She was not able to take her children with her to a shelter because they were over the age of 12. In addition, despite the fact that her police report led to convictions for domestic violence and possessing illegal weapons, the abuser was given suspended sentences and allowed to return to the family home. Luckily, Adriana was able to flee from the abuse in Croatia with her children to the United States. The abuser then filed a Hague petition requesting the return of the children.

Despite the fact that the abuser did not contest Adriana's recitation of the extensive family violence, a judge found that she had failed to prove grave risk in defending the 13(1)(b) petition. An expert testified that the children were at high risk of being abused because of the history of familial abuse, and that even if the perpetrator did not physically abuse the children, verbal abuse would likely continue and could potentially cause psychological harm. Regardless, the judge stated that the grave risk exception did not apply.

Thankfully, Adriana's 14-year-old son was permitted to testify, and stated that he did not want to return to Croatia. Her other son was over the age of 16 and thus not subject to return under the Convention. Based upon the 14-year-old's statement, the court denied the abuser's petition to return him to Croatia. Had the child been younger, his wishes may not have been considered, and he may have been returned to a violent environment in Croatia because of the virtual impossibility to prove a 13(1)(b) defense even when abuse is apparent.

Concerns to inform the Guide

Adriana's case is just one of many examples illustrating the following concerns:

- (1) Return is not always the best outcome for children subject to the Convention;**
- (2) Establishing a grave risk exception under 13(1)(b) is unreasonably difficult;**
- (3) Domestic abuse between parents has a significant psychological impact on children and poses grave risk;**
- (4) Once a 13(1)(b) defense has been established there should be no return. Relying on ostensible safeguards to protect victims should be a last resort; and**
- (5) Children's voices should be given paramount consideration in 13(1)(b) petitions.**

- (1) Return is not always the best outcome for children subject to the Convention**

The terms of the Convention reflect the basic assumption that wrongful removal is generally prejudicial to the child's welfare (see §35 of the Guide) and that prompt return is in the best interests of the child. However, drafters included Article 13(1)(b) and other exceptions for cases in which return is not the best outcome. Specifically, Article 13(1)(b) was included to create an exception to protect children in circumstances where they would be returned to an abusive parent. Thus, in a document written to provide guidance on Article 13(1)(b), clear language should be included to recognize that there are many circumstances where return is not the best outcome. Currently the Guide indicates that returning children is the best outcome. The best outcome is when a child's primary interest in being protected from physical or psychological danger, or being put in an intolerable living situation, is not trumped by a forced return.

There are unfortunately many instances in which returning children results in a negative outcome. The case of Michelle Monasky's child is a prime example. Michelle moved to Italy with her ex-husband shortly after they were married in the United States, and her husband began physically and sexually abusing her. One of the instances of sexual assault resulted in a pregnancy. The abuser continued to abuse Michelle, even when she was nine months pregnant and during the first month after their daughter was born. Michelle was able to flee the abuser with her four-week-old daughter shortly thereafter, when the child was four weeks old, and the abuser then filed a petition to return the child under the Hague Convention. The court found that Michelle was not able to prove a grave risk exception, and thus ordered the return of the child. Since her return, the child has had very limited opportunities to receive her mother's visits. The child is being taught only to speak Italian, inhibiting her abilities to speak with her mother in English. During one of the visits, it became apparent that the child was not being fed properly.

(2) Establishing a grave risk exception under 13(1)(b) is unreasonably difficult

Returning children can have dire consequences, but proving grave risk can be very difficult, if not impossible. Section 42 of the Guide recognizes that "the Convention provides for limited exceptions or "defences" to return (including Article 13(1)(b)) where, when raised and argued successfully to the appropriate standard of proof, the competent authority of the requested State is not bound to order the return of the child." An unreasonable standard of proof, and the difficulty to meet it through applying the particulars of these cases, undermines the Convention's objectives. The Guide should clarify that the corresponding standard of proof that is applied and its practical application cannot lead to this result.

In some jurisdictions, the burden of proof is "clear and convincing evidence," which is significantly more difficult to show than "preponderance of the evidence" standard. This higher standard is inappropriate when children's safety is at risk.. In these cases, where evidence is often circumstantial, and special circumstances are at stake (including the need for the victim who fled to expeditiously produce evidence that needs to be gathered internationally, often in situations where they may be experiencing post-traumatic stress, and

with limited financial resources) such a high standard places an undue burden on respondents, and undermines the Convention. This was the case for Adriana and Michelle's children, as well as many others that did not even attempt to escape violence for fear of being put in a worse position if faced with a forced return under the Convention because of the virtual impossibility of proving a 13(1)(b) defense.

We therefore suggest the following language to be added in the Guide:

- Best practices cited in §77: "...the need to interpret and apply the Article 13(1)(b) exception in a restrictive manner, as is the case with all of the exceptions under the Convention, *but in a way that does not render the exception unreasonably difficult to apply.*"
- Best practices cited on §99: "*Ensure that the expeditious nature of the proceeding does not prevent from assessing the matters that pertain to the Convention. In this assessment, consider the difficulty of international gathering of evidence, financial difficulties, and other relevant circumstances affecting the parties involved.*"

(3) Domestic abuse between parents has a significant psychological impact on children and poses grave risk

Notwithstanding research indicating that domestic violence against a parent can cause significant psychological harm to children (even if the children are not directly abused), it has not been legally established that such violence can in itself establish grave risk.

Experts are often needed to testify about this, and even then, courts are reluctant to find that violence against one parent is sufficient to establish grave risk to a child. Consulting an expert witness is just one of the financial burdens placed upon respondents defending Hague petitions under Article 13(1)(b). Many of the respondents are forced to leave their homes and livelihoods to escape abuse, and find themselves without financial support. In some jurisdictions, they may have to cover the petitioner's legal fees, as well as their own, if their efforts to defend are unsuccessful. This added burden may result in a 13(1)(b) defense not being applied, thus undermining the Convention.

Consequently, we suggest that:

- Appropriate language is included in the best practices cited in §207, and all fact patterns involving domestic violence.
- Training on the effects of domestic violence, including effect of children's exposure to adult domestic violence, is included as a best practice for judges handling these cases (§§269 et. seq.).
- A clarification is included in §249 for those cases when the taking parent claims that that he / she is unable to return with the child due to specific circumstances in the State of habitual residence, in the sense that no additional information provided by the Central Authority of the relevant state should result in the Convention turning

into an instrument of abuse and a child being put into one of the situations that Article 13(1)(b) was written to prevent.

- (4) Once a 13(1)(b) defense has been established there should be no return. Relying on ostensible safeguards to protect victims should be a last resort

Judges may have discretion to refuse a request to return the children, but they should not have discretion to return children if grave risk has been found. The language “is not bound to order the return” in the introductory chapeau of Article 13(1) indicates that judges have discretion in cases where the judge determines that returning children is not the best outcome. That language should not apply in the instance where grave risk is found; in such cases, judges should be bound to deny the petition to return. By including the language above, the drafters decidedly did not include language indicating that judges are not bound to return where conditions in Article 13 are met. There should be no discretion to ignore a grave risk that a child is put in danger. If the exceptions dictated under Article 13 could be so easily circumvented by judicial discretion, this section would become moot.

In particular, the Guide states (§65) that exceptions under Article 13 may not apply “when there are sufficient, concrete safeguards available in the State of habitual residence that effectively ameliorate a grave risk.” First, this creates due process issues. There is no language indicating where such safeguards are considered in the process, how safeguards should be investigated, or whether safeguards should be included in the order, leaving this up for interpretation. Judges may determine that if safeguards are shown by the petitioner, that grave risk need not be considered at all. Alternatively, judges may find grave risk, but then continue proceedings to investigate whether safeguards exist. In cases where expediency and efficiency are of utmost importance, it is irresponsible to assume that judges will have the time and resources required to adequately consider safeguards in the State of habitual residence, and whether those safeguards will actually work to protect the child from grave harm.

Furthermore, in cases where a State does provide for significant safeguards, there is no consideration as to whether they will be administered, much less effective. Even here, in the United States, where there are many safeguards in place to protect children from abuse, child abuse remains a rampant issue. Experience shows these measures are ineffective. As aforementioned, there is no guidance as to whether judges must include instructions about the safeguards in the order, or if it is simply assumed that the safeguards will work. Such an assumption is aspirational to the point of being dangerous.

Appropriate changes should be made in §§107 et. seq. of the Guide.

- (5) Children’s voices should be given paramount consideration in 13(1)(b) petitions

Children should be permitted to testify during 13(1)(b) hearings if they are willing and able, as their voices should be given paramount consideration in these petitions. A child’s

perspective can shed some light on the facts and circumstances of each case, and their desires should have more weight and impact in such proceedings.

This should be stressed in the best practices cited on §190.

Thank you again for considering the comments from AODVC. We hope that our perspectives shed some light on difficult issues that children face as subjects of 13(1)(b) proceedings, and that these perspectives will be used to inform the Guide and assist judges in making decisions in such challenging cases.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Lucas". The signature is fluid and cursive, with a large initial "P" and a stylized "L".

Paula Lucas
Founder and Executive Director
Americans Overseas Domestic Violence Crisis Center

**Letter from Lynn Hecht Schafran, Esq., Director, National Judicial Education Program,
Legal Momentum.**

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Lynn Hecht Schafran, Esq.

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NJEP is a project of
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in cooperation with
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August 21, 2017

By E-mail

Mr. Michael Coffee
Attorney-Adviser
Office of Private International Law
U.S. Department of State
Washington, DC

RE: Hague Convention on the Civil Aspects of International Child Abduction - Draft *Good Practice Guide on Article 13(1)(b)*

Dear Michael,

I read the draft *Good Practice Guide on Article 13(1)(b)* with great interest and was pleased to see that it has the potential to be a valuable resource for judges who find themselves presiding in Hague Convention cases in which “grave risk” is alleged under 13(1)(b) on the grounds of children’s exposure to domestic violence.

Annex 3 is a most welcome and vital part of the *Good Practice Guide*. In many instances the judge presiding in a 13(1)(b) case has had no prior education about domestic violence or misunderstands its impact on children, assuming, for example, that if the child is not directly abused there is no harm. Annex 3 addresses this knowledge gap with guidance about the realities of domestic violence and its impact on children that is vital for a judge to understand in order to make an informed decision when domestic violence is the ground for a 13(1)(b) defense.

That said, I have several suggestions about how the Guide can be made more accurate and informative.

Add a Section on the Neuroscience of Children's Exposure to Domestic Violence

In Annex 3 Section 3 (c) is headed “Harm to children who are exposed to domestic violence.” The text makes extensive reference to the social science research documenting the seriously negative impact of domestic violence on children. However, nowhere is there discussion of the neuroscience findings on this issue.

Providing the neuroscience findings is extremely important because some judges disdain social science as “soft science,” whereas they respect neuroscience, which they consider “hard science.”

As Director of the National Judicial Education Program (NJEP), I have been involved in providing judicial education about cases involving sexual assault and the intersection of sexual assault and domestic violence for over thirty years. In 2000, I added a ground-breaking unit on the neurobiology of trauma to NJEP's curriculum on adult victim sexual assault. Judges and others have found this neuroscience unit fascinating. It enables them to understand why the way in which traumatic memories are recorded and recalled prevents victims of traumatic events such as rape from producing the sequential, never-forget-a-detail narrative of the assault that most people mistakenly expect, as well as the psychophysical states that prevent victims from resisting.

Knowing the importance of providing judges with this “hard science” approach, I have followed developments in the neuroscience research on the impact of children's exposure to domestic violence. In 2014 I published an article in *The Judges' Journal*, the magazine of the American Bar Association Judicial Division, titled, “Domestic Violence, Developing Brains and the Lifespan: New Knowledge from Neuroscience.”¹

With the advent of magnetic resonance imaging, neuroscientists have produced scores of studies documenting on a neuronal level the profoundly negative impact of **exposure** to domestic violence on children from infancy on. These studies have also documented how children can recover when exposure to the violence is eliminated and they are secure in the care of their non-abusing, primary caregiver parent.

Note that the keyword here is **exposure** to domestic violence. Children need not be abused themselves – they do not have to directly witness or observe the abuse of their mother. Merely living in an environment suffused with fear has a profound impact on every aspect of their development, and this begins in infancy. It is an error to believe that infants are not impacted by exposure to domestic violence. See *First Impressions: Exposure to Violence and a Child's Developing Brain*.² My *Judges' Journal* article begins with the suggestion that readers view this 15 minute film before reading the article.

¹ Available at <https://www.nycourts.gov/courts/family-violence/pdfs/Children-DV-BRAINRESEARCH-LynnSchafran.pdf>. A copy of which is also attached.

² Available on YouTube at <https://www.youtube.com/watch?v=brVOYtNMmKk>.

The vast social science literature on the impact of children's exposure to domestic violence is now confirmed and explained by neuroscience. A review of more than 1,000 social science articles about the behaviors seen in children exposed to domestic violence concluded:

“At its most basic level, living with the abuse of their mother is to be considered a form of emotional abuse, with negative implications for children's emotional and mental health and future relationships.... Growing up in an abusive home can critically jeopardize the developmental progress and personal ability of children, the cumulative effect of which may be carried into adulthood and can contribute significantly to the cycle of adversity and violence.”³

This conclusion is supported in an article by nine neuroscientists, pediatricians, physicians, and public health experts titled, “The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology.” The authors wrote:

“[T]he detrimental effects of traumatic stress on developing neural networks and on the neuroendocrine systems that regulate them have until recently remained hidden even to the eyes of most neuroscientists.....

The convergence of evidence from neurobiology and epidemiology calls for an integrated perspective on the origins of health and social problems through the lifespan.”⁴

I encourage the Guide's drafters to include a section about the neuroscience of children's exposure to domestic violence and a link to my *Developing Brains* article.

Undertakings are Illusory, Inimical to the Interests of the Child, and Should Be Eliminated

Undertakings are not in the Convention. They are a product of case law that has evolved over the years to be treated as a highly desirable way to achieve a safe return after a grave risk of physical or psychological harm has been found. But the concept of undertakings is seriously flawed in several ways and they should be eliminated. Once grave risk has been found, return should be denied.

It is no secret that undertakings are difficult, if not impossible to enforce in any country other than that in which grave risk was found. See, e.g., Diana Carrillo & Sarah Lucy Cooper, *The*

³ Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797, 799, 802 (2008).

⁴ Robert F. Anda, Vincent J. Felitti, J. Douglas Bremner, John D. Walker, Charles Whitfield, Bruce D. Perry, Shanta R. Dube & Wayne H. Giles, *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 Eur. Archives of Psychiatry & Clinical Neuroscience, no. 3, Apr. 2006, at 174, reprinted in NIH Public Access 8, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3232061/pdf/nihms340170.pdf>.

*Undertakers Dilemma: Are Undertakings Given to a Court in England and Wales Enforceable in the Kingdom of Spain,*⁵ and the Guide at pages 34-35.

The Guide acknowledges the difficulty, if not the impossibility, of enforcing undertakings. But, at the same time, it makes the gold standard for these cases having judges in different countries communicate with each other about the protective measures available if a child is returned, and imposing undertakings on the left-behind parent so the court can order return. In effect, judges are asked to issue a court order which they know they cannot enforce and which it is highly unlikely that anyone else will.

Undertakings are unrealistic in their very concept. Undertakings expect the left-behind parent who, *by his own behavior*, created a “grave risk” to overnight renounce this behavior and commit to live by a list of conditions wholly out of step with his past behavior. This is not the way human beings behave.

Having judges in different countries ask one another about the protective services available in the country of habitual residence ignores the reality that it is unlikely that the judges will know what these services are or have the staff to research them. It is even more unlikely that they will know what is happening on the ground. For example, a judge in Santa Clara County, California might know or find out that the county has a domestic violence shelter, but would he/she know that the shelter can only accommodate 63 residents at a time, and turns away 2,500 requests for shelter each year, making it unlikely that there will be room for the taking parent in a Hague Convention case.⁶

The first sentence of the Hague Convention on the Civil Aspects of International Child Abduction reads, “Firmly convinced that the interests of children are of paramount importance in matters relating to their custody.” But undertakings do not support the interests of the child. Once grave risk has been found, undertakings and return put the child into a kind of limbo. The country of habitual residence is now dealing with custody. What will the court decide? How long will it take? What the child knows is that she/he was in a frightening situation, living in a home suffused with fear; then she/he was taken to a place of safety; now she/he is back in the place of fear, not knowing what will happen. Children diagnosed with severe post-traumatic stress disorder are being returned with only the “protection” of undertakings. See e.g., *Sabogal v. Velarde*,⁷ where the judge turns himself inside out to find a way to order return. This is not in children’s interests.

Again, once there has been a finding of “grave risk” the inquiry should end and return should be denied.

⁵ Available at <http://www.dianacarrillo.com/pdf/Undertakings%20in%20Spain1.pdf>.

⁶ Sue Dremann, “Domestic-violence victims turned away,” Palo Alto Weekly, <https://www.paloaltoonline.com/news/2017/01/20/domestic-violence-shelters-are-turning-away-victims-for-lack-of-space>.

⁷ 106 F. Supp. 3d 689; 2015 U.S. Dist. LEXIS 175354.

Problems with the Annex I Glossary Definition of Domestic Violence

In the Annex I Glossary, Domestic Violence is defined as:

Domestic and family violence:

The term “domestic violence” or “family violence” may, depending on the definition used in the relevant jurisdiction, encompass a range of abusive behaviours within the family, including, for example, types of physical, psychological and financial abuse. It may be directed towards the child (“child abuse”) and / or towards the partner (sometimes referred to as “spousal abuse” or “intimate partner violence”) and / or other family members. Unless stated otherwise, this Guide uses the term “domestic violence” or “family violence” in this broad sense. A distinction may be made between indirect and direct violence with respect to children. The first is domestic violence towards a parent or other members of the household, which may affect the child, depending on the circumstances of the case, thus exposing the child to the effects of domestic violence,⁴ and the second is violence within the family against the child itself. The latter case would generally be referred to as “child abuse”. The term “family violence” is used interchangeably with “domestic violence”.

In Annex 3, page 10, 2a the definition of domestic violence reads:

10. The term “domestic violence” may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical, psychological, sexual and / or financial; it may be directed towards the child (“child abuse”) and / or towards an intimate partner (sometimes referred to as “spousal abuse” or “intimate partner violence”) or other family members. This Guide uses the term “domestic violence,” unless stated otherwise, in the broad sense outlined in this paragraph, and is used interchangeably with the term “family violence”

Glossary Definition Omits Sexual Violence

The omission of sexual violence from the Glossary definition is perhaps a typo, but in any event it must be corrected. Sexual violence is an aspect of domestic violence that is frequently overlooked despite the fact that it presages increasing violence and potential lethality,⁸ and the fact that “A history of sexual assaults against the mother... [is] linked to increased risk of sexual abuse of the children and increased physical danger.”⁹ Note that the risk assessment instrument in Annex 3, page 18 includes forced sex.

⁸ Lynn Hecht Schafran, “Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence,” *Judicature*, Feb. 2010.

⁹ Lundy Bancroft, “Assessment of Risk to Children from Visitation with Batterer,” in *Understanding the Batterer in Custody and Visitation Disputes* (1998).

Glossary Definition Wrongly Asserts that in Some Circumstances Children Are Not Affected by Domestic Violence

The glossary definition of domestic violence includes this language:

“A distinction may be made between indirect and direct violence with respect to children. The first is domestic violence towards a parent or other members of the household which **may** affect the child, depending on the circumstances of the case, thus exposing the child to the effects of domestic violence. (emphasis supplied).”

As discussed above in my comments on the need for a section on the neuroscience of domestic violence and developing brains, children, including infants, are always affected by exposure to domestic violence. There is no “may.”

The Guide and Annex 3 Would Benefit from More and More Selective Case Citations

The Guide and Annex 3 cite few cases. To be of maximum benefit to the audiences for which the Guide is intended, the Guide and Annex 3 should include more citations to well-conceived opinions that will provide greater guidance as to how these cases should be approached and understood.

For example, where the Guide references situations in which the child cannot be returned without his or her protective parent because the child’s welfare is inextricably entwined with that parent’s welfare, the Guide should reference *Pallastro v. Pallastro*,¹⁰ written by Justice Rosalie Abella, now on the Canadian Supreme Court, when she was on the Ontario Court of Appeals. Justice Abella carefully explains why the psychological and physical well-being of this child “are inextricably tied to [the mother’s] psychological and physical security;” why the child, given his age and the father’s history, could not be returned without his mother; and why a situation in which the mother is at grave risk puts the child at grave risk. “It is therefore relevant in considering whether the return to California places the child in an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.”

The Gratuitous False Claims Conjecture Should Be Removed

In the Guide at page 2, footnote 11 and in Annex 3, page 9, item 5 there is a paragraph that reads:

“Some Central Authority officials and caseworkers dealing with international child abduction matters have noted anecdotally that allegations of domestic violence may be on the increase as a litigation or delay tactic on the part of taking parents, due to the limited exceptions available under the Convention. It is for the competent authority hearing the case to assess the substance, veracity and seriousness of any allegations, to the extent required within the limited scope of 13(1)(b) proceedings.”

¹⁰ 171 D.L.R. (4th) 32; 1999 D.L.R. LEXIS 133.

At a time when “evidence-based” is the watchword across all disciplines, it is startling to see this gratuitous “anecdotal” conjecture about an increase in false claims of domestic violence appear not once but twice in this draft Good Practice Guide. In their letter to you dated August 4, 2017, Dean Sudha Shetty and Dean Jeffrey Edelson detail the social science research debunking this false claims assertion. I will add that this is a non-evidence based claim frequently made in the U.S. against women who allege domestic violence in divorce and custody proceedings. Given that in Hague cases the vast majority, if not all, of the taking parents alleging a 13(1)(b) defense based on domestic violence are women, this non-evidence based claim should be called out for what it is – gender bias – and removed from both the Guide and Annex 3.

Guidance for Interviewing Children

The Convention provides that the judge may interview the child and if the child is sufficiently mature take the child’s views into account. See page 48, ii, The child’s voice and exceptions under the 1980 convention.

Children in families where there is domestic violence want to be heard. In a recent study from Australia in which the researcher talked with children in these circumstances, she found that “Children and young people believe that fathers who use family violence need to made more accountable, and it should be up to them, not the community or the courts, to decide whether they have anything to do with their Dads.” The researcher stated:

“Children’s perspectives on their relationship with fathers who use violence rarely figure in the research literature or in the legal proceedings dealing with family violence. But when I came to talking to them I was blown away by exactly how strong their views were, whether it was an older young person or a child as young as nine years old... They all in some way wanted their father to acknowledge that what they did was wrong and apologize.”¹¹

Interviewing children is a skill. Understanding the child’s developmental stage is essential. In addition to noting that the convention permits interviewing children, the Guide should offer guidance on where to find information about how these interviews should be conducted.

Language Choices that Should be Corrected

Throughout the document there is language that creates the “invisible perpetrator.” That is, language that obscures the fact that domestic violence does not “occur” like a hurricane or landslide but is perpetrated by an individual with agency who chose to be violent.

The phrase “co-occurrence” should be changed to “co-perpetrated.” See pages 73 and 74. At page 74, iii, 275 the first sentence begins “the assertion of the taking parent that he/she has experienced domestic violence...” “Experience” is a subjective term. More accurate language

¹¹ Andrew Trounson, “Children Speak Out on Family Violence,” University of Melbourne, *Pursuit*, <http://pursuit.unimelb.edu.au/articles/children-speak-out-on-family-violence>.

would be “the assertion of the taking parent that he/she **has been subjected** to domestic violence.”

The entire Guide and all Annexes should be reviewed for language choices.

Thank you for the opportunity to comment on the draft *Good Practice Guide on Article 13(1)(b)*.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Schafran", with a stylized flourish at the end.

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Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience

By Lynn Hecht Schafran

The author suggests that, before reading this article, you go to YouTube.com and watch *First Impressions: Exposure to Violence and a Child's Developing Brain* (15 minutes) featuring Dr. Bruce Perry, senior fellow of the ChildTrauma Academy in Houston, Texas,¹ and Dr. Linda Chamberlain, founding director, Alaska Family Violence Prevention Project,² available at <http://www.youtube.com/watch?v=brVOYtNMmKk>.³

The New England Journal of Medicine recently published an article titled "Silent Victims—An Epidemic of Childhood Exposure to Domestic Violence." It called on healthcare providers to understand the prevalence and neurobiological consequences of children's exposure to domestic violence and take action to mitigate it.

Childhood IPV [Intimate Partner Violence] exposure has been repeatedly linked to higher rates of myriad physical health problems in children. Altered neuroendocrine stress response may be one important mechanism accounting for this correlation. Highly stressful environmental exposure, such as exposure to IPV, causes children to repeatedly mount the "fight or flight" reaction. Although this response may be adaptive in the short term, repeated activation . . . results in pathologic changes in multiple systems over time; some

experts refer to this effect as the biologic embedding of stress.⁴

The *First Impressions: Exposure to Violence and a Child's Developing Brain* video starts with Dr. Perry explaining that contrary to what was long believed, neuroscience shows that the brains of babies and young children are sponges that soak up and are shaped by everything in their environment, including the harm of exposure to domestic violence. Dr. Linda Chamberlain, founding director of the Alaska Family Violence Prevention Project,⁵ explains the evolution of her understanding that even babies and young children are impacted by exposure to domestic violence and how that impact is experienced and expressed by children of different ages. "The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology" is an article by neuroscientists, pediatricians, physicians, and public health experts who assessed the findings of the long-running Adverse Childhood Experiences (ACE) study in the context of the new knowledge from neuroscience. The ACE questionnaire includes questions about childhood exposure to domestic violence and adult perpetration. After reviewing the more than 17,000 responses from the mostly white, well-educated sample, they wrote:

[T]he detrimental effects of

traumatic stress on developing neural networks and on the neuroendocrine systems that regulate them have until recently remained hidden even to the eyes of most neuroscientists. However, the information and data that we present herein suggest that this veiled cascade of events represents a common pathway to a variety of important long-term behavioral, health, and social problems.

The convergence of evidence from neurobiology and epidemiology calls for an integrated perspective on the origins of health and social problems through the lifespan.⁵





Judicial Guide to Child Safety in Custody Cases, the National Council of Juvenile and Family Court Judges provides this comprehensive definition:

[Domestic violence is] a pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial or sexual—that one parent uses against the other parent. The pattern of behaviors is neither impulsive nor “out of control” but is purposeful and instrumental in order to gain compliance or control.⁶

Articles about domestic violence sometimes describe children as “witnesses,” a problematic term for two reasons. First, “witness” implies a passive bystander, whereas children are deeply engaged with everything that happens in their family environment. Second, a child might never see or hear the physical or sexual abuse yet be profoundly harmed by the atmosphere of fear in which he or she lives. The preferred terminology is children “exposed” to domestic violence.

The Social Science Is Confirmed and Explained by the Neuroscience

Social science research amassed over the last few decades documents the many ways exposure to domestic violence undermines children’s mental and physical health, social and emotional development, and interpersonal relationships, as well as the fact that it is often intergenerational.⁷ Exposure to domestic violence can lead to behaviors “such as substance abuse, suicide attempts, and depressive disorders.”⁸ A review of the social science literature published just between 1995 and 2006 identified over 1,000 articles and concluded:

At its most basic level, living with the abuse of their mother is to be considered a form of emotional abuse, with negative implications for children’s emotional and mental health and future relationships. . . . Growing up in an abusive home⁹ can critically jeopardize the developmental

progress and personal ability of children, the cumulative effect of which may be carried into adulthood and can contribute significantly to the cycle of adversity and violence. Exposure to domestic violence may have a varied impact at different stages with early and prolonged exposure potentially creating more severe problems because it affects the subsequent chain of development.¹⁰

The social science and the neuroscience may be thought of as the “what” and the “why.” Social science tells us *what* exposure to domestic violence does to children’s development and behavior. Neuroscience tells us *why*.

The Neuroscience

Dr. Bruce Perry, as noted above, is a senior fellow at the ChildTrauma Academy in Houston; Dr. Jack P. Shonkoff is director of the Center for the Developing Child at Harvard University; and Dr. Edward Tronick is director of the Child Development Unit at Harvard. Many of their publications on the neuroscience of developing brains are intended for nonscientists in the hope that this new knowledge will find its way into public policy, the legal system, education, and public health, to the benefit of the individual child and society as a whole. This summary is drawn from several of their publications and videos, all available online.¹¹

In infancy and young childhood, the

This evidence leaves no doubt that when a nonabusing parent seeks help from the courts to protect a child from exposure to domestic violence, judges’ decisions can literally shape the child’s brain and impact the child’s mental and physical health, learning capacity, and behavior across the child’s lifetime.

Defining Domestic Violence

The justice system’s efforts to address domestic violence have been hampered by a schema that defines domestic violence as fist-in-the-face physical assault and harm to children as possible only if they see it. But domestic violence has many dimensions that together create an ongoing climate of tension and fear. In A



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human brain is extremely plastic, growing new neurons and making synaptic connections in response to sensory, perceptual, and affective experiences. Infants' experiences—most importantly, their relationship with their primary caregiver—literally shape the architecture of their brains.

Developing brains are acutely sensitive to stress and to the internal state of the

to memory deficits, as seen in children and adults with post-traumatic stress disorder (PTSD). The work of the brain is carried out by circuits created by synaptic connections. When the levels of cortisol and other stress hormones rise and remain elevated for days or months at a time, these hormones “poison” the circuits developing in the brain at that time, with lifetime consequences. If the circuit affected is one that

startle response, serious sleep disorders, anxiety, hyperactivity, conduct disorder, attention deficit and hyperactivity disorder (ADHD), and PTSD. The fact that children raised in an environment of persistent exposure to domestic violence are more likely to be violent themselves as children and adults is likely linked to their being in constant fight-or-flight mode and the cognitive distortions their fear produces. Everything—even eye contact or a shoulder tap—is perceived as threatening and elicits impulsive, violent reactions.

Dr. Perry explains that living in an alarm state has critical implications for children's ability to learn:

When a child is in a persisting state of low-level fear that results from exposure to violence, the primary areas of the brain that are processing information are different from those in a child from a safe environment. The calm child may sit in the same classroom next to the child in an alarm state, both hearing the same lecture by the teacher. Even if they have identical IQs, the child that is calm can focus on the words of the teacher and, using neocortex, engage in abstract cognition. The child in an alarm state will be less efficient at processing and storing the verbal information the teacher is providing.¹⁴

The resulting failure to learn has consequences across the lifespan.

What Can a Judge Do for Children Exposed to Domestic Violence?

Children's healthy brain development is supported by a nurturing relationship with one or more adults, especially the child's primary caregiver, usually the mother. The most important thing a judge can do to protect children exposed to domestic violence and help them heal is to end their exposure and support the child's relationship with the nonabusing parent.

The critical importance of the child's connection to the nurturing parent is dramatically illustrated in a DVD titled *Helping Babies from the Bench: Using the*

The most beneficial action a court can take for a child exposed to domestic violence is to end the exposure and support the protective parent.

caregiver upon whom the child depends. Even babies experience the fight-or-flight response and can dissociate or stage a mental retreat in the face of an acute or persistent threat. In a safe environment where the child has a nurturing relationship with a caregiver, moderate stress produces resilience. Some stress is normal and healthy for brain development. Children need to learn to deal with everyday stress. But in an unpredictable, tension-filled, violent environment where the stress is inescapable, it becomes toxic, unleashing a storm of neurochemicals that result in “embedded stress.”¹² Children learn to become fearful through this “fear conditioning,” which is strongly connected to anxiety disorders across the lifespan.

Lundy Bancroft, an expert on batterers as parents, writes that “[the] abuser creates a pervasive atmosphere of crisis in his home.”¹³ Children persistently exposed to domestic violence live in an ongoing “alarm” state, with powerful stress hormones, particularly cortisol, repeatedly priming them to flee or fight. This alarm state has many negative consequences for brain development. The hippocampus is critical for learning and memory. Toxic stress shrinks this area of the brain, leading

would otherwise be involved in building trust in a relationship, for example, absent an effective intervention that circuit is disrupted for life.

While some children exposed to domestic violence are trapped in a fight-or-flight alarm state, others—especially infants and young children who can neither fight nor flee—dissociate, sometimes called the defeat response. They turn inward, go somewhere safe in their imagination, feel as if they are observing rather than experiencing the situation from which escape is impossible. Like adults, for most children the response to an extreme stress—when neither fight nor flight is possible—may be to turn to dissociation.

Children subjected to toxic stress often display symptoms linked to the neurobiology of their major coping adaptation. The more prolonged the stressor, the greater the likelihood of long-term symptoms over the lifespan. The neurochemical system of the dissociating child predisposes to somatic complaints, withdrawal, helplessness, dependence, anxiety disorders, and major depression. The neurochemical system of the fight-or-flight child is predisposed to symptoms related to persistent hyperarousal, such as increased

Science of Early Childhood Development in Court,¹⁵ created by Florida Judge Cindy Lederman, a pioneer in using neuroscience to improve children's lives. Judge Lederman's DVD presents the neuroscience of the developing brain and the operations of her court and related agencies. Judges find that a segment of the DVD is helpful in understanding why it is vital to support and protect the bond between a child and his or her nurturing parent. It is the "Still Face Experiment" in which Dr. Tronick films a mother interacting with her year-old baby, which is available on YouTube.¹⁶

The child is in an infant seat while the mother crouches to be on eye level with her. She greets the baby; the baby greets her. The baby points; the mother looks in the direction in which the baby is pointing. They are closely engaged with each other, keeping eye contact, smiling, talking or making responsive noises, coordinating their emotions and intentions.

Then the mother is asked to turn away and turn back with a "still" face. The baby is immediately puzzled and tries to engage her in the kind of reciprocal communication she expects, but the mother remains impassive. Within two minutes the baby's stress is palpable. When she cannot elicit the engaged reaction she expects, she reacts with clearly negative emotions and screechy, beseeching sounds. Then the mother smiles and engages in her usual interactive play with the baby. Instantly the child is happy again.

Implications for the Courts of the New Knowledge from Neuroscience

The new knowledge from neuroscience has significant implications for many kinds of court cases as well as community safety.

Abuse and Neglect

Sometimes mothers seeking an order of protection are themselves charged with "failure to protect" and lose their children to foster care for "allowing" their children to be exposed to domestic violence. Apart from the fact that this outcome has been held unconstitutional,¹⁷ and the irony of charging a protective mother with "failure to protect," from a neuroscience

point of view this outcome is profoundly harmful for children. The most beneficial action a court can take for a child exposed to domestic violence is to end the exposure and support the nonabusive parent's efforts to protect the child. Support includes helping her to secure the services she needs, a safe place to live, and economic independence so that she and the child need not return to the batterer.

In some cases, it is necessary to remove children because the mother does not recognize that the maltreatment, cruelty, and exploitation to which she is being subjected is harmful to her and her children.¹⁸ These are complex cases, but in *Helping Babies from the Bench*, Dr. Shonkoff observes that child welfare agencies blunder in how they use foster care. Repeatedly changing children's placements is intended to prevent children from forming a close attachment with their foster parents. Neuroscience shows that having a close attachment with a nurturing parental figure supports healthy brain development and, in cases like these, can restore brain health.¹⁹

Custody and Visitation

Today every state's custody statute includes domestic violence as a factor to be considered in determining the best interests of the child, the standard for determining custody and visitation. Yet numerous studies over many years document that courts often award custody, joint custody, and unsupervised visitation to abusers.²⁰ What if, instead of saying that children exposed to domestic violence are "at risk," we said children exposed to domestic violence are "at risk of brain damage"? How would that shape perceptions of the "best interests of the child"?

The United States is having a national conversation about whether children should participate in contact sports because neuroscience has shown that concussions bounce the brain against the skull ("brain slosh"), resulting in traumatic brain injury and the long-term consequences that led former players to sue the National Football League.²¹ Similarly, neuroscience now shows us that for children, chronic exposure to domestic violence also results in physical changes

to the brain, impairment of brain function, and consequences for physical and mental health over the lifespan. Toxic stress changes the architecture of the child's brain. It is no less a physical agent of injury than brain slosh.

Custody Evaluators

Many judges rely on custody evaluators when making custody and visitation decisions. Repeated studies find that many evaluators know nothing about domestic violence and insist it does not harm children.²² Neuroscience shows us that exposure to domestic violence harms children's brains at the neuronal level, with lifetime consequences. Judges should require anyone seeking appointment as a custody evaluator to demonstrate knowledge of domestic violence and the relevant social science and neuroscience. Children's lives are at risk.

The Hague Convention

The 1980 Hague Convention on the Civil Aspects of International Child Abduction²³ provides that apart from a few defenses, children abducted from their country of habitual residence should be quickly returned. Many "taking" parents are caregiver mothers²⁴ who assert that they were fleeing domestic violence to secure safety for their children and themselves.²⁵ They invoke the section 13(b) defense, which states that a child need not be returned if there is "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." In 2010 the U.S. State Department acknowledged that "many" U.S. courts ignore the scientific evidence documenting that domestic violence against mothers harms children and return children to their mothers' abusers,²⁶ raising "significant issues related to the safety of the child and the accompanying parent."²⁷ Neuroscience helps judges assess "grave risk" in the domestic violence context. The toxic stress that harms developing brains comes from living in a chronic state of tension and fear. The risk for children cannot be measured solely by the gravity of their mother's physical wounds.

Judicial Education

Judicial education programs about domestic violence often include the social science research demonstrating the harm of exposure for children. It is time for these programs to include the new knowledge from neuroscience. Judge Cindy Lederman writes, “Although judges have limited time off the bench, they need to be made aware of relevant child-development research as often as they stay abreast of relevant appellate decisions involving procedure, evidence, and substantive law.”²⁸ With the new knowledge from neuroscience, “[t]he court can be viewed as a unique public-health setting with great potential for changing human behavior.”²⁹

Conclusion

Many neuroscientists focus not only on the individual child, but also on how children’s exposure to domestic violence has created a massive public health problem with serious implications for community safety. The U.S. Attorney General’s National Task Force on Children Exposed to Violence reported that children’s exposure to violence, including domestic violence, is a “national crisis . . . with effects lasting well into adulthood.”³⁰ The social science literature review quoted earlier reported:

[L]ongitudinal studies on pathways to delinquency have shown that young offenders are more likely to have been exposed to domestic violence, compared to their non-exposed counterparts and to become involved in anti-social behavior, violent crime, substance abuse, further delinquency and adult criminality. Finally, there is an association between exposure to domestic violence and peer aggression and bullying.³¹

Now we learn from neuroscience why this is so: Children exposed to repeated violence live in a perpetual “alarm” state, always ready to fight or flee, and carry that childhood adaptation into their adult lives. Dr. Perry offers this lesson for public policy, health policy, and the courts:

Law, policy and practice that are biologically respectful are more effective and enduring. . . . If society ignores the laws of biology, there will inevitably be neurodevelopmental consequences. If, on the other hand, we choose to continue researching, educating and creating problem-solving models, we can shape optimal developmental experiences for our children. The result will be no less than a realization of our potential as a humane society.³²

Human brain development is a long process, and exposure to domestic violence has specific impacts on children of all ages, from infants to teens. Thus, judges need to be mindful that in any case where a child has been exposed to domestic violence or is at risk of exposure in the future, in the words of Dr. Shonkoff, “Judges hold the integrity of a developing child’s brain in their hands.”³³ ■

Endnotes

1. CHILD TRAUMA ACADEMY, <http://childtrauma.org>.

2. *Alaska Family Violence Prevention Project*, DIV. OF PUB. HEALTH, ALASKA DEP’T OF HEALTH & SOC. SERVS., <http://dhss.alaska.gov/dph/Chronic/Pages/InjuryPrevention/akfvpp/default.aspx>.

3. FIRST IMPRESSIONS: EXPOSURE TO VIOLENCE AND A CHILD’S DEVELOPING BRAIN (Cal. Att’y Gen. 2008).

4. Megan Bair-Merritt et al. *Silent Victims—An Epidemic of Childhood Exposure to Domestic Violence*, N. ENG. J. MED. (Oct. 31, 2013), <http://www.nejm.org/doi/full/10.1056/NEJMp1307643?query=TOC>.

5. Robert F. Anda, Vincent J. Felitti, J. Douglas Bremner, John D. Walker, Charles Whitfield, Bruce D. Perry, Shanta R. Dube & Wayne H. Giles, *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 EUR. ARCHIVES OF PSYCHIATRY & CLINICAL NEUROSCIENCE, no. 3, Apr. 2006, at 174, reprinted in NIH PUBLIC ACCESS 8, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3232061/pdf/nihms340170.pdf>.

6. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD

SAFETY IN CUSTODY CASES 8 (2008). With respect to sexual abuse, see NAT’L JUDICIAL EDUC. PROGRAM, INTIMATE PARTNER SEXUAL ABUSE: THE HIDDEN DIMENSION OF DOMESTIC VIOLENCE CASES, web course available at <http://www.njepsacourse.org>, and Lynn Hecht Schafran, *Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence*, JUDICATURE, Jan.–Feb. 2010, at 161. The concept of ongoing “coercive control” was developed by Dr. Evan Stark and is central to understanding domestic violence. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007); Evan Stark, *Coercive Control*, FATALITY REV. BULL., Spring 2010, at 2, available at http://www.ncdsv.org/images/NDVFRI_FatalityReviewBulletin_Spring2010.pdf.

7. E.g., AM. BAR ASS’N CTR. ON CHILDREN & THE LAW, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (1994); Spouse Abuse—Statutory Presumption in Child Custody Litigation, H. CON. RES. 172, 101st Cong. (1990) (sense of Congress that every state should create a statutory presumption “[t]hat it is detrimental to the child to be placed in the custody of the abusive parent”).

8. Anda et al., *supra* note 5, at 174, reprinted in NIH PUBLIC ACCESS at 3.

9. With respect to writing about domestic violence generally, phrases such as “abusive relationship” or “abusive home” are inaccurate because they create the invisible perpetrator. Relationships and homes are not abusive; people are.

10. Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797,799, 802 (2008) (citations omitted). This article provides specifics on the way exposure to domestic violence impacts children of different ages: infants, toddlers, pre-schoolers, school-aged children, and teenagers. A useful resource for this detailed information is a free E-book, published by the London, Ontario, Centre for Children and Families in the Justice System: ALLISON CUNNINGHAM & LINDA BAKER, LITTLE EYES, LITTLE EARS: HOW VIOLENCE AGAINST A MOTHER SHAPES CHILDREN AS THEY GROW (2007), available at <http://www.yellowbrickhouse.org/english/2010/03/17/free-e-book-little-eyes-little-ears>.

11. Nat’l Sci. Council on the Developing Child, *Persistent Fear and Anxiety Can Affect Young Children’s Learning and Development* (Working Paper No. 9, 2010), <http://www.developingchild.harvard.edu>; FIRST IMPRESSIONS, *supra* note 3;

HELPING BABIES FROM THE BENCH: USING THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT IN COURT (Zero to Three 2007), <http://www.zerotothree.org/courtteams>; Bruce D. Perry, *Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture*, MARGARET MCCAIN LECTURE SERIES (Sept. 23, 2004), <http://www.lfcc.on.ca/mccain/perry.pdf>; BRUCE D. PERRY, EFFECTS OF TRAUMATIC EVENTS ON CHILDREN (2003), <http://www.ChildTrauma.org>.

12. Bair-Merriett, *supra* note 4.

13. *Understanding the Batterer in Custody and Visitation Disputes*, LUNDY BANCROFT (1998), <http://www.lundybancroft.com/articles/understanding-the-batterer-in-custody-and-visitation-disputes>.

14. Bruce D. Perry, *The Neurodevelopmental Impact of Violence in Childhood*, in TEXTBOOK OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY (Diane Schetky & Elaine P. Benedik, eds. 2001), http://childtrauma.org/wp-content/uploads/2013/11/Neurodevel_Impact_Perry.pdf.

15. HELPING BABIES FROM THE BENCH, *supra* note 11.

16. STILL FACE EXPERIMENT, available at <http://www.youtube.com/watch?v=apzXGEbZht0>.

17. *Nicholson v. Williams*, 787 N.Y.S.2d 196 (Ct. App. 2004); *In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2002).

18. CANDACE L. MAZE, SHARON M. AARON & JUDGE CINDY S. LEDERMAN, DOMESTIC VIOLENCE ADVOCACY IN DEPENDENCY COURT: THE MIAMI-DADE DEPENDENCY COURT INTERVENTION PROGRAM FOR FAMILY VIOLENCE HANDBOOK 7 (2005) (In addition to the domestic violence perpetrated against the mother, estimates of physical and sexual child maltreatment in homes where there is domestic violence are as high as 50 percent.).

19. *Id.* at 10. Best, of course, is for the nurturing adult to be the child's parent. The Miami-Dade Dependency Court Intervention Program "is based on the premise that a battered mother can regain the ability to care for herself and her children if her access to personal and community resources is facilitated at the earliest opportunity and her personal growth is supported."

20. LUNDY BANCROFT & JAY SILVERMAN, THE BATTERER AS PARENT (2d ed. 2011); News Release, Leadership Council on Child Abuse & Intimate Partner Violence, How Many Children Are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce? (Sept. 22, 2008), <http://leadershipcouncil.org/1/med/PR3.html>; Stephanie J. Dallam & Joyanna Silberg, *Myths That Place Children at Risk During*

Custody Disputes, 9 SEXUAL ASSAULT REP. 33 (2006), reprinted by the Leadership Council on Child Abuse & Intimate Partner Violence, available at http://www.leadershipcouncil.org/1/res/cust_myths.html; Mary Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991 (2005); Dennis P. Saccuzzo & Nancy E. Johnson, *Child Custody, Mediation and Domestic Violence*, 251 NIJ J. 21 (2004), <https://www.ncjrs.gov/pdffiles1/jr000251.pdf>.

21. Gregory D. Myer, *Can Animals Help Limit Concussions?*, N.Y. TIMES (Jan. 2, 2014), http://www.nytimes.com/2014/01/03/opinion/can-animals-help-limit-concussions.html?_r=0.

22. DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATORS' DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE, AND CUSTODY-VISITATION RECOMMENDATIONS (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf>; MICHAEL S. DAVIS ET AL., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf>; Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals,"* JUDGES' J., Winter 2003, at 10.

23. Implemented by the United States through the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 et seq.

24. See NIGEL LOWE, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PREL. DOC. NO. 8 A, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2008 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, PART I, at 14-25 (Nov. 2011), available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.

25. 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, 223 n.5. (2008) (citing countries' answers to the pre-meeting questionnaire, which showed that "country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent in Hague proceedings").

26. U.S. Response to Preliminary Doc. No. 21 Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Hague Conference on Private International Law, sec. 5.1 (Nov. 2010), available at http://www.hcch.net/index_en.php?act=publications.details&dtid+33 (follow "United States" hyperlink).

27. U.S. Response to Preliminary Doc. No. 2, Questionnaire on the Desirability and Feasibility of a Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law, sec. 5.1 (Dec. 2010), available at <http://www.hcch.net/index.en.php?act=publications.details&pic=5290&dtid=33> (follow "United States" hyperlink).

28. Cindy Lederman, *From Lab Bench to Court Bench: Using Science to Inform Decisions in Juvenile Court*, CEREBRUM, Sept. 2011, available at <http://dana.org/Cerebrum/Default.aspx?id=39466>.

29. *Id.*

30. ROBERT L. LINSTENBEE JR. ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE at iv (Dec. 12, 2012), available at <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

31. Holt et al., *supra* note 10, at 805-06 (citations omitted).

32. Perry, *Maltreatment and the Developing Child*, *supra* note 11, at 4.

33. HELPING BABIES FROM THE BENCH, *supra* note 11.

**Letter from Sudha Shetty, Esq., Assistant Dean for International Partnerships, Director,
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RE: Good Practice Guide on Article 13(1)(b)

Dear Michael, Philippe and Maja,

Thank you for the opportunity to comment on the draft Good Practice Guide on Article 13(1)(b). We appreciate the thought that is reflected in this Guide and the commitment of both the U.S. Department of State and the Permanent Bureau to address issues arising from 13(1)(b), especially allegations of domestic violence in Convention cases.

We would like to make several suggestions for changes before this draft Guide is distributed. These include changes regarding (1) presumption that return is the best outcome for a child, (2) focus on narrow interpretations of 13(1)(b), (3) comments in footnotes and annexes on allegations of domestic violence, (4) ability of judges to assess protective measures in the country of habitual residence, and (5) outcomes of cases following a Hague ruling.

Presumption that Return is Best Outcome

Part I of the draft Guide introduces an interpretive background of the 1980 Convention. The first item, #31, on page 9 states “the principle that the interests of children are of paramount importance.” This is consistent with the introductory paragraph of the 1980 Convention. The Convention text continues “Desiring to protect children internationally from the harmful effects of their wrongful removal or retention.” However, the draft Guide then focuses primarily on the rapid return of children and assuring left-behind parents access to their children.

There is a presumption in this draft Guide and among many involved in Convention cases that return of the child to their habitual residence is the best outcome for children's interests, regardless of the left-behind parent's behavior. A presumption is made that removal and retention are always harmful to the children's interests. In fact, our research, published in the 2012 book titled *Battered Women, Their Children and International Law* (Lindhorst & Edleson, Northeastern University Press), indicated that taking parents, in many cases mothers, who were the primary carers for their children were most often acting in the interest of their children's safety by fleeing across international borders. This is consistent with extensive testimony by taking parents around the world.

While we understand the underlying traditions of the Convention, neither the experience of children nor the social science support an assumption that return is the best outcome for a child. In *some cases* it may be that removal of the child from the country of habitual residence and retention in another country is the best outcome for the child.

Narrow Interpretation of Grave Risk

The draft Guide engages in an extensive discussion of a tradition of narrowly interpreting the grave risk exception (see Introduction, section 4, page 7). A fear is expressed that broadening the interpretation of grave risk might lead to undermining the Convention. In the same section it is noted that the grave risk exception is seldom applied.

The 1980 Convention focuses from the start on ensuring the interests of the child. The exceptions included in the Convention reveal the foresight of the drafters who, in 1980, were acting prior to any of the extensive published social science literature on the negative impacts of children's exposure to domestic violence (see Edleson, 1999, for an early review of this literature). While the drafters of the Convention may have foreseen the dangers of civil conflict in countries, as we see currently in Syria, they did not clearly foresee the dangers for children within their own homes.

There should be no fear to allow the Convention to be a living document that accommodates new scientific knowledge revealing grave risks to children in their own homes. The fear that allowing broader interpretations of Article 13(1)(b) might undermine the Convention actually does harm to its implementation. New signatories, for example India, are reluctant to sign-on if protections for children and their primary carers are not addressed (Law Commission of India, October 2016). It is the single-minded insistence on a narrow definition of grave risk in the face of growing social science and case evidence that threatens the credibility of the Convention and only serves to alienate many working in children's interests.

Footnotes and Annex Negative References to Allegations of DV

Footnote #11 on page 2 and repeated in Annex #3 (item 5 on p. 9) states "Some Central Authority officials and caseworkers dealing with international child abduction matters have noted anecdotally that allegations of domestic violence may be on the increase as a litigation or delay tactic on the part of taking parents, due to the limited exceptions available under the Convention. It is for the competent authority hearing the case to assess the substance, veracity

and seriousness of any allegations, to the extent required within the limited scope of 13(1)(b) proceedings.”

We *strongly* object to the insertion of this text. This implies that primary carers who are taking parents are using false allegations of domestic violence and grave risk to the child to gain leverage in Convention cases. While this may occur, the social science data indicates this is seldom the case. A far larger concern is left-behind parents who seek to discredit allegations that they have perpetrated domestic violence and who claim their children will be safe on return to their custody.

The international social science literature on false allegations of domestic violence is scant but clear that false claims rarely occur in court. For example, Shaffer and Bala’s (2003) studied published Canadian custody cases in which 42 of 45 mothers alleged domestic violence by the fathers of their children. The authors note that in most of these 42 cases of alleged abuse, the men had counter-alleged abuse by the women or that her injuries were the result of accidents and the like. Interestingly, in 31 of 42 allegations by mothers (74%) the court substantiated her claims and among the other 11 cases judges decided the allegations were either exaggerated or unfounded. Among these 11 cases, mothers were granted custody in three of them. In only one case did the court find allegations of abuse by a mother against a father were founded. In a report by Davis (2004) of 27 custody cases in New Zealand that involved a “finding of fact” hearing, only two mothers’ but 25 father’s allegations were discredited.

These data and similar data from child abuse cases (see Trocme & Bala, 2005) argue that false allegations by mothers occur very seldom. In fact, the draft Guide should express greater concern about fathers’ false allegations or denial of violent behavior than questioning the veracity of mothers’ allegations.

Judges Adequately Assessing Protective Resources in Another Country

There are two options presented on pages 28-29 in flowcharts in the draft Guide. There is an emphasis in both approaches on direct judicial communication and the expectation that judges hearing a Convention case will be able to adequately assess the protective resources for the child on return to his or her habitual residence.

Our research (Lindhorst & Edleson, 2012) as well as that of others (Reunite International, 2003) point to a lack of implementation of protective strategies once a child is returned to a country of habitual residence. Sadly, the Permanent Bureau and central authorities have not engaged in consistent follow-up after Convention decisions to gauge the consequences for children on either their return *or* retention. Even in a country like the United States, with a long history of legislation and social services on child protection and domestic violence, there is extensive research to show that these protections are inconsistently applied (see Stark, 2009).

The two options presented assume judges with large caseloads and few supporting resources will be able to easily locate judges in countries of habitual residence and then clearly communicate with them. In addition, this assumes that the judges in the country of habitual residence are well-informed about the protective services available in their own country. Our experience is that few judges engage in direct communication and even fewer have accurate information on the availability of protective resources in their own country much less another country. While the options look logical on a chart, the ability to carry out these steps is highly questionable and may

provide a false sense of protection for children. In the end, children will be the ones to suffer the consequences.

Outcomes of Cases following Convention Case Rulings

Finally, as stated two paragraphs above, neither the Permanent Bureau nor the central authorities are currently following Convention cases after Hague rulings have been made. There is scant evidence on the outcomes for children in the aftermath of a Convention ruling. As stated earlier, the little evidence available shows that protections for children are seldom, if ever, put in place on return of the child (Lindhorst & Edleson, 2012; Reunite International, 2003). There is a dire need for such information and, while it is beyond the scope of this draft Guide, it should at least suggest in the Guide that courts, central authorities and/or the Permanent Bureau undertake such follow-ups.

Again, we thank you for the opportunity to comment on this draft Guide and hope that it will, in the end, contribute to the Convention as a living document that continually accommodates changes in our scientific knowledge and case experiences.

Sincerely,

A handwritten signature in black ink that reads "Sudha Shetty". The signature is fluid and cursive, with the first name "Sudha" and last name "Shetty" clearly distinguishable.

Sudha Shetty, Esq.
Assistant Dean for International Partnerships
Director, Hague DV Project
Goldman School of Public Policy

A handwritten signature in blue ink that reads "Jeffrey Edleson". The signature is cursive and includes a long horizontal flourish at the end.

Jeffrey L. Edleson, Ph.D.
Dean and Harry & Riva Specht Chair in Publicly Supported Social Services
School of Social Welfare

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**Letter from Merle H. Weiner, Esq., Philip H. Knight Professor of Law, University of
Oregon School of Law.**

By email: CoffeeMS@state.gov

Mr. Michael Coffee
Attorney-Adviser
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September 2, 2017

Dear Mr. Coffee:

This letter supplements my comments at the August 8, 2017 meeting of the U.S. Department of State's Advisory Committee on Private International Law regarding the Guide to Good Practice on Article 13(1)(b) of the Hague Abduction Convention ("Guide").

It is my strong belief that the State Department should approach the Guide in the spirit with which it was created. That is, the Guide was written to address real problems with the Convention that have now been widely acknowledged.¹ Lady Brenda Hale recently described

¹ See, e.g., *Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: a Reflection Paper*, ¶¶ 1-2, Prel. Doc. No 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, at <https://tinyurl.com/y8moetlp> (noting the following concerns relating to, inter alia, the application of the Convention in cases involving domestic violence: "1.extent of or consistency in some judicial investigations into allegations of domestic violence; 2.extent to which some judicial actors are sensitive to and take allegations of domestic violence seriously; 3. extent of awareness of and sensitivity to domestic violence dynamics by lawyers representing abducting and / or left behind parents; 4. Insufficient recognition of the harmful effects of domestic or family violence on children, even when directed primarily or wholly at a parent; 5. lack of awareness of social science evidence of links between spousal and child abuse; 6. potential risks to the life or safety of the returning parent and/or the child following return orders; 7. appropriate use of protective measures ordered in conjunction with return orders, including the effectiveness or enforceability of voluntary undertakings or other conditions linked to return orders; 8. lack of adequate domestic violence legislation and social or governmental support for victims of domestic violence in the requesting or requested jurisdiction; and 9. lack of family, social and economic support (including legal aid / access to justice) for the returning parent in the requesting jurisdiction when she or he has been a victim of domestic violence.").

“one of the principal reasons why ... the Working Group was set up.” It was “to protect victims of domestic violence and abuse from the hard choice of returning to a place where they do not feel safe and losing their children.”² Consequently, the State Department should ensure that parts of the Guide that further this purpose are retained. Similarly, the State Department should suggest changes to the Guide that would better address the problems with which the Guide is concerned, including the problem of courts’ reluctance to grant the article 13(1)(b) defense in cases in which the taking parent (typically the primary caregiver) would experience abuse from the left-behind parent if the child were returned.

At the most general level, the State Department should be vigilant and ensure that the well-crafted parts of the Guide are maintained. There are, in fact, many parts of the Guide that would improve current practice. *See, e.g.*, Guide ¶ 221 (noting that the central authority should not share with the left-behind parent or foreign central authority the location of the child if sharing that information might put the safety of the child or taking parent at risk); Guide ¶ 137 n.148 (acknowledging that voluntary undertakings are not effective in cases of domestic violence); Guide ¶ 205 (recognizing that it “might be particularly advisable” for parties raising an article 13(1)(b) defense to have legal counsel); Guide ¶269 (observing that a court does not have to return the child to the left-behind parent, but can even return the child to a city other than the place where the left-behind parent lives); Guide ¶ 274 (acknowledging that “the exposure of the child to domestic violence between the child’s parents is increasingly recognized as harm to the child, as a body of social science research supports the conclusion that violence against a parent can also have a traumatic effect on children who witness it”); Guide ¶ 274 (recognizing that “a range of studies have found a correlation between instances of spousal abuse and child abuse”); Guide ¶ 277 (recognizing that domestic violence is coercive control beyond physical violence); Guide ¶ 277 (recognizing that post-separation violence exists); Annex 3 (providing general information about domestic violence). Apart from advocating for the continued inclusion of such provisions, the State Department should encourage the Permanent Bureau to move such helpful language from the footnotes (if it resides there) to text in order to give it more prominence. *See, e.g.*, Guide p. 44 n.199 (“[P]ast domestic or family violence may be highly probative on the issue of whether a risk of harm exists in the future.”).

The State Department should also recommend changes to cleanse the document of language that undercuts the Guide’s usefulness and may, in fact, make the Guide counterproductive. Quite a bit of biased, incorrect, and unnecessary language exists that might predispose judges to reject the article 13(1)(b) defense in the context of domestic violence when the defense would otherwise be warranted. *See, e.g.*, Guide, p. 2 n.11 (suggesting “anecdotally” that allegations of domestic violence may be on the increase as “a litigation or delay tactic,” but failing to note that false denials by perpetrators are common); Guide, annex 3 p. 9 ¶ 5 (same); Guide, p. 9 n.39 (suggesting that all children suffer detrimental effects from international child abduction, but failing to acknowledge that children who are removed from abusive households may experience no such effects and may benefit overall from removal); Guide ¶ 141 (recommending compassion toward the left-behind parent who should not be “overburden[ed]” by protective measures because “it is the taking parent that, by wrongfully removing or retaining the child, created an unlawful factual situation that the 1980 Convention seeks to address by restoring the status quo ante,” but failing to acknowledge that the left-behind parent is often the

² Brenda Hale, *Taking Flight—Domestic Violence and Child Abduction*, CURRNT LEGAL PROBLEMS, Aug. 13, 2017, at <https://doi.org/10.1093/clp/cux001>.

wrongdoer when the article 13(1)(b) defense is established); Guide ¶ 210 (suggesting that the left-behind parent should not be required to appear in proceedings “in a forum that the taking parent has unilaterally chosen,” but failing to recognize that the left-behind parent’s domestic violence may have necessitated the taking parent’s flight). The State Department should also strive to eliminate language that would limit other avenues of relief for domestic violence victims (*see, e.g.*, footnote 56, that suggests that article 20 should not be interpreted more widely than article 13(1)(b), although this is an unresolved substantive legal issue that goes beyond the Guide’s scope).

Yet even larger problems tarnish the Guide’s potential to be a useful document to help resolve cases involving domestic violence survivors who fled transnationally for safety with their children. The State Department should work with the Permanent Bureau to amend the Guide to eliminate these problems. This letter now addresses several of the biggest problems with the Guide: its treatment of protective measures; its definition of harm; its emphasis on expedition over an adequate hearing; its discussion of judicial communication; and its omissions. These provisions are not the only aspects of the Guide that might harm domestic violence victims and their children (as suggested by the thoughtful letters of Jeff Edleson and Sudha Shetty, Lynn Hecht Schfran, Paula Lucas, and Pam Brown and Joan Meier). However, these provisions have the potential to undermine the important gains domestic violence victims have made in courts in the United States while litigating the article 13(1)(b) defense. Simply, parts of the Guide are more restrictive than case law in the United States and will impose additional barriers for domestic violence victims seeking to use the article 13(1)(b) defense.

1. Protective Measures

The Guide promotes an approach to the adjudication of the article 13(1)(b) exception that is popular in Europe, but is at odds with U.S. law in some places and is *not* the best practice. Specifically, the Guide directs judges to decide whether there are adequate and effective measures of protection available in the foreign country so that a child can be returned to his or her habitual residence (and the accompanying parent can return too). The Guide does this explicitly at pages 25-29.

While the Guide concedes that not all countries follow this approach (*see, e.g.*, Guide ¶ 107 (“these approaches should not be deemed universal, and they may not apply to every legal system”)), the Guide nonetheless presumes uniformity and the propriety of this approach when it describes the law. *See, e.g.*, Guide ¶ 47 (“If grave risk has been established under Article 13(1)(b) *and there are no adequate measures of protection available*, a judge may decide to refuse the return of a child. This provision is the result of one of the delicate compromises reached by the drafters of the Convention.”); Guide ¶ 53 (“In a situation where there is evidence of a serious risk of harm to the taking parent upon his/her return with the child to the State of habitual residence, *which cannot be adequately addressed by protective measures in that State*, and which, if it occurred, would expose the child to a grave risk in accordance with Article 13(1)(b), the grave risk exception may be established.”); Guide ¶ 171 (“The issue that must be resolved is whether the court has sufficient information and/or evidence to determine whether the exception has been established (or if the grave risk were to be established based on allegations; see the two approaches described in Section 4, above), *and, if so, whether appropriate protective measures can be put into place* that would allow the safe return of the child (and accompanying parent, where relevant).”); Guide ¶ 172 (“*Good practices for courts*, if appropriate in the individual case and permitted under internal procedures and practices, *include* the following:...*Consider the availability of adequate and effective protective measures* in the child’s State of habitual residence as this may lead to a resolution of the case without a need to

enter into an extensive investigation and examination of the asserted facts.”).

The Guide heightens its emphasis on protective measures by the elaborate diagrams and by its suggestion that only two approaches to protective measures exist. It says, “In relation to the examination of the availability of adequate and effective measures of protection, mention can be made of two different approaches.” Guide ¶ 56. Of course, a third approach also exists: some judges deliberately refuse to consider protective measures. The reasons for this third approach, and its benefits, are nowhere described in the Guide.

To be clear, disregarding this alternative ignores an approach taken by many U.S. courts. While some courts in the U.S. consider protective measures, *see, e.g.* *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999); *Blondin v. Dubois*, 238 F.3d 153, 163 (2d Cir. 2001), this approach is not universal. For example, in *Baran v. Beaty*, the Eleventh Circuit said,

Not all courts, however, have accepted the Sixth Circuit’s interpretation of the grave risk analysis [including that there can be “a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”]. Relying on the plain language of Article 13(b), *many courts* hold when a respondent proves returning a child would expose him to a grave risk of physical or psychological harm, the reviewing court has discretion to deny the petition for return outright. That position is consistent with the Convention’s official commentary and with directives from the United States State Department.

Baran v. Beaty, 526 F.3d 1340, 1347 (11th Cir. 2008) (emphasis added).³ *See also, e.g.*, *Danaipour v. McLarey*, 386 F.3d 289, 303-04 (1st Cir. 2004) (“The district court[‘s] ...finding of the existence of sexual abuse and that the return of the children to Sweden would result in a grave risk of psychological harm was adequate to satisfy the Article 13(1)(b) exception, and no further inquiry into remedies available to the Swedish courts was required.”); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, (8th Cir. 1995) (finding the defense was not established, but rejecting that Article 13(1)(b) applies only if the Mexican government and courts of cannot protect the child); *Wigley v. Hares*, 82 So. 3d 932 (Fla. Dist. Ct. App. 2011) (“We adopt the approach of the Seventh and Eleventh Circuits and conclude that the Convention does not place a burden on the mother to prove that St. Kitts would not, or could not, protect her child.”).⁴

³ The Eleventh Circuit itself rejected the approach set forth in Approach 1, although it acknowledged that a court could follow the approach set forth in Approach 2. *See Baran v. Beaty*, 526 F.3d at 1348 n.2.

⁴ Some courts in the United States have also acknowledged that such an inquiry isn’t necessary in particular factual situations, such as when the child’s emotional state would make return harmful regardless of protective measures. *See, e.g.*, *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544, 557 (E.D. Pa. 2010) (“Similar to *Blondin*, in light of the sole, unimpeached and uncontroverted testimony of Dr. Davison that [the child’s] return to Cyprus would trigger post-traumatic stress disorder, there is no need for the Court to consider alternative living arrangements or reach out to the Cyprus authorities for their input.”); *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299 (JG), 2005 WL 67094, *11-12 (E.D.N.Y. 2005) (finding no ameliorative measures could negate children’s grave risk from PTSD and other psychological

Courts in the United States take this third approach in part because the Convention does not make protective measures part of the article 13(1)(b) analysis. The Seventh Circuit, for example, said, “The Convention says nothing about the adequacy of the laws of the country to which the return of the child is sought—and for good reason, for even perfectly adequate laws do not ensure a child's safety.” *Khan v. Fatima*, 680 F.3d 781 (7th Cir. 2012). *See also* *Noergaard v. Noergaard*, 244 Cal. App. 4th 76, 88 (Cal. Ct. App. 2015) (same). The Eleventh Circuit noted that the Perez-Vera report makes no mention of protective measures either. *See Baran v. Beaty*, 526 F.3d 1347-18 (“The commentary says nothing about a reviewing court’s duty to assess the home country’s ability to protect a child from harm.”). The same court noted that the State Department’s pronouncements at the time the U.S. became a party to the Convention also do not mention protective measures. *Id.* at 1347 (citing Hague Int’l Child Abduction Convention: Text and Legal Analysis, 51 Fed.Reg. 10,494, 10,510 (Mar. 26, 1986)).

Courts in the United States have recognized that relying upon protective measures to defeat an article 13(b)(1) defense is inconsistent with the Convention. The approach undermines the Convention’s hierarchy of values. Because the assessment of protective measures is fraught with peril and because a court can never assure the safety of the accompanying parent and child (as described below), the approach undermines the reason for the article 13(b)(1) exception: the Convention places a “higher premium on children's safety than on their return.” *See Baran v. Beaty*, 526 F.3d at 1348. The Guide emphasizes expedition, deterring abduction, and trusting the habitual residence, but the Convention’s drafters rejected the elevation of these same objectives above a particular child’s interest in physical and psychological safety and avoiding an intolerable situation. *See Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007). Judge Posner did an excellent job explaining that the Guide’s is inconsistent with the Convention:

[T]o define the issue not as whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregards the language of the Convention and its implementing statute; for they say nothing about the laws in the petitioning parent's country. The omission to mention them does not seem to have been an accident—the kind of slip in draftsmanship that courts sometimes correct in the exercise of their interpretive authority. If handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some nonnegligible probability injure the child, the child should not be handed over, however severely the law of the parent's country might punish such behavior.

Van De Sande v. Van De Sande, 431 F.3d 567, 571 (7th Cir. 2005). Simply, no child should ever be used instrumentally to achieve broader social objectives like deterring objection.

While the Convention does give judges discretion to return a child even when the grave risk defense is made out, this discretion was always intended to be exercised sparingly, not in the regular course as the Guide advocates. In fact, that is how courts historically treated this residual discretion. *Beaumont and McEleavy* stated: “[I]n relation to Article 13(1)(b) the discretion has been relegated to a position of nominal importance and in many instances has been ignored

effects of the domestic violence); *Blondin v. Dubois*, 238 F.3d 153, 168 (2d Cir. 2001) (*Blondin IV*). The Guide does not mention this commonly recognized exception.

entirely.” They explain why: “The assumption must be that, given the rigorous test imposed in interpreting what constitutes a grave risk, a positive result will indicate such an overwhelming possibility of serious harm that a judge would find it very difficult, if not impossible, to make a return order.”⁵ That result is as it should be; relying on protective measures puts the child’s well being at risk in a way that is unnecessary.

The Convention’s solution of non-return is better than the approaches proposed by the Guide. As already mentioned in passing, the judicial inquiry into protective measures is fraught with peril. It is impossible for a judge to know whether protective measures will, in fact, be adequate and effective. As the Eleventh Circuit said: “To require a respondent to adduce evidence regarding the condition of the legal and social service systems in a country she has fled creates difficult problems of proof....” *See Baran v. Beaty*, 526 F.3d at 1348. It is extremely difficult to prove that existing protections won’t in fact work.

The sources of information about protective measures will compound judges’ difficulty making an accurate assessment. Institutional pressures will predictably cause judges to overestimate the safety that will exist upon return. Relevant information may come from the central authority or a judge of the habitual residence, but these entities will rarely, if ever, confess that their country has inadequate laws, processes, and protections for domestic violence victims and children. To do so would reduce the number of children returned to their jurisdiction and countries care greatly about the return rate. For example, in the United States, Congress monitors the performance of the State Department’s Office of Children’s Issues and equates the return of children to the United States with that office’s success. Moreover, for a central authority or a judge to admit that a country can’t protect a victim of domestic violence is akin to admitting a violation of public international law, as States have duties to protect victims and children of violence (as the Guide, Annex III §§ 30-35, points out). This description of institutional dynamics is not based on conjecture. As the EU acknowledged in connection with Brussels IIa: “It will generally be difficult for the judge to assess the factual circumstances in the Member State of origin. The assistance of the central authorities of the Member State of origin will be vital to assess whether or not protective measures have been taken in that country and whether they will adequately secure the protection of the child upon his or her return.” *See the Practice Guide for the Application of the Brussels IIa Regulation*, § 4.3.3, at <http://ec.europa.eu/justice/civil>.

Not only do institutional dynamics give the entities in the child’s habitual residence reason to minimize the uncertainties and problems with protective measures, but institutional dynamics also give judges adjudicating petitions reasons to accept without question the information provided. After all, the entire Convention structure is built on trust between treaty partners. It would contravene the ethos undergirding the Convention for a judge to distrust the assurances given by representatives from another country.⁶ As a practical matter, the accuracy of

⁵ PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 155 (1999).

⁶ Anecdotally, I have heard that the rate of return for successful article 13 (1)(b) cases pursuant to Brussels IIa, Council Regulation (EC) No 2201/2003 of 27 Nov. 2003, is very high, if not virtually universal. Existing empirical work does not allow one to draw a conclusion one way or the other, however, about whether the article 13(1)(b) defense allows children to remain in the abducted-to state when Brussels IIa applies. *See generally* Paul Beaumont, Lara Walker, & Jayne Holliday, *Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)-(8)*

the information provided will not be probed because the Guide does not recommend that foreign judges or foreign central authorities become fact witnesses subject to cross examination by the respondent (assuming the respondent even has a lawyer to engage in this task). The adjudicator also faces pressure to accept at face value what a foreign judge says because the Hague judicial network emphasizes collegiality and judges increasingly have, or anticipate, repeat interactions with each other (as States continue to concentrate jurisdiction).

Moreover, even assuming that judges obtain an accurate description of available protective measures and an accurate assessment of their general effectiveness, it is impossible to predict their adequacy and effectiveness in a particular case. No judge is clairvoyant; no one can know how those measures will actually work. Judge Posner noted, “There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations.” *Van De Sande*, 431 F.3d at 570-571. It is not just the formal institutions and their human actors that create unpredictability, but so does the batterer. While judges sometimes acknowledge the inadequacy of protective measures and deny return,⁷ other judges, unfortunately, have miscalculated the risks and made mistakes. That must be what happened when the left-behind parent killed Cassandra Hasanovic upon her return to England. She had a court-ordered non-molestation order. She was going to shelter. Yet the police refused to escort her to shelter and she was killed.⁸ Research by Edleson and Lindhorst relayed the stories of seven of twelve women whose children were returned pursuant to the Hague Convention and who continued to experience physical harm. They described children who also were subject to physical abuse upon return.⁹ The judges returning the children undoubtedly did not imagine these results, including one batterer’s success in tracking down and finding the mother at a domestic violence shelter.¹⁰ Similarly, judges probably never imagined that the undertakings they extracted to keep survivors’ safe would not work, but those assurances did not. *SEE REUNITE, THE OUTCOMES FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION* 31 (2003), at <https://tinyurl.com/y9nyuvzv>. *See also* Edleson et al. at 256 (quoting attorney who said, “These undertakings – that are given – are flouted all the time...”).¹¹

Brussels IIa proceedings across the EU, 12 J. of Priv. Int’l L., 211 (2016) (reporting that out of 63 Brussels IIa proceedings, 40 non-returns were based on article 13(1)(b) in whole or in part; overall, courts issued Article 42 certificates requiring the return of the child in 41% of the non-return cases, but the percentage of those cases that were decided on article 13(1)(b) grounds is unclear).

⁷ *See, e.g., Walsh v. Walsh*, 221 F.3d 204, 220-221 (1st Cir. 2000) (reversing the decision to return the children to Ireland with undertakings because the petitioner repeatedly violated prior court orders); *Simcox v. Simcox*, No. 1:07CV96, 2008 WL 2924094 *4 (N.D. Ohio July 24, 2008) (finding, on remand, that protective measures could not “adequately protect the children”).

⁸ *See* THE DAILY MIRROR, Feb. 17, 2014, at <http://www.mirror.co.uk/news/uk-news/cassandra-hasanovic-inquest-mum-stabbed-3155912>.

⁹ Jeffrey L. Edleson et al, *Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases* 180-81 (2010).

¹⁰ *Id.* at 182-83.

¹¹ It is not hard to find research about treaty partners that discusses the inadequacy and ineffectiveness of protective measures for often a large percentage of domestic violence victims.

These mistakes are evidence of the inability of judges to predict accurately the adequacy and effectiveness of protective measures. These examples are especially important because there is no empirical evidence that demonstrates that returning children with protective measures is as safe as allowing the custody adjudication to proceed in the requested state (or, at times, in the requesting state but with participation by the taking parent and child from abroad). In short, no empirical evidence demonstrates that children who were returned despite a successful article 13(1)(b) exception, or their protective parents, are in fact safe. Rather the few outcome studies indicate the opposite. That is not surprising since the parents who are litigating a Hague child abduction matter are a unique subset of the general population, characterized by high conflict. Moreover, no empirical research has focused on the U.S.-Mexico cases, often involving low-income parents, to see how protective measures work in that context.

To make matters even worse, presumably almost all children will be returned if foster care is an option for the judge. While foster care won't necessarily protect the child who would suffer retraumatization from returning to the habitual residence regardless of the risks to physical safety, foster care would be an option for many children outside this category and for many children whose protective parents cannot prove retraumatization because they lack an expert. There is something terribly wrong with the Convention if children end up in foster care when they have loving caregivers who, in fact, have already protected them by removing them from the grave risks that exist in the habitual residence. This avenue of "protection" would eviscerate the article 13(1)(b) exception altogether, totally in contravention to what the drafters would have wanted. The Guide would seem to permit it,¹² but instead the Guide should expressly pronounce

See, e.g., Cathy Humphreys and Ravi K. Thiara, *Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence*, 25 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 196, 204 (2003) (reporting results of study in the UK where 25% of victims with civil protective orders said that the orders were of "no help; the abuse continued and police or the courts were unhelpful in acting upon breaches."). Of course, the same sort of information is available in the United States, where the non-responsiveness of the criminal justice system is well documented. *See* Sherry Hamby, David Finkelhor & Heather Turner, *Intervention Following Family Violence: Best Practices and Helpseeking Obstacles in a Nationally Representative Sample of Families with Children*, Psych. of Violence 1, 8 (2014) (noting, inter alia, that police did not arrest the perpetrator in 53 percent of the incidents that were reported to them that involved an injury, nor in the 42 percent of the cases that involved an injury requiring medical care). The inability of protective orders to afford safety for many victims is also well documented. *See, e.g.,* Christopher T. Benitez, Dale E. McNiel and Renée L. Binder, *Do Protection Orders Protect*, 38 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW ONLINE 376 (September 2010) ("available research supports the conclusion that there is a substantial chance that a protection order will be violated"). The State Department need only recall the tragedy of Jessica Gonzales Lenahan to appreciate the risks involved. *See, e.g.,* *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

¹² The Guide does not explicitly mention foster care, but it does mention the notification of "appropriate child protection bodies" "so they may act to protect the welfare of children upon return when their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked." (Guide ¶ 257).

such a resolution as an “intolerable situation” for the child.¹³

The Guide does not acknowledge the limitations of the protective measures approach. As such, the Guide will contribute to the additional harm parents and children will suffer from institutional betrayal, as judges assure victims that adequate and effective protective measures exist when no such guarantee is possible. *See generally* Jennifer Freyd and Carly Parnitzke Smith, *Institutional Betrayal*, 69 AM. PSY. 575, 578 (2014) (“Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution.”); Carly P. Smith et al., *The Psychology of Judicial Betrayal*, 19 ROGER WILLIAMS UNIV. L. REV. 451 (2014) (describing the effects of such betrayal, including “poorer physical health, anxiety, depression, dissociation, borderline personality disorder characteristics, shame, hallucinations, self-harm, and revictimization,” and PTSD).

Finally, the Guide will heighten the problems that already exist with courts’ consideration of protective measures, especially in the U.S., where the burden of proof for article 13(1)(b) is clear and convincing evidence. The Guide suggests that Alternative 1 is just as viable an approach as Alternative 2, even though Alternative 1 would likely lead a judge to place the burden of proof on the taking parent to prove that protective measures cannot work. While the Guide does not expressly allocate the burden of proof to the taking parent, the Guide’s language does not rule out this possibility. The Guide only recommends that a court, “In general, ensure that the burden of proving whether adequate and effective measures of protection are available is not placed solely on the left-behind parent,” Guide ¶ 36. That language does *not* prohibit a court from placing the burden solely on the taking parent. In fact, when the adequacy of protective measures is assessed as part of the grave risk analysis, not merely as part of an exercise of discretion after the grave risk exception is made out, *see* Guide ¶ 115-16,¹⁴ then the court is *likely* to allocate to the respondent the burden of proving protection measures cannot work. Language in the Guide reinforces the possibility of this outcome. For example, the Guide says, “Even if the court gathers information or evidence *ex officio*, ...the court still needs to be satisfied that the burden of proof to establish the exception has been met by the individual or body objecting to return.” (Guide ¶ 165). Unfortunately, at least one court in the U.S. has already allocated to the taking parent the burden of disproving the adequacy of protective measures,¹⁵ and the Guide puts

¹³ Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases*, 58 AM U. L. REV. 335, 349-50 (2008).

¹⁴ Approach 1 also is dangerous because the court is more likely to misevaluate the adequacy of protective measures if it has not heard evidence about the abuse. Evidence about the nature and type of abuse may not be evident in the pleadings.

¹⁵ *See, e.g., In re Application of Adan*, 437 F.3d 381, 395 (3rd Cir. 2006) (emphasis added) (“There is little question that, under this standard, the abuse, sexual and otherwise, that Avans contends Adan has inflicted on Arianna would, if true, qualify as an intolerable situation and grave harm for purposes of Article 13. *The question, however, becomes whether Avans produced clear and convincing evidence of these allegations, and whether she established, as she must, that “ ‘the court[s] in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.’ ”*). Upon remand, the child was ordered returned. *See In re Application of Adan v. Avans*, No. 04-5155, U.S. D. Ct. 2007 WL 1850910 (D.N.J. June 25, 2007). The order of return was reversed summarily by the Court of Appeals for the Third Circuit with a ruling from the bench. *See In re Application of Adan*, 544 F.3d 542, 542 (3rd Cir. 2007). Anecdotal reports, as well as news reports, suggest that the Third

its imprimatur on this approach. While a footnote in the Guide acknowledges that experts have criticized the unfairness of this arrangement,¹⁶ the Guide never endorses the experts' criticism.

As the State Department formulates its position on protective measures, it should remember its position on "undertakings." The State Department has advised that "if the requested . . . court is presented with unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm, . . . then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context could embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(1)(b) exception."¹⁷ Similarly, a court's inquiry into protective measures and its need for extensive arrangements to protect the child's and the accompanying parent's safety (assuming such safety could ever be assured) would embroil courts, and central authorities, in the merits of the underlying custody issues, would dilute the force of the article 13(1)(b) exception, would import into the Convention a test that is totally absent.¹⁸

For all of the above reasons, the State Department should propose that the Guide take a different position on protective measures. At a minimum, the State Department should have the Permanent Bureau eliminate language in the Guide that endorses the protective measures approach and include language in the Guide about the limitations of the protective measures approach.

Circuit was disgusted with the trial court's ruling in light of the evidence at trial. *See* Bob Braun, *Court Spares Girl, 8, From Deportation*, Newark Stare Ledger, Sept. 23, 2008, at http://blog.nj.com/njv_bob_braun/2008/09/court_spares_girl_8_from_depor.html (last visited Aug. 31, 2017).

¹⁶ Guide p. 36 n.155 ("Some experts do suggest that, in certain circumstances, the burden of proving the adequacy and effectiveness of the requesting State's mechanisms for protecting the child should fall to the applicant requesting return, as it is difficult to prove the negative.") I am one of the experts. *See* Merle H. Weiner *International Child Abduction and the Escape From Domestic Violence* 69 FORDHAM L. REV. 593, 660 (2000) ("it is very difficult to prove a negative--the future noncompliance of a batterer with undertakings or inaction by governmental authorities with their laws-on-the-books."); 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 International Child Abduction*, 2008 UTAH L. REV. 221, 287 ("*Simcox* illustrates how hard it is for a respondent to prove a negative (that the state of habitual residence will not protect the children), especially by clear and convincing evidence. The respondent will have a difficult time making out the defense so long as the system might offer some protection.") (citing *Simcox v. Simcox*, 499 F. Supp. 2d 946, 957 (N.D. Ohio 2007)).

¹⁷ This position is quoted with approval in a number of cases, including *Danaipour v. McLarey*, 286 F.3d 1, 25 (1st Cir. 2002).

¹⁸ This is to be distinguished from the obligation of Central Authorities under article 7(b) of the Convention to take appropriate provisional measures to stop further harm to a child.

2. The Meaning of Harm

The Guide sets forth the three types of harm that article 13(1)(b) recognizes (physical harm, psychological harm, and an intolerable situation), but then adds the following quite remarkable statement:

While the three categories constitute distinct exceptions, they are inter-linked in that the term “otherwise” indicates that the physical or psychological harm is harm to an extent that also amounts to an intolerable situation. The term ‘intolerable’ indicates that the exception requires that the potential physical or psychological harm to the child or the potential situation, in which the child would be placed upon return, be of such a degree that the child cannot reasonably be expected to tolerate it. (Guide ¶¶ 60, 61)

This language misstates the level to which the physical or psychological harm must rise for a successful article 13(1)(b) defense. First, none of the cases cited for the proposition are U.S. cases. Nonetheless, a closer reading of them suggests that the judges were only saying the harm must be “substantial, and not trivial.” *See, e.g.,* Thomas v. Thomson [1994] 3 SCR 551, 6 RFL (4th) 290 (Can.) (noting “the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another”). This message is much different than saying the harm must be intolerable.

Most revealing is the case *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] A.C. 133 ¶ 34 (U.K.), a case cited by the Guide for the proposition that the harm must be intolerable. Yet, in that case, “intolerable” meant that the child ought not be expected to tolerate the harm. The court made clear that any physical or psychological abuse or neglect is intolerable. It also made clear that it is intolerable for a child to observe the physical or psychological abuse of the other parent. Here is the relevant language. It is worth sharing the passage in its entirety:

[T]he words “physical or psychological harm” are not qualified. However, they do gain colour from the alternative “or *otherwise*” placed “in an intolerable situation” (emphasis supplied). As was said in *Re D*, at para 52, “‘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’”. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent.

Second, requiring that the physical or psychological harm be intolerable is again at odds with U.S. law in many places. While one federal circuit agrees with this interpretation (the defense is only established if “[t]he child will face immediate and substantial risk of an

intolerable situation,” *see* Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995)), no other courts have picked up the Eighth Circuit’s standard. Rather, courts in the United States recognize that there are two separate inquiries involved in the “grave risk of harm” analysis: is there 1) a grave risk 2) of a serious enough harm. Grave does not modify harm, but risk. *See* De Aguiar Dias v. De Souza, 212 F. Supp. 3d 259 (D. Mass. 2016) (“The risk must be ‘more than serious,’ though it need not be ‘immediate.’ The harm involved ‘must be a great deal more than minimal.’”); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000) (“Not any harm will do nor may the level of risk of harm be low. The risk must be “grave” [T]he harm must be “something greater than would normally be expected on taking a child away from one parent and passing him to another”; otherwise, the goals of the Convention could be easily circumvented.”).

Applying this analysis, courts in the United States have made clear that injury to the child is sufficient for the article 13(1)(b) defense. For example, the U.S. Court of Appeals for the Second Circuit aptly described the spectrum of potential harm to the child as follows.

[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 13(b); the latter do.

Blondin v. Dubois, 238 F.3d 153, 162 (2d Cir. 2001). *See also* Van De Sande, 431 F.3d at 571 (“If handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some nonnegligible probability injure the child, the child should not be handed over....”).¹⁹

The travaux préparatoires indicates that the drafters did not intend the word “otherwise” to suggest that the physical or psychological harm must be intolerable. United Kingdom delegate Jones noted that “it 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’.” *See* Permanent Bureau, Fourteenth Session of the Hague Conference on Private International Law Actes et documents, Tome III, Enlèvement d’enfants, Child Abduction 302 (1980). That language suggests that the drafters found physical or psychological harm to be an intolerable situation, and that the exception needed to be expanded to other situations similarly intolerable to the child.

A requirement that physical or psychological harm be intolerable is obviously absurd. If the article 13(1)(b) exception requires that the physical or psychological harm be intolerable, then children must be subject to harm worse than torture, as commonly understood, to be eligible for the exception to return. Torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26,

¹⁹ As the Supreme Court of the United Kingdom has recognized, “Although ‘grave’ characterizes the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as “grave” while a higher level of risk might be required for other less serious forms of harm.” *Re E (Children) (Abduction: Custody Appeal)* [2012] A.C. at ¶ 33.

1987). Jay Bybee's now discredited memo to Alberto R. Gonzales proposed a narrower definition of torture: an act that "inflict[ed] pain that is difficult to endure." See Memorandum from the Justice Dep't Office of Legal Counsel on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzalez, Counsel to the President 1 (Aug. 1, 2002), *available at* <http://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>. What the Guide proposes for the article 13(1)(b) exception is akin to Bybee's narrow definition of torture.

The drafters of the Hague Convention did not want article 13(1)(b) limited only to situations in which a child would experience a harm greater than the internationally understood meaning of torture. Rather the drafters acknowledged that the defense was meant to respect "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Elisa Pérez-Vera, *Explanatory Report*, in Permanent Bureau, Fourteenth Session of the Hague Conference on Private International Law Actes et documents, Tome III, Enlèvement d'enfants, Child abduction, 426, 433 ¶29 (1980).

Ironically, the Guide itself recognizes that children should be protected from *any* physical or psychological harm. For example, it states, "In cases where it is established that the taking parent, during or after the abduction, is exposing the child to physical or psychological harm, the requested State should take urgent protective measures, such as the removal of the child from the taking parent..." Guide ¶ 135. The Guide also discourages mediation if it would cause any level of harm. See Guide ¶ 196 ("It is of the essence that mediation should not put the safety or well-being of any person at risk..."). While these passages are not addressing the meaning of article 13(1)(b), it seems odd for the Guide to recognize that people deserve protection from physical and psychological harm generally, but then to erect a very high barrier to what harm counts in the context of article 13(1)(b). Of course, from the perspective of a child, harm is harm.

Perhaps, most problematically, the Guide suggests that even if children are exposed to harm that is akin to torture, and even if there are NOT protective measures that could protect the children, courts only "need to consider refusing return," not that courts should not return the children. See Guide ¶ 142. See also Guide ¶ 145 (noting that protective measures directed toward an accompanying parent may be inadequate or ineffective to prevent a grave risk of harm to a child, so the court "will have to consider non-return"). A Guide to Good Practice should not shy away from telling courts to deny return in such a situation.

3 Emphasis on Expedition Over an Adequate Hearing

When discussing the duty to act expeditiously, the Guide uses the term "undue delay" to condemn some fact finding by courts. See Guide ¶ 97. See also Guide p. 37 ("Ensure that consideration of adequate and effective measures of protection in an Article 13(1)(b) case does not cause undue delay in the consideration of the case in the return proceedings."). The term "undue delay" is inappropriate. Fact finding only causes an "undue delay" when a court permits duplicative evidence, irrelevant evidence, and the like. When a court is taking evidence to satisfy due process or to gather information related to the merits of the defense, the time it takes is not "undue delay."

Courts in the United States adjudicating Hague claims have emphasized that "One of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue." See, e.g., *Noergaard v. Noergaard*, 244 Cal. App. 4th 76, 87 (Cal. Ct. App. 2015) (noting "Due process required the trial court to decide the material issue of father's alleged death threats and to afford mother the opportunity to offer relevant and competent evidence on that issue."). The

Guide's description of "undue delay" is inconsistent with U.S. case law.

Moreover, it is inconsistent with prior conclusions reached by States at Special Commission meetings. For instance, the last Special Commission concluded that promptness *and* adequacy were important; adequacy was not to be sacrificed for speed. It said: "Where Article 13(1) *b* of the 1980 Convention is raised concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be *adequately and promptly* examined to the extent required for the purposes of this exception." See *Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, (1=10 June, 2011), Annex I ¶ 36 (emphasis added). The Guide should capture this point better. Dropping the phrase "undue delay," as it is presently used in the Guide, would help.

4. Judicial Communication

The description of judicial communication on page 31 (¶ 128) raises at least two concerns. First, the communication would often be case specific and make the foreign judge a fact witness. For example, the Guide calls for the judge to "verify the adequacy of statements made or information provided by the taking parent to support his/her claim..., such as statements about the situation of the child in the State of habitual residence...." This provision raises many potential problems. I do not repeat them here as they have already been conveyed in connection with the topic of judicial communication more generally and the Hague judicial network.

Second, the Guide suggests items for which judicial communication would be helpful, and the matters identified would generally buttress the petitioner's case and harm the respondent. For instance, the judge is to "verify...statements made ...by the taking parent to support his/her claim," but the Guide does not recommend that the judge "verify ...statements made ...by the left-behind parent to support his/her response to the exception." In addition, the liaison judge is supposed to provide "information about laws, procedures and/or services available in the State of habitual residence," but need not also provide information about the limitations of those laws, procedures, and/or services. For example, if the judge isn't required to mention the police's failure to enforce the laws, pro se litigants difficulty accessing legal aid, or the short supply of shelter beds when such facts exist, then the fact-finding process will be even more inaccurate and lop-sided than it would otherwise be as a result the forces already described in point one.

5. Omissions

Finally, the State Department should ask the drafters to add several important, but missing, pieces of information to the Guide. First, in the discussion of the child's voice, the list of good practices omits mentioning that the interviewer needs knowledge of domestic violence and child abuse. It says, "Ensure that the child is interviewed by individuals with adequate training and expertise in the hearing of children, be it as a judge, independent expert or other person..., if possible, with knowledge and a sound understanding of the 1980 Convention, the scope of return proceedings and of the grave risk exception." The list should be expanded.

Second, paragraph 277 talks about post-separation violence. It should not say, without qualification, that such violence occurs "directly after" departure. (It says, "Note that directly after leaving a seriously abusive situation, the risk of serious or lethal injuries to the taking parent by the abusive parent increases...."). Such violence can occur later than that, especially if

the victim is not physically proximate until some time later. Also, the violence can be directed at the children. Such was the situation when Danyela and Deyan Perisic were shot, and Deyan killed, by their left-behind parent after they were returned. See CBCNews, Dec., 15, 2010, <https://tinyurl.com/yctr8q72>. See generally Cathy Humphreys and Ravi K. Thiara, *Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence*, 25 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 196, 198 (2003) (noting “many women have suffered violence, abuse and stalking years after they considered themselves to have separated”); id. at 199 (noting that a safe, secret address was the explanation for 25% of women in study whose post-separation abuse ceased within 6-12 months, and that 36% of sample reported continuing abuse).

Undoubtedly other items are missing too. I urge you to have experts from the Office of Violence Against Women look over the Guide and recommend other additions and corrections.

Conclusion

Parts of the Guide to Good Practice should be changed if the Guide is not to undermine the advances made by domestic violence victims and their children in courts in the United States.

Very truly yours,



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