Cultural Considerations and Capabilities of the Habitual State: American Jurisprudence Fails to Protect Victims in International Child Abduction Cases

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ABSTRACT: The Hague Convention on the Civil Aspects of International Child Abduction aims to protect children from international abduction and establish uniform procedures to ensure prompt return to their habitual country. The Convention requires judges to weigh the divergent goals of protecting children and respecting state sovereignty when the taking-parent alleges grave risk to the child. This Note focuses on the difficulty American courts have when determining whether there is a sufficiently grave risk to a child, particularly when judges must consider cultural attributes of the habitual state. This Note advocates that American courts abandon application of ameliorative measures and consideration of protective abilities to better protect victims of abuse.

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INTRODUCTION

Mr. Saada, an Italian citizen, married Ms. Golan, an American citizen, in 2015.[1] The couple had a child quickly thereafter and resided together in Italy.[2] After attending a wedding in New York in 2018 with her son, Ms. Golan moved into a confidential domestic violence shelter instead of returning to Italy.[3] Mr. Saada accused Ms. Golan of kidnapping and commenced civil proceedings in Italy, including filing for custody.[4] Mr. Saada also brought proceedings in the U.S. District Court for the Eastern District of New York in hopes of getting his son to return to Italy.[5] During the trial in New York, however, Ms. Golan alleged "that Mr. Saada physically, psychologically, emotionally and verbally abused [her]."[6] Ms. Golan further alleged that Mr. Saada abused her while pregnant with her son and in front of him after he was born, and that Saada had harmed the child.[7]

After hearing from several witnesses, including experts that testified on the capabilities of the Italian police and social services to protect Ms. Golan if she were to return to Italy for custody proceedings,[8] the district court determined that a return to Italy posed a grave risk of harm to the child.[9] Nonetheless, the district court allowed them to return so long as Mr. Saada agreed to certain measures, including paying for Ms. Golan's travel and legal fees, pursuing dismissal of his charges against Ms. Golan, and attending therapy.[10] However, this proceeding was not the end of Ms. Golan and Mr. Saada's legal journey—the case would eventually reach the U.S. Supreme Court in 2022.

1. Saada v. Golan, No. 18-cv-5292, 2019 WL 1317868, at *1–2 (E.D.N.Y. Mar. 22, 2019).
2. *Id.* at *2.
3. *Id.* at *3.
4. *Id.* at *4.
5. *Id.* at *1.
6. *Id.* at *4.
7. *See id.* at *4–10.
8. *Id.* at *14.
9. *Id.* at *18.
10. *Id.* at *20.

The decision ended a circuit split by holding that district courts are not *mandated* to consider available remedial measures after finding that return to the habitual state presents a grave risk to the child but still have the option to do so.[11] On remand, the district court outlined the existing protective measures in Italy, including a protective order against Mr. Saada and Italian social services oversight.[12] The court then held that the protective abilities of the Italian judicial system were sufficient to protect both Ms. Golan and her child.[13]

Saada v. Golan illustrates a typical fact pattern in an international child abduction case. Such cases are governed by a multilateral treaty, the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). To bring the Convention into force, the United States enacted the International Child Abduction Remedies Act ("ICARA"), which reflects the purpose of the Convention. This Note discusses the shortcomings of ICARA and American jurisprudence in protecting victims of child abuse and domestic violence under a grave risk affirmative defense. This Note will first discuss the history of the Convention and analyze existing American jurisprudence. The Note then explores what happens when judges examine a habitual state's culture and abilities and how their analysis harms victims of abuse. Finally, the Note advocates for two straightforward solutions—American courts ought to abandon any cultural comparisons and receive specialized training to allow for improved treatment of victims in Convention cases.

I. THE HAGUE CONVENTION AND THE GRAVE RISK EXCEPTION

The Hague Convention on the Civil Aspects of International Child Abduction "is an international treaty that seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return."[14] The primary purposes of the Convention are "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "[t]o ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[15] More generally, the Convention is "designed to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international

11. *See generally* Golan v. Saada, 142 S. Ct. 1880 (2022) (holding that the Second Circuit's categorical requirement that lower courts consider ameliorative measures after finding a grave risk of harm is inconsistent with the purpose of the treaty and judges have the *discretion* to consider ameliorative measures, but are not required to).

12. Saada v. Golan, No. 18-cv-5292, 2022 WL 4115032, at *2–3 (E.D.N.Y. Aug. 31, 2022).

13. *Id.* at *9.

14. JEREMY D. MORLEY, THE HAGUE ABDUCTION CONVENTION: PRACTICAL ISSUES AND PROCEDURES FOR FAMILY LAWYERS 1 (3d ed. 2021).

15. Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

forum shopping," preventing any reward for international child abduction.[16] Convention parties have agreed that if a child is taken from one Convention nation to another, "in violation of the left-behind parent's custodial rights, [the child] shall be promptly returned."[17] The Convention's goal is that the habitual state determine the merits of an underlying custody claim rather than courts in the receiving country.[18] Therefore, a court in the receiving state only has jurisdiction to decide whether the child has been wrongfully removed or retained from their habitual residence and then return them if so—the receiving state cannot determine the merits of an underlying custody dispute.[19]

Prior to adoption of the Convention, international child abduction by the child's parent was a growing issue with no consistent solution.[20] The Convention was adopted in 1980 in response to a drastic increase in international abductions in the 1970s as international marriages became more common, and with it, international divorces, and countries had no legal framework to address custody issues across borders.[21] To become a member to the Convention, a state must sign the treaty and ratify it, or accede to it.[22] There are currently 103 contracting states to the Convention,[23] and it is considered one of the most successful multilateral treaties in private international law.[24]

Initially, Convention drafters assumed that "[t]he typical child abductor was a non-custodial father seeking a more advantageous venue for a custody challenge."[25] That arrangement was the case at the beginning.[26] However, this

16. Baxter v. Baxter, 423 F.3d 363, 367 (3d Cir. 2005) (holding that the Convention has a primary goal of returning the abducted child to their habitual state, leaving custody proceedings to the habitual state's government).

17. OFF. OF CHILD.'S ISSUES, U.S. DEP'T OF STATE, THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: LEGAL ANALYSIS 1 (1986), https://travel.state.gov/content/dam/childabduction/Legal_Analysis_of_the_Convention.pdf [https://perma.cc/UJ97-9V45].

18. Salguero v. Argueta, 256 F. Supp. 3d 630, 635 (E.D.N.C. 2017).

19. *Id.*

20. Peter J. Messitte, *Getting Tough on International Child Abduction*, 58 FAM. CT. REV. 195, 196 (2020).

21. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 602 (2000); *see also* Ericka A. Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. J. INT'L HUM. RTS., Spring 2004, at 4 ("[T]he 1960's and 1970's gave rise to marriages between people of different religious, ethnic, and cultural groups in unprecedented numbers.").

22. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, arts. 38, 43, 1343 U.N.T.S. at 104–05.

23. *Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 [https://perma.cc/LE6Q-F3AF].

24. *See* Rosalie Silberman Abella & Jocelyn Plant, *The Hague Convention and Transnational Custody Disputes*, 59 FAM. CT. REV. 350, 350 (2021).

25. Carolyn A. Kubitschek, *Failure of the Hague Abduction Convention to Address Domestic Violence and Its Consequences*, 9 J. COMPAR. L. 111, no. 1, 2014, at 118.

26. *Id.*

situation is no longer the typical case—since the early 1990s mothers represent the majority of abductors,[27] many of whom allege they are fleeing an abusive partner, "often from countries whose legal systems are unwilling or unable to protect women from domestic violence."[28] The Convention and ICARA are drafted to reflect this inaccurate assumption and require a stricter burden of proof for a grave risk finding.[29]

A. THE AMERICAN APPROACH TO INTERNATIONAL CHILD ABDUCTION

The United States brought the Convention into U.S. law through the ICARA in 1988.[30] The Convention provides a legal framework for international abduction cases and ICARA establishes procedures for filing Convention cases in American courts.[31] The Act grants concurrent original jurisdiction to both state courts and U.S. district courts,[32] and it establishes procedures for filing Convention cases.[33]

The abduction of American child Sean Goldman by his mother to Brazil in 2009 spurred additional congressional action after the story gained major media attention, supplementing ICARA's requirements.[34] In 2014, Congress passed the International Child Abduction Prevention and Return Act ("ICAPRA"), with the express purpose of ensuring improved compliance with the Convention, particularly through additional reporting requirements regarding where abducted children are taken to and from.[35] Notably, ICAPRA requires the Secretary of State to submit a yearly report, known as the Annual Report on International Child Abduction, which lists all countries in which there were one or more abduction cases; whether that country is party to the Convention; and whether it adheres to Convention protocols, other protocols, or no protocols at all with respect to child abduction.[36] According to the State Department's Annual Report on International Child Abduction of 2022, there were "a total of 679 active abduction cases involving 904 children" in

27. *Id.*

28. *Id.*

29. *See infra* notes 70–75 and accompanying text.

30. Messitte, *supra* note 20, at 196.

31. *International Parental Child Abduction: Laws and Regulations*, BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/laws.html# [https://perma.cc/76TF-M9KT].

32. International Child Abduction Remedies Act, 42 U.S.C. § 11603(a) (2018).

33. *Id.* § 11603.

34. Scott Stump & Ree Hines, *David and Sean Goldman Look Back on Infamous Abduction Ordeal 10 Years Later*, TODAY (Aug. 8, 2019, 9:42 AM), https://www.today.com/news/david-sean-goldman-look-back-infamous-abduction-ordeal-10-years-t160316 [https://perma.cc/Z9NV-LGSK].

35. MORLEY, *supra* note 14, at 289.

36. Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 § 101, 22 U.S.C § 9111 (2021).

2021.[37] "Of those 679 cases, 246 were opened in 2021."[38] There are some criticisms of ICAPRA, namely that it fails to address real issues that complicate the Convention, like issues of state sovereignty.[39]

Each Convention state must "designate a Central Authority to discharge the duties which are imposed by the Convention."[40] The Central Authority has several roles: it aids parties, their attorneys, and the courts; it devises protocols and effective procedures; and, more generally, educates the public and cooperates with law enforcement.[41] With an Executive Order, President Reagan designated the U.S. Department of State as the United States's Central Authority.[42]

"Most . . . Convention [claims] follow a [common] factual and procedural path."[43] "After a parent realizes that [their] child has been abducted to" another country, "[t]he left-behind parent [may] inform[] the Central Authority" in the child's habitual country, so long as their country is party to the Convention.[44] The habitual country's Central Authority will "initiate the process for the return of, or access to, the child" by gathering documents and materials.[45] The habitual country's Central Authority then forwards all information to the receiving country's Central Authority, where legal proceedings typically follow.[46] The receiving country's "Central Authority generally has the responsibility to help locate abducted children, . . . encourage amicable solutions, and . . . facilitate . . . safe return [where] appropriate."[47] A typical case for return consists of four elements: (1) the child's habitual residence; (2) wrongful removal or retention; (3) exercise of custody right; and (4) age of the child.[48]

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37. 2022 U.S. DEPT. OF STATE ANN. REP. ON INT'L CHILD ABDUCTION 1, https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2022%20ICAPRA%20Annual%20Report.pdf [https://perma.cc/74XZ-LKXJ].

38. *Id.*

39. MORLEY, *supra* note 14, at 289–90.

40. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, art. 6, 1343 U.N.T.S. at 99.

41. Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35, 37 (1994).

42. Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (Aug. 11, 1988), *reprinted in* 22 U.S.C. § 9006 (2018).

43. KILPATRICK TOWNSEND ATTORNEYS AT LAW, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 3 (2012), https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/Litigating%20International%20Child%20Abduction%20Cases%20under%20the%20Hague%20Abduction%20Convention%20(NCMEC).pdf [https://perma.cc/6E5R-5KKV].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Important Features of the Hague Abduction Convention – Why the Hague Convention Matters*, BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html# [https://perma.cc/9XAT-7N89].

48. *See id.*

The Convention does not define "habitual residence," which has led to different nations using different tests to determine whether a child has established habitual residence in one state or another.[49] The term is among the most litigated issues under the Convention.[50] Prior to the Supreme Court's decision in *Monasky v. Taglieri*, there was disagreement even among American courts, leading to three distinct approaches.[51] The *Monasky* decision ended this disagreement when the Court mandated lower courts consider "the totality of the circumstances specific to the case" when determining where a child has habitual residency.[52]

Removal or retention is wrongful when it is in breach of the habitual state's custody laws.[53] Rights of custody, as defined in Article 5(a) of the Convention, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[54] A petitioner "must establish that he or she had a 'right of custody' over the child under the law of the child's habitual residence."[55] "A parent does not necessarily need to present a custody order to prove that [their] custodial rights were violated. . . . [T]he Convention allows proof according to the laws of the child's habitual residence, often by showing proof of parenthood or marriage."[56] Finally, the Convention only applies to a child, and "shall cease to apply when the child attains the age of [sixteen] years."[57] Even if a case is commenced prior to the child's sixteenth birthday, "the case must terminate upon the child reaching the age of [sixteen]."[58]

If all four elements are met, a child must be returned to the country of

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49. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, 1343 U.N.T.S. at 98; *see also* Rhona Schuz, *Disparity and the Quest for Uniformity in Implementing the Hague Abduction Convention*, *in* THE 1980 HAGUE ABDUCTION CONVENTION: COMPARATIVE ASPECTS 1, 5–9 (Robert E. Rains ed., 2014) (discussing different models of habitual residence).

50. MORLEY, *supra* note 14, at 220.

51. *Id.* at 113–26. "[T]he Second Circuit and five other circuits applied a heavy presumption that a child's habitual residence should be determined by the shared intent of those entitled to fix the child's residence . . . at the latest time that their intent was shared." *Id.* at 113. The Sixth Circuit held that a child's habitual residence should be based only on the objective circumstances of the child. *Id.* at 120–21. Finally, the Third and Eighth Circuits used a blended approach, combining the other two American approaches. *Id.* at 123.

52. Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).

53. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, art. 3, 1343 U.N.T.S. at 98–99; *see also* Hannah Loo, Comment, *In the Child's Best Interests: Examining International Child Abduction, Adoption, and Asylum*, 17 CHI. J. INT'L L. 609, 617 (2017) (discussing the common elements of a Convention child abduction claim).

54. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, art. 5(a), 1343 U.N.T.S. at 99.

55. MORLEY, *supra* note 14, at 17.

56. *Important Features of the Hague Abduction Convention – Why the Hague Convention Matters*, *supra* note 47.

57. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, art. 4, 1343 U.N.T.S. at 99.

58. MORLEY, *supra* note 14, at 17.

habitual residence, unless one of five exceptions, outlined in Articles 12, 13, and 20 of the Convention, applies.[59] The taking-parent may raise any one or several affirmative defenses in an attempt to prevent return, but all exceptions "are extremely limited and difficult to prove."[60] Courts still have the discretion to order return where an exception is proven[61] and have frequently done so.[62] This Note focuses only on the "grave risk" exception within Article 13(b).

"The grave risk of harm 'defense' is raised in almost every [Convention] case," but is infrequently successful.[63] The Convention allows a court to refuse the return of a child if "[t]here 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."[64] The Convention's vague language has received criticism and praise, as it provides, at least, some mechanism to avoid returning a child to a harmful situation. However, the exception fails to outline what really presents a grave risk.[65] When separated into its elements, the exception contains three different types of grave risk—physical harm, psychological harm, or an intolerable situation.[66] Each of the three may be raised independently of the others as an affirmative defense to prevent return.[67] There is a lack of clarity as to what constitutes an intolerable situation, beyond that the threshold is high, and how it may be distinguished from physical and psychological harm, resulting in inconsistent application both within the United States and abroad.[68] Drafting documents of the Convention, however,

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59. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, arts. 12, 13, 20, 1343 U.N.T.S. at 100–01. There are five exceptions where a court may refuse to return a child to their habitual residence: (1) where the petitioning parent consented or acquiesced to the child being taken to the new state; (2) where the child has objected to repatriation; (3) where public policy forbids return because return would reject the fundamental principles relating to the protection of human rights and fundamental freedoms; (4) where return would subject the child to a grave risk of "physical or psychological harm" or "an intolerable situation"; and (5) where the child is deemed sufficiently well-settled in the new country. *Id.*

60. Kubitschek, *supra* note 25, at 118.

61. *See id.* (noting that if at least one affirmative defense is proven "children *may* be returned").

62. *See, e.g.*, Saada v. Golan, No. 18-cv-5292, 2022 WL 4115032, at *4–8 (E.D.N.Y. Aug. 31, 2022) (finding there was a grave risk of harm to the child but still granting return to Italy because there were sufficient protective measures); Turner v. Frowein, 752 A.2d 955, 972–77 (Conn. 2000) (reversing a lower court's decision to deny return after sexual abuse was found to constitute grave risk but the lower court had failed to consider all available ameliorative measures allowing child to be returned).

63. MORLEY, *supra* note 14, at 21.

64. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, art. 13(b), 1343 U.N.T.S. at 101.

65. Schuz, *supra* note 49, at 14–16.

66. Convention on the Civil Aspects of International Child Abduction, *supra* note 15, art. 13(b), 1343 U.N.T.S. at 101; *see also* Deborah Reece, *Exposure to Family Violence in Hague Child Abduction Cases*, 36 EMORY INT'L L. REV. 81, 87 (2022) (discussing the three risks).

67. Reece, *supra* note 66, at 87.

68. MORLEY, *supra* note 14, at 220. Due to the lack of clarity, abducting parents frequently litigate this issue and have argued that intolerable situations can range from difficulty adjusting

do indicate that "intolerable situation" was included to capture situations that are not covered by "physical or psychological harm," like in situations of domestic abuse between parents.[69]

In the United States, the "burden of proof for the grave risk defense is quite high," regardless of whether the taking-parent alleges physical or psychological abuse or an intolerable situation.[70] The taking-parent must prove the exception by *clear and convincing evidence*[71] and ICARA indicates that the exception is meant to be applied narrowly and in few cases.[72] The U.S. State Department further notes that taking-parents "may not use the grave harm exception to 'litigate or relitigate the child's best interests'" because that determination ought to be made by the habitual state.[73] This is a higher burden of proof than is required both by the Convention[74] and for other affirmative defenses in ICARA.[75]

The grave risk exception is usually successful in preventing return in only two scenarios: where the country of habitual residence is experiencing war, famine, or disease, and in cases of serious abuse or neglect.[76] Courts have explicitly rejected that relative unhappiness, poor living conditions, financial hardship, and poor parenting reach the grave risk exception.[77] Even where a court finds grave risk, it still has the discretion to return the child to their habitual country, usually after considering available ameliorative measures.[78]

Grave risk analysis requires consideration of both "the magnitude of the potential harm" *and* "the probability . . . the harm will materialize."[79] The

back to the habitual country, separation from primary caregivers or siblings, relative unhappiness, financial hardship, poor parenting, and a lack of educational opportunities. *Id.* at 238–51.

69. ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III – ENLÈVEMENT D'ENFANTS CHILD ABDUCTION 302 (1980), https://assets.hcch.net/docs/05998e0c-af56-4977-839a-e7db3foea6a9.pdf [https://perma.cc/A3NL-KCGE]; *see also* Reece, *supra* note 66, at 88 (reviewing drafting documents to determing the meaning of "intolerable situation").

70. Vieira v. De Souza, 22 F.4th 304, 309 (1st Cir. 2022).

71. MORLEY, *supra* note 14, at 21; *see also* 22 U.S.C. § 9003(e)(2)(A) (2018) (opposing the removal of a child requires the respondent to prove "by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies").

72. 22 U.S.C. § 9001(a)(4); *see also* Christine Sutherland, Case Comment, *International Family Law — The Balancing Act of the Grave Risk of Harm Exception Under the Hague Convention of Civil Aspects of International Child Abuse* — Ermini v. Vittori, *758 F.3d 153 (2d Cir. 2014)*, 38 SUFFOLK TRANSNAT'L L. REV. 267, 272–73 (2015) ("In the past, the grave risk exception was meant to be narrow.").

73. Sutherland, *supra* note 72, at 274; *see also* Walsh v. Walsh, 221 F.3d 204, 218–19 (1st Cir. 2000) (reviewing the purpose of the "grave risk" exception).

74. Schuz, *supra* note 49, at 34.

75. *See* 22 U.S.C. § 9003(e)(2)(B) (establishing a burden of proof "by a preponderance of the evidence" for certain exceptions).

76. Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

77. MORLEY, *supra* note 14, at 238–51.

78. Simcox v. Simcox, 511 F.3d 594, 605–06 (6th Cir. 2007).

79. Jacquety v. Baptista, 538 F. Supp. 3d 325, 332–33 (S.D.N.Y. 2021) (quoting Souratgar v. Lee, 720 F.3d 96, 103 (2d Cir. 2013)); *see also* 22 U.S.C. § 9001(a)(4) (describing the

analysis requires that "[t]he risk must be 'more than serious,' and the harm must be 'a great deal more than minimal.'"[80] Effectively, the potential harm must be severe to trigger the exception.[81] Some circuit courts require that the grave risk be *immediate*, meaning that the risk to the child would occur as soon as the child returns to the habitual state, even before custodial proceedings occur.[82] Other courts reject this requirement.[83]

Cases involving abuse under the grave risk exception typically fall into three categories: minor, clearly grave, and those in the middle, where "abuse 'is substantially more than minor, but is less obviously intolerable.'"[84] There are some forms of abuse that courts consistently agree are clearly grave, like sexual abuse.[85] For those cases in the challenging middle category, the court performs "a fact-intensive inquiry that depends on . . . several factors, including the nature and frequency of abuse, [and] the likelihood of reoccurrence."[86] Abuse is a satisfactory defense when there is "a 'sustained pattern of physical abuse and/or a propensity for violent abuse.'"[87] Courts frequently look to context of past abuse or threats to indicate the probability of future harm[88] and look to "whether the risk of harm is specifically targeted at the child."[89] Courts frequently adhere to a two-pronged analysis regarding abuse—the probability of abuse if the child is returned and the magnitude of the harm if that

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exceptions as "narrow").

80. Reece, *supra* note 66, at 88 (first quoting Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 14 (1st Cir. 2002); then quoting Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000)); *see also* Ermini v. Vittori, 758 F.3d 153, 164 (2d Cir. 2014) (first quoting Blondin v. Dubois (*Blondin IV*), 238 F.3d 153, 162 (2d Cir. 2001); then quoting Souratgar v. Lee, 720 F.3d 96, 103 (2d Cir. 2013) (holding that there is grave risk of harm if "repatriation would make the child 'face a real risk of being hurt, physically or psychologically'" and "there must be a 'probability that the harm will materialize'").

81. Velozny *ex rel* R.V. v. Velozny, 550 F. Supp. 3d 4, 18 (S.D.N.Y. 2021).

82. *See, e.g.*, Jones v. Fairfield (*In re* ICJ), 13 F.4th 753, 764–65 (9th Cir. 2021) ("[B]ecause the Hague Convention provides only a provisional, short-term remedy in order to permit long-term custody proceedings to take place in the home jurisdiction, the grave-risk inquiry should be concerned only with the degree of harm that could occur in the *immediate* future.").

83. Walsh v. Walsh, 221 F.3d 204, 218–19 (1st Cir. 2000); *see also* Colon v. Mejia Montufar, 470 F. Supp. 3d 1280, 1292 (S.D. Fla. 2020) (rejecting an immediacy requirement for the grave risk inquiry).

84. Salame v. Tescari, 29 F.4th 763, 767 (6th Cir. 2022) (quoting Simcox v. Simcox, 511 F.3d 594, 607–08 (6th Cir. 2007)).

85. Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996); Díaz-Alarcón v. Flández-Marcel, 944 F.3d 303, 306 (1st Cir. 2019); Golan v. Saada, 142 S. Ct. 1880, 1894 (2022).

86. MORLEY, *supra* note 14, at 237; *see also* Pawananun v. Pettit, 508 F. Supp. 3d 207, 217–18 (N.D. Ohio 2020) (finding no grave risk exception where the court found scant evidence of child sexual abuse and psychological abuse and one or two instances of physical abuse).

87. Ermini v. Vittori, 758 F.3d 153, 164 (2d Cir. 2014) (quoting Souratgar v. Lee, 720 F.3d 96, 103 (2d Cir. 2013)).

88. *Colon*, 470 F. Supp. 3d at 1292.

89. *Id.* at 1293; *see also* Silverman v. Silverman, 338 F.3d 886, 901 (8th Cir. 2003) (finding no grave risk of harm because suicide bombers constitute general regional violence that threaten everyone in Israel).

probability materializes.[90]

In determining whether to refuse return, once there is a finding of grave risk, a court has the discretion to consider whether there are ameliorative measures that could reduce whatever risk might be associated with a child's repatriation.[91] These measures could be taken either by the parents or by the authorities of the habitual residence state.[92]

B. THE U.S. SUPREME COURT AND CONVENTION CASES

The U.S. Supreme Court has considered the Convention five times since adoption.[93] Most recently, in *Golan v. Saada*, the Court addressed the "grave risk" exception for the first time to resolve a circuit split regarding consideration of ameliorative measures.[94] Ameliorative measures are those measures that may be undertaken either by the parents or by the authorities in the habitual state that "could 'reduce whatever risk might otherwise be associated with a child's repatriation.'"[95] The Second Circuit previously *required* district courts to consider available ameliorative measures after a finding that repatriation would put the child in grave risk of harm.[96] The Supreme Court rejected this categorical approach, because nowhere does the Convention, nor ICARA, mention ameliorative measures and "[t]he Second Circuit's rule, 'in practice, rewrite[s] the treaty.'"[97]

However, a district court still has the discretion to consider ameliorative measures if it so chooses.[98] The Court instructed that a "court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA" and "[c]ourts must remain conscious of" the Convention's purpose of "protect[ing] the interests

90. Acosta v. Acosta, 725 F.3d 868, 876 (8th Cir. 2013).

91. Golan v. Saada, 142 S. Ct. 1880, 1887 (2022).

92. *Id.*

93. *See generally* Abbott v. Abbott, 560 U.S. 1 (2010) (holding that a parent's *ne exeat* right is a right of custody protected by the Hague Convention); Chafin v. Chafin, 568 U.S. 165 (2013) (holding that the return of a child to a foreign country pursuant to a Convention return order does not render an appeal of that order moot); Lozano v. Montoya Alvarez, 572 U.S. 1 (2014) (holding that equitable tolling of a one-year period to seek the return of a child under the Convention is not available because there is not a general presumption regarding equitable tolling that it applies to treaties); Monasky v. Taglieri, 140 S. Ct. 719 (2020) (holding that the habitual residence of a child under the Convention depends on the total circumstances specific to a case, not on an actual agreement between parents); Golan v. Saada, 142 S. Ct. 1880 (2022) (holding that a court is not required to categorically consider ameliorative measures prior to denying a petition for the return of a child where return would expose the child to grave risk of harm, ending a circuit split).

94. *Golan*, 142 S. Ct. at 1888.

95. *Id.* at 1887 (quoting Blondin v. Dubois, 189 F.3d 240, 248 (2d Cir. 1999)).

96. *See Blondin*, 189 F.3d at 248.

97. *Golan*, 142 S. Ct. at 1893 (second alteration in original) (quoting *Lozano*, 572 U.S. at 17).

98. *See id.*

of children and their parents."[99] "[A]ny consideration of ameliorative measures must prioritize the child's physical and psychological safety," abide by the Convention's requirement to avoid adjudicating the underlying custody dispute, and allow for timely resolution.[100]

Ameliorative measures where American courts are imposing orders on foreign states invites concern that American courts are going beyond their jurisdiction and risk rejection of recommended government action by the habitual country.[101] In *Golan*, the district court considered ameliorative measures that would prevent further domestic abuse, like an issuance of a protective order in the habitual country and requiring the petitioning parent attend parenting classes and therapy.[102] But there is no guarantee that the habitual country will follow American recommendations, as the recommendations go beyond American courts' jurisdictional limits. There is little research on whether the habitual country follows the requested measures or if they are successful in preventing the abuse at issue at all.

C. Domestic Violence and Child Abuse Under ICARA

The Hague Convention initially assumed that the majority of abductors would be noncustodial fathers, but it has more frequently been mothers, often fleeing domestic violence.[103] Once the fathers petition the receiving country for return, mothers commonly raise the grave risk defense, typically in the form of domestic or child abuse.[104] In cases where the taking-parent alleges abuse of both herself and the child, courts are least likely to order return.[105] Courts are most likely to order return when there has only been abuse against the mother and not the child.[106] Even where the child has witnessed the father's physical violence against the mother, courts are hesitant to prevent return.[107] Typically, if the court makes a finding of grave risk where only the parent is abused, it is because the taking-parent has been able to show a strong link between the abuse directed toward the parent and either realized or potential harm to the child.[108] In the Second Circuit, domestic violence can satisfy the grave risk defense when the abducting parent can "show[] by clear and convincing evidence a 'sustained pattern of physical abuse and/or a propensity for violent abuse.'"[109]

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99. *Id.* at 1893.
100. *Id.* at 1893–94.
101. *See* MORLEY, *supra* note 14, at 278.
102. *Golan*, 142 S. Ct. at 1891.
103. Kubitschek, *supra* note 25, at 118.
104. *Id.* at 119–20.
105. *Id.* at 120.
106. *Id.* at 120–25.
107. *Id.* at 124.
108. MORLEY, *supra* note 14, at 257.
109. Ermini v. Vittori, 758 F.3d 153, 164 (2d Cir. 2014) (quoting Souratgar v. Lee, 720 F.3d

Domestic violence advocates have long lamented the treatment toward abuse victims in fleeing their abusers. Frequently, women who flee their abusers to another country have run out of all available options and are desperate. Many have gone to the police in the habitual state, separated from, and even divorced the abusive father in an attempt to end the abuse, but to no avail.[110] While interviewing women during and after their Hague Convention cases, Professors Taryn Lindhorst and Jeffrey L. Edleson found that more than eighty-five percent had contacted at least one resource regarding their abuse prior to fleeing the habitual state.[111] Of the women who contacted the police, none received assistance with domestic violence, and in extreme cases the police were overt in supporting the abusive husband in continuing his abuse.[112]

American courts treat domestic abuse inconsistently under the grave risk exception. Some circuit courts interpret the grave risk exception broadly and frequently hear expert testimony regarding the likelihood that domestic abusers will become child abusers over time.[113] Others construe the grave risk exception narrowly, focusing on the Convention's primary goal of returning the child to their habitual state.[114] Over time, more courts have followed the former approach, as there is greater understanding of the severe impacts on a child when there is domestic abuse between parents.[115]

Child abuse, in contrast, is more likely to qualify as grave risk because courts are more focused on the risk directly to the child, not the abused parent. However, many parents will combat child abuse allegations by arguing there was no abuse, but just physical discipline. Even in extreme cases of physical discipline, American judges are hesitant to deny return due to the overarching goal of the Convention—return. Courts frequently address allegations of child abuse in Convention abduction cases and often consider whether corporal punishment crosses the line into abuse. There has been varied treatment of corporal punishment across circuit courts. The Tenth Circuit held that "a parent who is 'in the habit of striking the children,' even for disciplinary purposes, might pose a grave risk of harm to them."[116] Meanwhile, the Second Circuit has held that "[s]poradic or isolated incidents of physical discipline directed at the child … have not been found to constitute a grave risk."[117]

96, 103 (2d Cir. 2013)).

110. TARYN LINDHORST & JEFFREY L. EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW: THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION 64–73 (2012).

111. *Id.* at 65.

112. *Id.* at 66 (recounting officers encouraging further abuse to prevent the abuser's spouse from reporting abuse to police at all).

113. MORLEY, *supra* note 14, at 258–59.

114. *See id.*

115. *See id.* at 258–61.

116. Gil-Leyva v. Leslie, 780 F. App'x 580, 590–91 (10th Cir. 2019) (quoting Ermini v. Vittori, 758 F.3d 153, 165 (2d Cir. 2014)).

117. Souratgar v. Lee, 720 F.3d 96, 104 (2d Cir. 2013).

Some district courts have taken more aggressive approaches in finding grave risk. For example, in *Di Giuseppe v. Di Giuseppe*, the court held that, after the petitioner testified that she "only" used corporal punishment two to three times a month, the punishment was "abusive and excessive," and denied return.[118] However, other district courts, even where abuse appears severe, have refused to find a grave risk exception.[119]

II. HABITUAL STATE ANALYSIS FAILS VICTIMS THROUGH PREJUDICE ON CAPABILITIES AND CULTURE

During a grave risk determination, it is common for parents to litigate issues related to the habitual country, including the ability of judicial bodies to properly determine child custody issues. Consideration of a habitual state's characteristics and attributes has allowed American judges' prejudice and personal opinions to permeate their determinations, often resulting in a failure to protect victims of abuse. Namely, this occurs in two areas of analysis: the protective abilities of the habitual state and acceptable corporal punishment in the habitual state.

Section II.A addresses circumstances when courts consider the abilities of habitual states. These considerations commonly occur in two areas—protective abilities and ameliorative measures. When courts do analyze the ability of habitual states to protect children upon their return, there is no uniform test or analysis. Instead, many judges allow their preconceived notions of certain habitual states to cloud their judgment.

Section II.B discusses the changing views on corporal punishment both

118. Di Giuseppe v. Di Giuseppe, No. 07-cv-15240, 2008 WL 1743079, at *6–7 (E.D. Mich. Apr. 11, 2008).

119. *See, e.g.*, Mejia Rodriguez v. Molina, No. 22-cv-00183, 2022 WL 4597455, at *1–2 (S.D. Iowa Sept. 17, 2022) (granting return to Honduras after respondent provided evidence of petitioning parent beating child with a belt, leaving bruises on the child frequently, and kicking the child); McManus v. McManus, 354 F. Supp. 2d 62, 65 (D. Mass. 2005) (granting return to petitioning parent after evidence that parent violently physically disciplined children and had neighbors discipline them as well); Jaet v. Siso, No. 08-81232, 2009 WL 35270, at *7 (S.D. Fla. Jan. 5, 2009) (granting return after evidence of a pattern of abuse within the family because there were no "documented instances of child abuse"); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109, 1125–26 (D. Colo. 2008) (granting return because the petitioning parent had never physically abused the children, even though the family had been terrified of the petitioner for years); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850–51 (Ky. Ct. App. 1999) (granting return even after expert testimony indicated the child had PTSD, likely experienced physical and emotional abuse in the country of habitual residence, and probable child neglect); Rial v. Rijo, No. 10-cv-01578, 2010 WL 1643995, at *2 (S.D.N.Y. Apr. 23, 2010) (granting return even though petitioner had threatened to kill the respondent parent and physically abused her because there was no physical abuse against the child); Tabacchi v. Harrison, No. 99-c-4130, 2000 WL 190576, at *2–3, *9, *14 (N.D. Ill. Feb. 10, 2000) (granting return after allegations that petitioner had choked respondent parent in front of child because there was a protective order in place in the habitual country); Arguelles v. Vazquez (*In re* Hague Child Abduction Application), No. 08-2030, 2008 WL 913325, at *13 (D. Kan. Mar. 17, 2008) (granting return because "the primary abuse has been directed at the spouse").

within the United States and abroad. In many cases alleging child abuse, the left-behind parent frequently argues that they were using corporal punishment acceptable in the habitual state. Judges are quick to accept this analysis when habitual countries are those located in the global south, wrongly believing that American laws are stricter regarding corporal punishment.

A. CONSIDERING A HABITUAL STATE'S COMPETENCY

In international child abduction cases, American judges frequently consider the relative ability of the habitual state to adequately protect the child upon their return.[120] Such analysis frequently occurs when contemplating protective abilities and ameliorative measures. This Note will discuss each in turn.

1. Court Prejudice Shapes Acceptable Protective Measures

The Supreme Court resolved one circuit split regarding grave risk analysis,[121] but another remains—whether a grave risk determination requires proof of a lack of protection in the habitual residence state.[122] Once a court finds return poses grave risk to the child and before denying the petition for return, some have required taking-parents to present evidence that the child's country of habitual residence is unable, unwilling, or unlikely to protect the child upon their return.[123] It appears this approach originated in the Sixth Circuit's decision of *Friedrich v. Friedrich*, where the court held that the grave risk exception may apply only "when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[124] The Second and Third Circuits have also adopted this analysis.[125] Additionally, state courts have adopted this approach, namely California, Texas, and Ohio courts.[126] Meanwhile, the First, Seventh, Eighth,

120. MORLEY, *supra* note 14, at 267–70.

121. *See generally* Golan v. Saada, 142 S. Ct. 1880 (2022) (ending the circuit split over whether district courts are required to consider ameliorative measures).

122. MORLEY, *supra* note 14, at 267–70.

123. Baran v. Beaty, 526 F.3d 1340, 1346–47 (11th Cir. 2008); *see also* MORLEY, *supra* note 14, at 267 (discussing the various approaches to lack of protection requirements).

124. Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996); *see also Baran*, 526 F.3d at 1347 (analyzing whether the court should adopt a similar analysis as outlined in *Fredrich*, before rejecting such an approach).

125. *See* MORLEY, *supra* note 14, at 268; *see also* Blondin v. Dubois, 238 F.3d 153, 163 n.11 (2d Cir. 2001) (adhering to *Friedrich*'s test, which requires the court "examine the full range of options that might make possible the safe return of a child to the home country" including a determination of whether the habitual country's authorities are able to provide adequate protection); *In re* Application of Adan, 437 F.3d 381, 395 (3d Cir. 2006) (requiring the respondent to prove by clear and convincing evidence that the authorities are incapable or unwilling to provide adequate protection).

126. *See* Forrest-Benavides v. Eaddy (*In re* Marriage of Forrest & Eaddy), 51 Cal. Rptr. 3d 172, 179 (Ct. App. 2006) ("Even if the evidence had supported a conclusion that returning Ashlee to Australia would create some risk of harm, the court could not deny Forrest–Benavides's petition without also finding that . . . the Australian courts were incapable of or unwilling to adequately

and Eleventh circuit courts have flatly rejected this approach.[127]

Protective abilities analysis focuses on whether the habitual state will be able to protect victims of abuse during custody proceedings. This analysis is similar to ameliorative measures but still distinct. Discussion of a habitual state's protective abilities generally occurs *before* a grave risk determination is made, while consideration of whether ameliorative measures are available occurs *after* grave risk is found.[128] Moreover, ameliorative measures consider specific courses of action, while a protective abilities analysis is a more general consideration of the habitual state's capacity to protect victims.

Both the Hague Convention itself and ICARA are silent on whether such analysis is necessary—protective abilities analysis is a judicially created examination.[129] But a document known as the Guide to Good Practice, published by the Permanent Bureau of the Hague Conference with the goal of supporting international implementation of the Convention, recommends courts "consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established."[130]

A court may look to a variety of factors to determine whether a state can protect victims of abuse, "including access to legal services, financial assistance, . . . support to victims," and the criminal justice system.[131] Even if

protect Ashlee."); *In re* A.V.P.G., 251 S.W.3d 117, 128 (Tex. Ct. App. 2008) (finding there is no grave risk exception because "there is no evidence that a court in Belgium is incapable or unwilling to give the children adequate protection"); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (refusing a finding of grave risk because "there is no evidence that the courts in Greece cannot protect Bronte" even after allegations of abuse at the hands of Greek authorities); Robert v. Tesson, No. 04-cv-333, 2005 WL 1652620, at *24 (S.D. Ohio 2005) (holding there is no evidence that French courts are incapable or unwilling to protect the children).

127. *See* Van De Sande v. Van De Sande, 431 F.3d 567, 571 (7th Cir. 2005) ("To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise. The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody."); *Baran*, 526 F.3d at 1348 ("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, and appears not to have been contemplated by the Convention."); Danaipour v. McLarey, 386 F.3d 289, 304 (1st Cir. 2004) (rejecting the petitioner's argument that Swedish courts ought to be the one to decide whether abuse occurred because the district court's finding of grave risk "was adequate to satisfy the Article 13(b) exception, and no further inquiry into remedies available to the Swedish courts was required"); Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) (rejecting petitioner's argument "that the Article 13b 'intolerable situation' exception applies only if the government agencies and courts of Mexico are unable to protect the child if he is returned to that country").

128. MORLEY, *supra* note 14, at 267.

129. *See* Golan v. Saada, 142 S. Ct. 1880, 1892 n.7 (2022).

130. HAGUE CONF. ON PRIV. INT'L L., 1980 CHILD ABDUCTION CONVENTION: GUIDE TO GOOD PRACTICE 31 (citation omitted), https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb37oc497f.pdf [https://perma.cc/UJ3G-M8QX].

131. *Id.* at 34.

these services do exist, it is entirely possible they are unable or refuse to assist victims. As discussed above, more than eighty-five percent of mothers fleeing domestic abuse attempted to use domestic violence resources in the habitual state prior to fleeing, to no avail.[132]

In courts that mandate consideration of protective abilities, it is uncommon for judges to closely scrutinize protective abilities. Instead, many decisions include a short statement indicating that the habitual state is likely able to protect victims.[133] Even when courts conduct an extensive analysis of the habitual state's protective abilities, rarely does a judge find that another country's protective abilities are inadequate. In one of only a few cases where protective abilities were held to be inadequate, the court in *Reyes Olguin v. Cruz Santana* denied return after a lack of evidence that there were any doctors in the area trained to work with victims of domestic violence or who had experience treating PTSD.[134] Expert testimony further indicated that social services in the area were not sufficient and that the Mexican culture was generally accepting of "violence toward[] women and children."[135]

Even though courts infrequently find that protective abilities are insufficient, the length and thoroughness of analysis often differs substantially depending on the location of the habitual state. When the habitual state is European, judges frequently complete quick and meager analyses, finding that the habitual state is capable of adjudicating the custody complaint without expert witnesses or evidence.[136] Meanwhile, when the habitual state is a non-European country, courts are more likely to hear expert testimony regarding whether the judicial systems are capable.[137]

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132. LINDHORST ET AL., *supra* note 110, at 65.

133. *See* Moreno v. Martin, No. 08-22432, 2008 WL 4716958, at *16 (S.D. Fla. Oct. 23, 2008) (finding that "Spanish courts are fully capable of adjudicating" the custody complaint without examining evidence or hearing expert testimony); Maurizio v. L.C., 135 Cal. Rptr. 3d 93, 114 (Ct. App. 2011) (finding "that the Italian government has the same capacity to address the needs, physical and psychological, of children under its jurisdiction" without viewing any related evidence); L.G. v. M.M., No. D067027, 2015 WL 8296831, at *5 (Cal. Ct. App. Dec. 9, 2015) ("There is nothing in the record indicating the courts in Mexico are unable to issue orders to protect the children's physical and emotional health. . . ."); Garcia v. Angarita, 440 F. Supp. 2d 1364, 1376, 1381–82 (S.D. Fla. 2006) (admitting expert testimony regarding the competence of Colombian courts to make a custody determination and protect the child from any further abuse upon their return).

134. Reyes Olguin v. Cruz Santana, No. 03-cv-06299, 2005 WL 67094, at *11 (E.D.N.Y. Jan. 13, 2005).

135. *Id.*

136. *See Moreno*, 2008 WL 4716958, at *16 (finding that "Spanish courts are fully capable of adjudicating" the custody complaint without examining evidence or hearing expert testimony); *Maurizio*, 135 Cal. Rptr. 3d at 114 (finding "that the Italian government has the same capacity to address the needs, physical and psychological, of children under its jurisdiction" without viewing any related evidence); *L.G.*, 2015 WL 8296831, at *5 ("There is nothing in the record indicating the courts in Mexico are unable to issue orders to protect the children's physical and emotional health. . . .").

137. *See Garcia*, 440 F. Supp. 2d at 1376, 1381–82 (admitting expert testimony regarding the competence of Colombian courts to make a custody determination and protect the child from

2. Ameliorative Measures and Undertakings

The U.S. Supreme Court ruled that district courts are no longer *required* to consider ameliorative measures in a grave risk analysis in *Golan v. Saada*.[138] Instead, lower courts may "decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave."[139] Because *Golan v. Saada* was decided only last year, it remains unclear exactly how courts will respond, but it is likely courts will continue to consider ameliorative measures with at least some frequency.

Where there is a grave risk finding, a court may look to certain measures that could eliminate the harm to the child upon their return.[140] "In assessing ameliorative measures, courts often impose certain 'undertakings'" on the left-behind parent "that must be followed upon the child's return."[141] Undertakings are typically treated as a voluntary agreement between parents and attempt to resolve a variety of concerns, "including lifting criminal charges and travel restrictions" in the habitual country for the taking-parent.[142] A primary problem with undertakings is the inability to enforce them—"once the child is back in" their habitual country, "a U.S. court has little or no power to enforce compliance with its orders, rendering meaningless any ameliorative measure it had put in place."[143]

In cases alleging domestic violence or child abuse, courts may attempt to devise ameliorative measures, so long as the abuse is not clearly grave.[144] In abuse cases, ameliorative measures frequently include some form of a protective order, a mandate that the left-behind parent drop criminal charges, and a mandate that the takng-parent agree not to take the child out of the country again until custody proceedings conclude.[145]

When determining ameliorative measures and available undertakings, courts make two key assumptions that are rarely analyzed comprehensively—that the habitual state will follow the ameliorative measures and that those undertakings will prevent abuse. For example, in *Danaipour v. McLarey*, the district judge granted return while ordering the father not see the child until Swedish courts conducted a forensic examination to determine the veracity

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any further abuse upon their return).

138. Golan v. Saada, 142 S. Ct. 1880, 1888 (2022).

139. *Id.* at 1894.

140. Valentina Shaknes & Justine Stringer, *Ameliorative Measures Gut the Grave Risk Exception Under the Hague Convention*, N.Y.L.J. (July 23, 2021, 1:30 PM), https://www.law.com/newyorklawjournal/2021/07/23/ameliorative-measures-gut-the-grave-risk-exception-under-the-hague-convention/? [https://perma.cc/FGE2-F95B].

141. *Id.*

142. LINDHORST ET AL., *supra* note 110, at 133.

143. Shaknes et al., *supra* note 140.

144. MORLEY, *supra* note 14, at 275.

145. *See id.* at 280.

of sexual abuse allegations.[146] On appeal, the decision was overturned, in part because the Swedish government refused to follow the district court's order and also because Swedish agencies lacked the authority to complete a forensic examination at all.[147]

Quantitative data is lacking on what happens after return, but authors Taryn Lindhorst and Jeffrey L. Edleson interviewed women after Convention decisions and found that many experienced continued physical abuse upon return compounded with a loss of custody because the father was able to paint the mother as a child abductor.[148] Not only can undertakings fail to end abuse, but they can be a form of abuse themselves.[149] Undertakings can be used as a form of "procedural stalking" of victims where an abuser will use the courts and child protection to continue to control former partners.[150]

B. CULTURAL ARGUMENTS REGARDING PHYSICAL DISCIPLINE

Where an abducting parent alleges child abuse as the foundation of a grave risk exception, the left-behind parent often argues the alleged abuse was reasonable physical discipline, particularly given the norms of the home culture. In *Mejia Rodriguez v. Molina*, the child's father took his daughter and walked her from Honduras to Iowa, before the child's mother petitioned for the child's return under the Convention.[151] The father argued the child was at grave risk due to severe physical discipline at the hands of the child's mother, including beating the child with a belt repeatedly.[152] In granting the mother's petition for return, the judge noted that "[t]he Court struggles to understand why any parent would beat their child with a belt, but it also recognizes the need to be sensitive to different cultures and their methods of parenting."[153] Lacking in the court's analysis of this cultural difference, however, is any evidence that the punishment was acceptable in Honduras. Honduras has banned corporal punishment in all settings, including at home,[154] and the father had several witnesses testify to the mother's inappropriate abuse.[155]

Even in cases with minimal physical abuse, like in *Jaet v. Siso*, judges warily

146. Danaipour v. McLarey, 183 F. Supp. 2d 311, 327 (D. Mass. 2002).

147. Danaipour v. McLarey, 286 F.3d 1, 24 (1st Cir. 2002).

148. LINDHORST ET AL., *supra* note 110, at 135–41.

149. *Id.* at 145.

150. *Id.*

151. Mejia Rodriguez v. Molina, No. 22-cv-00183, 2022 WL 4597455, at *2 (S.D. Iowa, Sept. 17, 2022).

152. *Id.* at *8.

153. *Id.*

154. *Honduras: Corporal Punishment of Children Banned*, CHILD RTS. INT'L NETWORK (Oct. 2, 2013), https://archive.crin.org/en/library/news-archive/honduras-corporal-punishment-children-banned.html [https://perma.cc/D4AQ-WW4S].

155. *Mejia Rodriguez*, 2022 WL 4597455, at *1–2.

discuss corporal punishment.[156] In *Jaet*, allegations of abuse consisted of only occasional spanking.[157] Yet the court still included cultural analysis: "Cultural differences alone can account for some of the physical discipline. This Court cannot substitute its view of child rearing for those of parents in other countries."[158]

Of particular interest in the cases involving cultural analysis of corporal punishment is the fact that the United States is far behind other nations in protecting children from corporal punishment. In the United States, parents have substantial discretion in childrearing, and the current laws do not preclude physical discipline from that discretion.[159] However, over a quarter of countries around the globe have banned corporal punishment in all circumstances.[160] Nineteen states in the United States still allow corporal punishment in school and all states allow it in the home.[161] The assumption that the United States is a leader in this field, when it is, in fact, far behind, is erroneous. Such erroneous assumption indicates that American judges view American culture in a better light over the true realities of it.[162]

When a court decides to apply state law to international abduction cases, it opens the possibility that choice of a different state could yield different results. There is significant variety of corporal punishment throughout the United States. School corporal punishment is legal in nineteen states[163]; Minnesota is considered to all but have outlawed corporal punishment at home because its regulations are so strict[164]; Massachusetts requires a lengthy multifactor test to determine whether a parent used reasonable force[165]; the Utah Supreme Court recently overturned a child abuse conviction when parents spanked their child with a belt because the parents lacked an intent to harm their child.[166] Other states have even more varied approaches to

156. *See, e.g.*, Jaet v. Siso, No. 08-81232, 2009 WL 35270, at *8 (S.D. Fla. Jan. 5, 2009).

157. *Id.* at *2–4.

158. *Id.* at *8.

159. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) (discussing "the liberty of parents and guardians to direct upbringing and education of children under their control"). *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923) (confirming the rights of parents to be in control of their child's childrearing over schools).

160. *Global Progress: Countdown to Universal Prohibition*, END CORPORAL PUNISHMENT, https://endcorporalpunishment.org/countdown [https://perma.cc/A8Y3-TVWM].

161. Michael Levenson, *Paddling Makes a Comeback in a Missouri School District*, N.Y. TIMES (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/corporal-punishment-schools.html [https://perma.cc/E2SN-RX9N].

162. DAPHNA HACKER, LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION 280 (2017).

163. Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, SOC. POL'Y REP., Autumn 2016, at 1, 5 (2016).

164. MINN. R. 9502.0395 (2023).

165. Commonwealth v. Dorvil, 32 N.E.3d 861, 867–72 (Mass. 2015).

166. B.T. v. State (State *ex. rel.* K.T.), 424 P.3d 91, 93 (Utah 2017).

corporal punishment.[167]

Another recent development in American jurisprudence is the application of states' treatment of corporal punishment to Convention cases. For example, in *Sanchez v. Sanchez*, the petitioner demanded return of his daughter to Honduras as outlined in the Convention.[168] The respondent attempted to establish that the daughter would be at grave risk of physical violence if returned to Honduras because of the petitioner's use of corporal punishment.[169] The district court took a novel approach in addressing this allegation—considering whether North Carolina law would allow for the kind of alleged physical discipline:

> [T]he Court observes that, via a decision authored by an esteemed judge now sitting on the Fourth Circuit, the North Carolina Court of Appeals has held that a "[f]ather's punishment of [his child] in the form of a spanking or whipping that resulted in a bruise did not constitute abuse. . . ." If parents in North Carolina may punish their children by administering "whipping[s] that result[ ] in [ ] bruis[ing]," then a federal court in North Carolina surely should not treat a small number of similar disciplinary actions by Petitioner towards N.D.M.H. (in Honduras) as clearly and convincingly creating "a grave risk . . . [of] physical or psychological harm."[170]

The significant variety in American states' approach to corporal punishment could open the door to parents choosing a forum that would be more susceptible to their arguments if the *Sanchez* approach is widely adopted. For example, a Minnesota court may be more willing to deny return where severe corporal punishment is alleged, while states like Utah may be more likely to grant return when applying state law. Parents may be able to forum shop within the United States with this approach.

III. GRAVE RISK ANALYSIS REQUIRES A CONSISTENT APPROACH

First, American courts should abandon any consideration of ameliorative measures and protective abilities where the taking-parent has successfully proven domestic violence or child abuse. Second, there must be a concerted effort to provide more research, training, and assistance to judges, lawyers, and litigating parents. These solutions will ensure a more consistent approach, thus allowing for equitable solutions that prioritize the safety and well-being of victims of abuse.

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167. Denver Nicks, *Hitting Yours Kids Is Legal in All 50 States*, TIME (Sept. 17, 2014, 7:47 PM), https://time.com/3379862/child-abuse [https://perma.cc/Y2ZD-DU8Z] (discussing the different degrees of acceptable physical discipline among the fifty states).

168. Sanchez v. Sanchez, No. 18-cv-449, 2021 WL 1227133, at *1 (M.D.N.C. Mar. 31, 2021).

169. *Id.* at *14.

170. *Id.* at *18 (alterations in original) (quoting *In re* C.B., 636 S.E.2d 336, 338 (N.C. Ct. App. 2006)).

A. American Courts Should Abandon All Consideration of Ameliorative Measures and Protective Abilities in Cases of Domestic Abuse

Ameliorative measures can be a useful tool in certain cases, but there is no basis for them when litigating a case involving domestic abuse or child abuse. Hague Convention decisions should be made in the context of understanding abuse as an ongoing pattern of emotional terrorizing and coercive control.[171] A grave risk finding already has a high standard, requiring the taking-parent prove by *clear and convincing evidence* that there is a grave risk.[172] After a grave risk finding, there is no reason to attempt to find ameliorative measures. The Convention nor ICARA recommend or advocate for such measures and the U.S. State Department recommends they "be used sparingly."[173] Ameliorative measures are infrequently followed once the child is returned, offering no genuine protection to victims. Moreover, by ordering another country's judiciary to follow American court orders, American judges are stepping beyond their jurisdiction, rejecting the very purpose of the Convention.

The Supreme Court has allowed district courts the deference over whether to consider ameliorative measures at all after a grave risk finding. District courts ought to avoid considering ameliorative measures. These measures are not followed, there is no way to enforce the orders across borders, and they can result in continued abuse for both the mother and child. By allowing considerations of ameliorative measures, American district courts are putting international diplomacy over the safety of children in their care.

The circuit split regarding consideration of protective measures should be resolved by siding with the Seventh Circuit and courts should not consider whether a habitual country has sufficient measures in place for adequate protection of the child and parent experiencing abuse. There is no basis for this consideration in ICARA nor in the Convention. Consideration of this element is surface-level at best when it is considered and tends to expose a judge's stereotypical beliefs of other countries. For example, when the habitual state is a western nation, it is common for judges to blanketly state that it is foreseeable that the country can protect the child, whereas there is frequently a great deal more analysis regarding this issue when the habitual country is a nonwestern country—indicating that western states have sufficient social protections while nonwestern states lack protective abilities.

Moreover, this consideration relies on an unrealistic premise—the mere fact that a country may have a functioning judiciary and capable social services does not mean they will be able to protect victims of domestic, familial abuse. American police have a history of failing to protect victims of domestic

171. LINDHORST ET AL., *supra* note 110, at 144.

172. MORLEY, *supra* note 14, at 223; *see also* 22 U.S.C. § 9003(e)(2)(A) (establishing clear and convincing evidence standard).

173. MORLEY, *supra* note 14, at 274.

violence, as do European police forces.[174] As clearly explained in *Van de Sande v. Van de Sande*:

> 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. Because of the privacy of the family and parental control of children, most abuse of children by a parent goes undetected. To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise. The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody.[175]

Circuit courts that still mandate lower courts consider the protective abilities of the habitual countries ought to avoid this inept reasoning, and instead, determine whether there is a grave risk to the child regardless of the possible capabilities of the habitual state.

B. THE CENTRAL AUTHORITY MUST PROVIDE SPECIALIZED TRAINING TO ENSURE FAIR REPRESENTATION

Over the several decades the Convention has been in place, a lot has changed. Not only was the Convention written with erroneous assumptions in mind, namely that the taking-parent would be a father looking for a permissive forum for custody proceedings, but there has been a pronounced increase in research and understanding regarding the impacts of both corporal punishment and domestic violence on children. The Convention has not adapted to new research. The development of national and global guides that incorporate the changing landscape of international abduction can allow for greater consistency both within the United States and abroad.[176] The Guide to Good Practice, represents a good start, but individual states ought to improve upon their resources, too.

The U.S. State Department may be able to assist in this arena. The State

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174. Tamsin Rose, *Resourcing for Domestic Violence Policing in NSW Lags Behind Other States, Audit Finds*, GUARDIAN (Apr. 4, 2022, 6:45 AM), https://www.theguardian.com/australia-news/2022/apr/04/resourcing-for-domestic-violence-policing-in-nsw-lags-behind-other-states-audit-finds [https://perma.cc/R7KU-NGJV]; *Family and Domestic Violence Sexual Assault Up 13%*, AUSTRALIAN BUREAU OF STAT. (June 24, 2021), https://www.abs.gov.au/media-centre/media-releases/family-and-domestic-violence-sexual-assault-13 [https://perma.cc/UEZ5-BPXP]; Sophie Gorman, *French Police Face Disciplinary Hearings Amid High Numbers of Femicide*, FRANCE 24 (Jan. 1, 2022, 5:30 PM), https://www.france24.com/en/france/20220103-french-police-face-disciplinary-hearings-amid-high-numbers-of-femicide [https://perma.cc/BDG8-787L]; Alexandra Topping, *'No Support': Domestic Abuse Survivors on Feeling Ignored by Police*, GUARDIAN (Sept. 17, 2021, 1:04 PM), https://www.theguardian.com/society/2021/sep/17/no-support-domestic-abuse-victims-on-being-ignored-by-police [https://perma.cc/9BTS-DJRE].

175. Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005) (citation omitted).

176. LINDHORST ET AL., *supra* note 110, at 190.

Department is the United States's Central Authority as required by the Convention. The Central Authority aids judges in matters regarding international child abduction cases, among other roles.[177] This is an important role, as many judges have never tried a Convention case, particularly at the state level. Once a case is brought, the Central Authority provides materials to the judge hearing the case, including information on the Convention, a guide to the elements of an international abduction case, and an introduction to the various affirmative defenses.

Among the materials provided to judges, the State Department should include some additional guidance regarding cultural considerations. Judges frequently hear and consider cultural arguments and compare the American judiciary to habitual states. Because they are unlikely to have heard similar cases, judges likely do not have much experience with these arguments. The State Department ought to provide more guidance on when ameliorative measures are appropriate, if at all, and recommend judges avoid decision-making based solely on cultural considerations without proper expert testimony or judicial research. As it stands today, many judges make decisions based on their perceptions of other cultures and countries, even if unintentional. The State Department, as the Central Authority, has the unique opportunity to provide guidance, allowing judges to make better decisions for the welfare of the child.

Attorneys litigating Convention cases are similarly unfamiliar with the Convention, its purpose, case law, and available exceptions, like judges. Attorneys are in an important role to support both the taking-parent and the left-behind parent, and greater education will allow attorneys to best support and advocate for their clients. The U.S. State Department currently administers the Hague Convention Attorney Network, which has a primary goal of matching low-income litigants with attorneys offering pro bono and reduced-fee legal representation.[178] No prior experience is necessary to join, and it appears no training is offered to members.[179] This group has the unique opportunity of improving materials and providing training for attorneys in Convention cases. However, the Hague Convention Attorney Network is only for attorneys representing left-behind parents from other countries. There is no existing network for attorneys that represent taking-parents. The American Bar Association, the American Immigration Lawyers Association, or the American branch of the International Law Association all may be able to fill this gap. By providing improved resources to attorneys litigating a petition for return, victims of domestic abuse will have greater representation and protection.

177. Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299, 306 (2013).

178. *Join the Hague Convention Attorney Network*, BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/attorneys/join-the-attorney-network.html [https://perma.cc/CH4L-5XML].

179. *Id.*

CONCLUSION

The Hague Convention on International Child Abduction has dueling purposes of returning children to their habitual country while preventing grave harm. The United States can improve proceedings by ending consideration of ameliorative measures and protective abilities and providing improved resources to judges, lawyers, and litigants.