

**VIOLENCE CONJUGALE ET FAMILIALE ET L'ARTICLE 13 « RISQUE GRAVE » EXCEPTION
DANS LE FONCTIONNEMENT DE LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980 SUR
LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS :
DOCUMENT DE RÉFLEXION**

établi par le Bureau Permanent

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**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**

drawn up by the Permanent Bureau

*Document préliminaire No 9 de mai 2011 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

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Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

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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 Paper¹

I. Background

1) Introduction

1. The issue of domestic violence within the context of the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter “the Convention” or the “1980 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, in connection with past Special Commission meetings or otherwise, have flagged issues involved at various junctures.² 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,³ in academic journals,⁴ and in recent research.⁵

¹ The Permanent Bureau would like to thank Maja Groff, Legal Officer at the Permanent Bureau, for carrying out the principal research and writing of this paper. Gratitude is also due, for assistance in identifying case law and in applying research questions to this case law (see Section II, *infra*), to Hannah Baker, Legal Officer (case law analysis for the United Kingdom – England and Wales), Florencia Castro, Administrative Assistant for Latin America (case law analysis for Latin America), Juliane Hirsch, Legal Officer (case law analysis for Germany), Corinne Milliken, former Intern (case law analysis for the United States of America, Canada and New Zealand), Joanna Mitchell, former Legal Officer (case law analysis for Australia), Ausias Ortí Moreno, former Intern (INCADAT searches), and Nicolas Sauvage, Legal Officer (case law analysis for France).

² For instance, see “Report of the Third Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)”, drawn up by the Permanent Bureau, at pp. 20 and 22-23. See also “Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, Prel. Doc. No 2 of October 2006 for the attention of the Fifth Special Commission to review the operation of the 1980 Convention (30 October – 9 November 2006), responses to Questions 25-31, pp. 309 and forward. Both documents are available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”.

³ See, in *The Judges’ Newsletter on International Child Protection*: A) in Vol. V, Spring 2003, 1) Justice J. Chamberland, “Article 13(1)(b) and Domestic Violence: The Canadian Situation”, pp. 17-21, 2) L. Silberman, “Recent American Decision: *Danaipour v. McClarey*”, pp. 21-24, 3) Justice C. L’Heureux-Dubé, “Cherishing our Children: The Role of the Hague Convention on the Civil Aspects of Child Abduction”, pp. 25-29; B) Vol. X, Autumn 2005, 4) Justice J. Chamberland, “Domestic Violence and International Child Abduction: Some Avenues of Reflection”, pp. 70-78; C) Vol. XI, 2006, 5) Justice J. Gillen, “The Safe Return of the Child: The Hague Convention and Domestic Violence – Friend or Foe?”, pp. 31-36; D) Vol. XII, Spring-Summer 2007, 6) Justice J. Chamberland, “General Overview: The 2006 Special Commission Meeting: A Canadian Point of View”, at para. 8, p. 28; 7) Justice S. Fisher, “Safe Return of the Child: How far did the conclusions and recommendations of the Fifth Meeting of the Special Commission Advance the Interpretation of Article 13(1) *b* Grave Risk Defence?”, pp. 54-60; and E) Vol. XV, Autumn 2009, 8) Justice A. Moylan, “Experience of a Judge from England and Wales”, pp. 17-20. All articles available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “Child Abduction Section” then “The Judges’ Newsletter on International Child Protection”.

⁴ See, for instance, M. Kaye, “The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned By Coach and Four”, *International Journal of Law, Policy, and the Family*, Vol. 13 (1999), 191; M. Weiner, “International Child Abduction and the Escape from Domestic Violence” (69 *Fordham Law Review* 593), November 2000; J. Lewis, “Comment: The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity”, Fall 2000, 13 *Transnat’l Law* 391; C. Bruch, “The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases”, *Family Law Quarterly*, Fall 2004 (38:3), p. 529; S. Shetty and J. Edleson, “Adult Domestic Violence in Cases of International Parental Child Abduction”, *Violence Against Women*, Vol. 11, No 1, January 2005, pp. 115-138.

⁵ Recent research on the topic has been conducted within at least one jurisdiction, raising a number of concerns about the treatment and context of Convention cases involving instances of non-trivial domestic violence alleged / experienced by taking parents. See J.L. Edleson, T. Lindhorst, with 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 #2006-WG-BX-0006), November 2010. Available at < <http://www.haguedv.org/reports/finalreport.pdf> > (last consulted 1 May 2011). See further reference to and discussion of this report *infra*, Section VI.1, at paras 141-142, and Annex I.

2. The concerns raised in the above sources include such issues as:
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.

3. At this time there are no specific, comprehensive statistics on how many 1980 Convention cases, across jurisdictions, involve allegations or findings of domestic violence. In one study of 368 left-behind parents involved in child abductions, some form of family violence was found to be present in as many as 54% of the relationships in which parental child abduction occurred.⁶ In the same study, 30% of the left behind parents admitted to engaging in or having been accused of acts of family violence.⁷ One judge has noted that two of the three "common explanations" of the "modern day abductor" include "domestic violence" and "a genuine belief that the other parent is abusing a child".⁸ One national study (Australia) reported that in 6% of parental child abduction cases the abducting parent's motivation was fleeing violence.⁹

⁶ See G.L. Greif and R.L. Hegar, *When Parents Kidnap: The Families Behind the Headlines*, The Free Press, New York, 1993, p. 36.

⁷ *Ibid*, pp. 268-269.

⁸ Principal Family Court Judge Peter Boshier, *The Strengths and Weaknesses of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – A New Zealand Perspective*, International Family Law Conference, Cumberland Lodge, Windsor, England, 4-7 August, 2009, p. 9 (citing M. O'Dwyer, *Current issues in Hague Convention cases: a New Zealand perspective*, New Zealand Family Law Journal, March 2002, p. 5). See also responses by a range of States Parties to the 1980 Convention to Question 5.1 of Prel. Doc. No 1 of November 2010 ("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*", for the attention of the Special Commission of June 2011) reporting that "the issue of domestic violence or abuse" is "often raised" as an exception to return. Available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Child Abduction Section" and "Special Commission meetings on the practical operation of the Convention."

⁹ Family Law Council, *Parental Child Abduction*, Commonwealth of Australia, January 1998, pp. 11-13.

2) Focus of this Paper

4. This Paper is primarily a limited study of a cross-section of judicial practice, through an analysis of readily available national case law,¹⁰ mainly focusing on procedural matters relevant to the application of Article 13(1) *b*) of the Convention,¹¹ raised by parties opposing return of the child to his or her place of habitual residence, where domestic or family violence is a primary allegation. The main section of this analysis is Section II, below, "Analysis of case law sample".

5. This Paper, in a corollary and non-exhaustive fashion, presents some regional and international law sources, social science and other research in the area that may be helpful or relevant to discussion of the topic.

3) Scope and limitations of this Paper

6. Section II, "Analysis of case law sample," summarises results from applying a set of research questions¹² to case law found primarily on INCADAT¹³ which explicitly makes reference to domestic or family violence issues. The set of sample cases was generated through a series of INCADAT searches.¹⁴ Researchers involved in the case law analysis for this study also proposed a number of additional cases from a variety of jurisdictions, which were not yet on INCADAT.¹⁵

7. As much as possible an effort was made to maintain regional diversity and diversity of legal tradition in the cases analysed. Notwithstanding this, it is inevitable that the jurisdictions with the greatest number of 1980 Convention cases and the most effective case reporting systems (through INCADAT or otherwise) will be over-represented in this study. A further caveat is that full reported judgments were sometimes not available and INCADAT case summaries were sometimes used in the analysis; there was therefore not always complete information to answer all the research questions posed. However, it should be noted that this was often also true for the full text judgments of the cases analysed.

8. Thus, it should be clearly noted at the outset that the case law analysed in this Paper is not exhaustive and seeks only to present a descriptive "snap-shot" of a number of policy issues and judicial responses which arise when there are domestic violence

¹⁰ See note 61, *infra*, for a list of the 19 countries whose jurisprudence is included in this study.

¹¹ It has been noted that other Convention articles may provide relevant exceptions to return in cases of domestic violence, including Arts 12, 13(2) and 20 (see C. Bruch, *supra*, note 4, p. 531). The current paper focuses on the Art. 13(1) *b*) exception as it seems to be employed most often in this context, although it is noted below (see Section II, para. 86) that the Art. 13(2) defence seems to be commonly raised in connection with the Art. 13(1) *b*) defence.

¹² Please see Annex III for a list of these research questions.

¹³ The International Child Abduction Database is available at < www.incadat.com >.

¹⁴ Namely, keyword searches of INCADAT using the words "violence" and "domestic violence" and searches of "HC Articles", "13(1) *b*)" were employed, after which the cases were screened for references to family violence. Please note that these searches did not necessarily include all cases which might be available on INCADAT on the topic of family violence, for instance where the terms "domestic violence" or "violence" were not explicitly used. Please note also that not all cases found on INCADAT were included in the study, due to the high volume of cases in a number of jurisdictions.

¹⁵ It is planned that these additional cases will be added to INCADAT, subject to further editorial review.

allegations raised under Article 13(1) *b*) of the Convention. The analysis contained in this Paper is intended to be a starting point from which further research may be considered, and should be used as a basis for discussion rather than as a definitive statement of past or present judicial practice within any one jurisdiction or globally.

9. It is also beyond the scope of this Paper to investigate issues of false allegations (*i.e.*, intentionally fabricated allegations) of domestic or family violence in Article 13(1) *b*) cases where domestic violence is alleged.¹⁶

4) Definition of and research on particular dynamics of domestic violence

a) Definition of domestic violence used in this Paper

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 and / or sexual; 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.¹⁷ This Paper uses the term "domestic violence,"¹⁸ unless stated otherwise, in the broad sense outlined in this paragraph, and will be used interchangeably with the term "family violence".

11. It should be noted that "[c]urrent research suggests that the level of violence is known to vary greatly across families," and some scholars have suggested a potential

¹⁶ It should be noted, however, that Section II "Analysis of Case Law Sample", *infra*, and in particular Sections II.7 and II.8, deal with a range of evidentiary issues and practices by which judges ascertain whether or not such allegations are credible and well-founded. In the course of research for this paper it was observed that in one jurisdiction (United Kingdom – England and Wales) a national prosecution service has issued interim guidance to prosecutors concerning prosecutions for the offence of "perverting the course of justice" in relation to intentionally false allegations of rape or domestic violence, taking note that "victims of domestic violence may sometimes retract a true allegation: for example as a result of pressure, fear of violence, or intimidation" or for other reasons, and also acknowledging that false allegations can have a "devastating effect" on a wrongly accused. See *Interim Guidance Perverting the Course of Justice – Charging in cases involving rape and/or domestic violence allegations*, February 2011, Crown Prosecution Service, at para. 13 and para. 23 (available at < http://www.cps.gov.uk/consultations/pcj_consultation.html > (last consulted 1 May 2011)). Some national research exists on rates of substantiation of allegations of domestic violence in the context of family law proceedings. See, for example, J.R. Johnson, S. Lee, N.W. Olesen and M.G. Walters, "Allegations and Substantiations of Abuse in Custody-disputing families", *Family Court Review*, 43, 2005, 283-294, and M. Shaffer and N. Bala, "Wife Abuse, Child Custody and Access in Canada", in R. Geffner, R.S. Ingelman, & J. Zellner (Eds.), *The Effects of Intimate Partner Violence on Children*, 2003, New York: Haworth Maltreatment & Trauma Press, pp. 253-276. See also research cited in "Fact Sheet #2: The myth of women's false accusations of domestic violence and rape and misuse of protection orders", Australian Domestic and Family Violence Clearinghouse (< www.adfvc.unsw.edu.au/ >) prepared by M. Flood, March 2005; revised May 2010, at p. 2. For another research study on false allegations of child abuse and neglect in general child custody matters see N. Trocmé and N. Bala, "False Allegations of Abuse and Neglect When Parents Separate", *Child Abuse and Neglect*, 29, (2005) 1333-1345.

¹⁷ For an example of a contemporary iteration of such an expansive definition of domestic violence in national legislation, including physical, sexual, and psychological abuse with respect to all those in a "domestic relationship", see the New Zealand Domestic Violence Act 1995 No 86 (as at 01 July 2010), Public Act (available at < <http://www.legislation.govt.nz/act/public/1995/0086/latest/DLM372117.html> > (last consulted 1 May 2011)). Art. 3(b) of the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (adopted 7 April 2011) enshrines a similar definition whereby domestic violence means "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shared or has shared the same residence with the victim".

¹⁸ It should be noted that the term "domestic violence", in some jurisdictions, has been used to refer predominantly to "spousal abuse" or "intimate partner violence".

approach, based on social science literature, whereby it could be established if a child's exposure to family violence would pose a "grave risk" of harm to the child.¹⁹

12. It should also be noted that scholarly literature has asserted that parental abduction or kidnapping can be both a response to domestic violence and also a form of domestic violence. A parent can kidnap a child or children as part of a continuum of violent or abusive behaviour.²⁰

13. Most research indicates that women are the majority of intimate partner violence victims and suffer from more severe harm as a result of this violence.²¹ It has been noted that women, due to socio-economic inequalities or other discriminatory patterns, can find their circumstances of victimisation within the family further compounded and complicated (for instance, when they are socially or economically dependent upon an abusive spouse).²²

b) Coercive control, post-separation violence and traumatic syndromes

14. Some current definitions of domestic violence²³ suggest that it should be conceived as an "on-going pattern of intimidating behaviour in which the threat of serious physical violence is present and may be carried out with the overall goal of controlling the partner".²⁴ Within this conception, dynamics of domestic violence are more than just occurrences of physical violence, but rather an evaluation must be made of the overall context of relationship patterns where strategies of "coercive control" are present.²⁵

15. One judge has noted the challenges such patterns may present for judges dealing with domestic violence issues under 1980 Convention return petitions:

¹⁹ See Shetty and Edleson, *supra*, note 4, p. 128.

²⁰ See, for instance, J. Zorza, "The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes?" 37 *Fordham Urban Law Journal* 909 (2000), p. 909; S. Kreston, "Prosecuting Parental Kidnapping", *American Prosecutors Research Institute*, Update – Vol. 11, No 4, 1998, p. 1; and Greif and Hegar, *supra*, note 6 at pp. 37-42. Greif and Hegar present two of five common abduction patterns, "Pattern 1: Abduction by a Violent Visitor" (26% of cases in the study's sample) and "Pattern 4: Abduction by a Violent Shared Custodian" (11% of the study's sample) where relationships were marked by violence perpetrated by the abductor. J. Chiancone, "Parental Abduction: A Review of the Literature", US Department of Justice, Office of Justice Programs, at p. 5, notes research where it was found that "[a]bout one-quarter of [abduction] cases involved allegations of domestic violence against the abductor, and another one quarter involved allegations against the left-behind parent".

²¹ For a recent discussion on statistical debates see S. Hamby, "The Gender Debate About Intimate Partner Violence: Solutions and Dead Ends", *Psychological Trauma: Theory, Research, Practice, and Policy*, 2009, Vol. 1, No 1, 24-34. The Preamble to the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (*supra*, note 17) recognises that "domestic violence affects women disproportionately, and that men may also be the victims of domestic violence".

²² The World Health Organization notes that violence against women is "both a consequence and a cause of gender inequality", and risk factors for domestic violence in a woman's life can include a woman's level of education, financial autonomy, level of empowerment and social support, and the general attitudes towards the status of women in her surrounding culture and social environment. *WHO Multi-country Study on Women's Health and Domestic Violence Against Women: summary report of initial results on prevalence, health outcomes and women's responses*, Geneva, World Health Organization (WHO), 2005, at p. viii and p. 8.

²³ Please note that this sub-section uses a definition of domestic violence which pertains primarily to "intimate partner violence" or "spousal abuse".

²⁴ See M.A. Dutton and L.A. Goodman, "Coercion in intimate partner violence: Toward a new conceptualization", *Sex Roles*, 52 (2005), pp. 743-756, and E. Stark, *Coercive control: The entrapment of women in personal life*, New York: Oxford University Press, 2007.

²⁵ *Ibid.* See also the WHO Study, *supra*, note 22, at p. 9, for a description of types of "controlling behaviour" which can form a part of the matrix of intimate partner abuse.

"[a] difficulty resides in the imbalance of forces between the abuser and his victim. The judge must be well aware of this imbalance when the time comes for him / her to ask the victim if she is satisfied with the undertakings proposed by the Petitioner to ensure her safety; the judge must be aware of the potential intimidation exercised on these victims, particularly on those not represented by counsel".²⁶

16. Legal scholars have also noted that abusive spouses or partners may use legal proceedings as another way to harass, seek control of and undermine a spouse, initiating and continuing, for example, drawn-out custody, access or other legal proceedings (potentially including Hague return proceedings).²⁷ This dynamic of what might be called "intimidatory litigation" may be particularly damaging to one spouse or partner (and also indirectly or directly to a child) if there is a significant gap in legal and financial resources between the two parents in question, or if the respondent parent lacks family and social support.²⁸

17. Also noted in social science literature are potential continued harassment, violence and retaliation patterns of an abusive spouse or partner which may occur when the abused person takes a step to leave an abusive relationship. Research has noted that it may be directly after leaving an abusive situation (by seeking divorce or leaving the family residence, for instance) that the abused person is most at risk of being more seriously injured or even killed by a violent partner.²⁹ Similar dynamics may be at play upon the departure or return of a parent after the parent has fled cross-border for safety.³⁰

18. Finally, the psycho-social effects of "Battered Women's Syndrome" and Post-Traumatic Stress Disorder (PTSD) experienced by an abused parent may compromise perceptions of credibility or the believability of the abused person's testimony as a respondent in court, as well as the existence or non-existence of an evidentiary basis on which to assess a respondent's allegations of domestic violence (for instance, delays in or non-reporting of domestic violence incidents to the police could be caused by lack of receptivity of relevant police officials, intimidation, lack of autonomy, "learned helplessness" due to abuse, or cultures of secrecy around domestic violence).³¹

²⁶ Chamberland, *supra*, note 3, Vol. X, Autumn 2005, p. 72.

²⁷ See Zorza, *supra*, note 20, p. 920, and Bruch, *supra*, note 4, p. 541.

²⁸ *Ibid*, and also see discussion below, paras 143 and 144, citing M. Freeman, *International Child Abduction: The Effects*, 2006, The Reunite Research Unit, Leicester, at p. 39.

²⁹ See multiple research sources cited in Bruch, *ibid*, pp. 541 and 542.

³⁰ *Ibid* and see Edleson *et al.*, *supra*, note 5, at p. ix, for a summary of key findings indicating that behaviour of partners or spouses reported by Hague return proceeding respondents involved in the study was consistent with social science literature concerning post-separation violence.

³¹ See J. G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorneys Association, American Prosecutors Research Institute, August 2007. See also Edleson *et al.*, *ibid*, which describes challenges reported by respondents in Hague return applications in seeking help and / or building an evidentiary base in the requesting country. A recent speech by the United Kingdom (England and Wales) Director of Public Prosecutions notes statistics that indicate "[w]omen experience an average of 35 incidents of domestic violence before reporting an incident to the police" (K. Starmer QC, "Domestic Violence: the facts, the issues, the future", available at < http://www.cps.gov.uk/news/articles/domestic_violence_-_the_facts_the_issues_the_future/ > (last consulted 1 May 2011)).

5) Effects of domestic violence on children

a) *Links between domestic violence and child abuse*

19. There are a number of statistical correlations cited in research that link abuse and harm patterns towards one parent to abuse and harm patterns also towards children who are exposed to adult domestic violence.

20. A range of studies have found a correlation of between 30 to 60% between instances of spousal abuse and abuse of children.³² This means that children who are part of a family where adult domestic violence is found are at greater risk of being exposed to physical harm themselves. It has been noted in literature that there are linkages between spousal homicide and child homicide such that "in about a quarter of cases where male batterers kill their intimate female partners, they also kill their children".³³

b) *Harm to children who are exposed to domestic violence*

21. A recent World Health Organization study on domestic violence in 10 countries³⁴ notes that: "[v]iolence against women has a far deeper impact than the immediate harm caused[...] [i]t has devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children".³⁵

22. A body of social science research supports such observations, and it is reported in this literature that there are correlations between a child's exposure to domestic violence, whether direct or indirect, and contemporaneous childhood and later problems in adult life.³⁶ Such problems may include higher rates of "aggressive and antisocial" and "fearful and inhibited" behaviours among children, "lower social competence," and higher than average rates of "anxiety, depression, trauma symptoms and temperament problems".³⁷ The degree of harm to the child in particular situations of family violence has also been found to vary depending on the presence or absence of a variety of other influential factors, including substance abuse of one of the parents, the presence of a protective care-giver or the presence of other protective factors.³⁸

23. A number of modern national legislations include provisions that directly recognise the harm caused to children by exposure to family violence. For instance, English law

³² See, for example, Hester and Radford, *Domestic Violence and Child Contact in England and Denmark*, Polity Press, 1996; A.E. Appel and G.W. Holden, "The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal", *Journal of Family Psychology*, 12 (1998), pp. 578-599; J.L. Edleson, "The Overlap Between Child Maltreatment and Woman Battering", *Violence Against Women*, Vol. 5. 134-154 (1999).

³³ See Zorza, *supra*, note 20, p. 930, citing N. Websdale, *Understanding Domestic Homicide*, Northeastern University Press, 1999, pp. 179-180. Zorza notes that Websdale found that "in 52.6% of domestic child homicides where two parents were involved in caring for the children, the woman was known to have been beaten before the child was killed... [and that] overall children make up 26% of all domestic homicides".

³⁴ *Supra*, note 22. The countries included in the study are Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia and Montenegro, Thailand and the United Republic of Tanzania.

³⁵ *Ibid*, at page vii.

³⁶ See J.L. Edleson, "Children's Witnessing of Adult Domestic Violence", *Journal of Interpersonal Violence*, 14 (1999), pp. 839-870; J.W. Fantuzo and W.K. Mohr, "Prevalence and Effects of Child Exposure to Domestic Violence", *The Future of Children*, 9 (1999), pp. 21-32; G. Margolin, "Effects of Witnessing Violence on Children", in P.K. Trickett and C.J. Schellenbach (Eds.), *Violence Against Children in the Family and the Community*, American Psychological Association, Washington, DC, 1998, pp. 57-101, and Shetty and Edleson, *supra*, note 4, p. 126 (citing, among others, S. Sutton, "Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children", *Journal of Consulting and Clinical Psychology*, 59 (1991), pp. 258-265; H.M. Hughes, "Psychological and Behavioral Correlates of Family Violence in Child Witness and Victims", *American Journal of Orthopsychiatry*, 58 (1988), pp. 77-90).

³⁷ Shetty and Edleson, *ibid*.

³⁸ *Ibid*, p. 128.

recognises that a child witnessing or hearing domestic violence is a child protection issue, and the meaning of harm to a child has been amended by the Adoption and Children Act 2002 to include "impairment suffered through seeing or hearing the ill treatment of another".³⁹ The *New Zealand Domestic Violence Act 1995* includes within its definition of psychological abuse of a child the act of causing or allowing a child to witness domestic abuse, or of putting the child "at real risk of seeing or hearing the abuse".⁴⁰

6) Domestic and family violence: national and international law context

24. There has been much recent national activity in the development of legislation and case law which seeks to address issues of domestic violence more effectively and appropriately. For instance, a Lord Justice of the United Kingdom (England and Wales) (President of the Family Division) has remarked that it was not until a ground-breaking 2000 Court of Appeal Case that "the judiciary really took domestic abuse on board for the evil that it is".⁴¹ Recently, Spain created a system of specialised jurisdiction to hear cases on a variety of matters (including child custody), where issues of domestic violence are involved.⁴² A number of national jurisdictions have recognised, under their asylum or refugee law, a potential ground for asylum related to gender-based persecution, which may include domestic or family violence.⁴³ A recent report of the Secretary General of the United Nations also details a range of national developments around the world, as part of the Secretary General's special campaign to end violence against women.⁴⁴

25. While it is beyond the scope of this Paper to explore the range of these national developments (despite the fact that these developments may influence national judicial treatment of issues under the Convention), it is perhaps important to highlight some key international obligations of States, through treaty law or otherwise, with respect to issues of family and domestic violence. The obligations contained within the United Nations *Convention on the Rights of the Child* are set out immediately below and the remainder are discussed in Annex II to this Paper.⁴⁵

³⁹ *Children Act 1989*, ss 31(9). See also Sir Nicholas Wall, President Family Division, *Keynote address by the President for the National Resolution Domestic Abuse Conference: "Seeking safety – the whole picture"*, 15 October, 2010, at para. 3.

⁴⁰ *Supra*, note 17. Part 1, Section 3(3)(a) and 3(3)(b) of the Act provide that psychological abuse of a child occurs when a person: "a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring".

⁴¹ Wall, *supra*, note 39, para. 2, referencing *In re L (A Child) (Contact: Domestic Violence)*; *In re V, M and H* [2001] Fam 2006.

⁴² *Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género*. The law, however, does not provide for specialised jurisdiction courts to deal with 1980 Convention cases.

⁴³ These jurisdictions include, among others, Canada, Australia, the United Kingdom and the United States of America. See L. Mendel-Hirsa, "Recent Landmark Victories in an On-Going Struggle for U.S. Immigration Law to Recognize and Fully Protect Women's Human Rights", November 19, 2010 (Empire Justice Center). See also Council of Europe work in this area, including its new Convention, Chapter VII (*supra*, note 17).

⁴⁴ See *Intensification of efforts to eliminate all forms of violence against women*, Report of the Secretary-General (A/65/208, of 2 August 2010). Paras 9-10 and 12-14 present particular detail within national jurisdictions.

⁴⁵ The frameworks and obligations set out in such regional and international instruments might be helpful for legislators in the context of international child abduction seeking to employ preventive measures, to support and protect parents dealing with domestic violence issues in the requested or requesting State under Convention applications, and in relation to "safe return" issues. See e.g., *My child ... our child! Prevention Guide International Abduction*, Child Focus, Belgium, June 2010, p. 42, which notes that "long-term violence in a relationship can lead to an international child abduction". Available at < http://www.childfocus.be/uploads/Newsmanager/2010/JUIN_ChildFocus_GuidePrev_AN.pdf > (last consulted 1 May 2011).

Convention on the Rights of the Child

26. The United Nations *Convention on the Rights of the Child*, New York, 20 November 1989 (hereinafter, the "UNCRC")⁴⁶ contains clear provisions which obligate States to combat "the illicit transfer and non-return of children abroad" (Art. 11(1)), to prevent the abduction of children "in any form" (Art. 35), and which affirm the right of a child, "save in exceptional circumstances," to maintain "personal relations and direct contacts with both parents" when those parents reside in different States (Art. 10(2)).

27. The UNCRC also contains strong statements and provisions which censure family strife and instances of violence in the child's life. The preamble to the UNCRC recognises that for "the full and harmonious development" of the child's personality, he or she "should grow up in a family environment, in an atmosphere of happiness, love and understanding". Article 19(1) of the UNCRC provides that States Parties "shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse [...]". The Committee on the Rights of the Child General Comment No 13 clarifies that "mental violence" includes "exposure to domestic violence".⁴⁷

7. Preliminary interpretive issues concerning Article 13(1) b)

28. The *Chapeau* and relevant provision of Article 13 of the 1980 Convention read as follows:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - [...]

b) 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."

29. The Explanatory Report⁴⁸ to the 1980 Convention (hereinafter, "the Explanatory Report"), prepared by Elisa Pérez-Vera, provides an authoritative supplementary means of interpretation of Article 13(1) b).⁴⁹

30. In the Explanatory Report "First Part – General characteristics of the Convention," the author mentions the principal object of the Convention, namely, to counter the increase in international abductions, and also prominently mentions other connected questions which "appreciably affect the scope of the Convention's objectives, and in particular *the importance which has been placed on the interest of the child and on the possible exceptions to the rule requiring prompt return [emphasis added]*".⁵⁰

31. The Explanatory Report describes the main fact-pattern envisaged by the Convention as the "use of force to establish artificial jurisdictional links on an

⁴⁶ The UNCRC has 193 States Parties (last consulted 1 May 2011 at < http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en >).

⁴⁷ Committee on the Rights of the Child, General Comment No 13 (2011), *Article 19: The right of the child to freedom from all forms of violence*, at p. 9.

⁴⁸ Fourteenth Session of the Hague Conference on Private International Law (1980), *Actes et documents de la Quatorzième session*, Tome III, *Enlèvement d'enfants, Child abduction*, pp. 426 to 476. (The Explanatory Report is also available on the Hague Conference website at < www.hcch.net > under "Publications" then "Explanatory Reports".)

⁴⁹ *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, Art. 32.

⁵⁰ See *supra*, note 48, p. 428.

international level, with a view to obtaining custody of a child,⁵¹ where the person who removes the child “hopes to obtain a right of custody from the authorities of the country to which the child has been taken”.⁵² It further notes that in this circumstance “the abductor will hold the advantage”.⁵³

32. In counterpoint to this fact pattern, the Explanatory Report notes that “it has to be admitted that the removal of the child can sometimes be justified for objective reasons which have to do either with its person, or with the environment with which it is most closely connected,”⁵⁴ and therefore a number of exceptions, including the Article 13(1) *b*) “grave risk” defence, were built into the Convention. The Explanatory Report specifies that the exceptions to return, for the most part, are “concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area” and form an important “element in understanding the exact extent” of the main duty of the Convention to secure the return of the child.⁵⁵

33. Further, it is noted that the terms of Article 13(1) *b*) and 13(2) “clearly derive from a consideration of the interests of the child” and invest the interests of the child with “definite content”.⁵⁶ The Explanatory Report further states that “[t]hus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation”.⁵⁷

34. The Explanatory Report goes on to note that “exceptions to the rule concerning the return of the child must be applied only so far as they go and no further[...] [t]his implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter,” and that “a systematic invocation of the said exceptions [...] would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration”.⁵⁸ However, the Explanatory Report gives little further guidance on what is meant by a “restrictive” or narrow interpretation of the exceptions.⁵⁹

35. The Convention *travaux préparatoires* may clarify to some extent the nature of the Article 13(1) *b*) defence in situations of domestic violence where a child may not be a primary target of this violence:

Mr Jones (United Kingdom) [...] Moreover, 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’. For example, where one spouse was subject to threats and violence at the hands of the other and forced to flee the matrimonial home, it could be argued that the child suffered no physical or psychological harm, although it was clearly exposed to an intolerable situation.⁶⁰

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 429.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 432.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p. 433.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, pp. 434-435.

⁵⁹ See also “Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)”, Conclusion and Recommendation No 1.4.2 which reaffirms Recommendation No 4.3 of the 2001 meeting of the Special Commission: “The Article 13, paragraph 1 *b*), “grave risk” defence has generally been narrowly construed by courts in the Contracting States, and this is confirmed by the relatively small number of return applications which were refused on this basis.” Available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention” then “Conclusions and Recommendations”.

⁶⁰ *Supra* note 48, p. 302.

II. Analysis of case law sample

1) Requested and requesting State information, jurisdiction, court level and time-depth of case law sample

36. The case law sample analysed in this study includes 92 cases from a total of 19 jurisdictions.⁶¹ Annex IV presents the full list of cases analysed for this study, including an assigned short title for each case, the respective court level, requesting State and INCADAT citation, where applicable. Court levels represented include cases at first instance, appellate, or superior appellate levels, and in federal or other States with territorial units, the case law sample includes cases from a number of these units. The time-depth represented by this sample includes jurisprudence from 1989 to 2011. It includes cases involving 25 requesting States.

2) Outcome of cases: return or non-return ordered and additional conditions / measures stipulated

37. Out of the 92 cases included in the sample, 49 ended in a return order.⁶² Thirty-two cases resulted in a judicial refusal of return based on Article 13(1) *b*). The outcome of seven was a decision of non-return on a basis other than the Article 13(1) *b*) defence. Four cases in the sample were remanded or remitted to lower courts, three for an evaluation of the availability of protective undertakings or conditions upon a possible return order (*Nunez, Van de Sande, Simcox*), and one in order to engage an independent expert to assess allegations so as to evaluate the grave risk of harm upon a possible return (*D. v. G.*).

38. Out of the 49 cases where a return was ordered, it was indicated in 25 of the decision texts that undertakings or other conditions were (or would be) attached to the order of return with the goal of facilitating safe return of the child and / or accompanying parent (see discussion below, at para. 102 *et seq.*).⁶³

3) Nature of allegations of domestic violence

39. The research question regarding the allegations of domestic violence⁶⁴ enquired as to the nature of these allegations, and also whether the violence alleged was directed towards: (1) the parent and child; (2) the parent only with the child as a witness; (3) the parent without the child as a witness; or (4) the child only. In the case law sample,

⁶¹ Argentina, Australia, Canada, Chile, China (Special Administrative Region of Hong Kong), Costa Rica, Finland, France, Germany, Hungary, Ireland, Israel, New Zealand, Norway, South Africa, Spain, Switzerland, the United Kingdom (England and Wales) and the United States of America.

⁶² This is a return rate, by judicial decision, of approximately 56%, or 49 out of 88 cases (when subtracting the four cases from the total which were remitted to lower courts with unknown outcome). The judicial refusal of return rate in this sample is approximately 44%. It may be interesting to compare these figures to those of the overall global Convention application statistics reported for cases arising in the year of 2008 (this is the sample of *all* cases, making no distinction as to whether they included allegations of domestic violence): 59% of applications going to court ended in a return order, 33% of applications going to court ended in a judicial refusal of return, and 5% in orders of access. See "Part I –A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global Overview", Prel. Doc. No 8 A of May 2011. Soon to be available on the Hague Conference website at < www.hcch.net > under "Conventions" then "Convention 28" then "Statistics".

⁶³ Thus, in 24 cases in the sample where return was ordered, there lacked an indication in the judgment as to whether there were any conditions attached to or follow-up subsequent to a return order.

⁶⁴ See Annex III, Question 3.

particularly in INCADAT summaries where no full text of the case was available, there were a number of cases (a total of 13) where it was not clear what the specific allegations were. Rather, the allegations were only described as “domestic violence” or “incidents of violence”, or in other similar non-specific wording, and therefore it could not be determined into which of the above four categories the allegations fell.

40. Where there was description of the nature of the allegations, the case law sample included allegations of a variety of scenarios, including all of the above four categories, with the most common category being the first category (36 cases). In 14 cases it was unclear whether the alleged violence fell into the second or third categories, and in three cases there was lack of clarity between categories one and two. Thirteen cases fell into category two, three cases into category three, and ten cases into the fourth category.

41. The allegations, when described, included a range of abusive behaviour, often in combination, including physical, psychological and “verbal” abuse. In several cases it was specified that the allegations were in relation to one discrete incident of physical violence (*Finizio, Katsigiannis, Charalambous* [all including allegations of types of verbal / emotional abuse]). Most cases presented allegations consisting in repeated acts of physical abuse which were also very often alleged to be accompanied by psychological and / or other types of abuse.

42. Physical abuse, when described, included allegations of being injured with a knife (*H. v. C.*); or being threatened with a knife (*Matzke*), grabbing by the throat / strangling (*W. v. S., Harris, Tabacchi, Matzke, Ryan*), suffocation (*DT v. LBT*), head-butting, punching and kneeing (*Murray*), punching the parent in the face and breaking and re-breaking an arm (*Harris*), throwing household objects (*e.g., Tabacchi, H.J.*), causing a black eye and loose tooth (*Tabacchi*), breaking the parent’s nose (*Miltiadous*), being thrown across a room (*Struweg*) and being pushed down a flight of stairs (*Re K*).

43. Death threats to the taking parent and very often to the child / children were commonly alleged (sometimes to the children directly and / or to the parent that the children would be killed) (*e.g., W. v. G., Paris I, Achakzad, Murray, Bassi, Harris, Van de Sande, Blondin, Plonit*). The taking parent’s lawyers or police officers were also reported to have been witnesses to threats towards the parent in several cases (*Achakzad, Lombardi*). Allegations of threats or death threats sometimes involved the alleged abusing spouse using a weapon (*Krishna* [knife], *Achakzad* [loaded gun], *Re K* [shotgun], *Re W (2004)* [firearm]) or maintaining a collection of weapons (*Murray* [the father was part of a gang who allegedly would likely be enlisted to commit violence against the mother]).

44. Patterns of psychological torment and / or control were alleged in a number of cases, with the alleged abuser using a variety of “control” mechanisms such as preventing the taking parent from leaving the house (*Matzke, Re M (1996)* [for seven days]), other controlling of behaviour (*Re W (2010), DT v. LBT*), hand-cuffing the parent to a bed (*Re K*), evidencing “unpredictable” behaviour (*AG Frankfurt I, DT v. LBT*), “stalking” behaviour (*Mander*), for instance by breaking into the mother and child’s home (*H.J.*), damaging personal property (*Ryan*), sometimes in connection with “economic abuse” (*P. v. P.*) or circumstances of great economic instability due to the family’s economic dependence on the alleged abuser (for example, failing to pay rent on numerous occasions such that the family had to move multiple times (*P.F.*)). In several

cases it was alleged that the paternal family participated in the abuse of the mother or children (*H.Z., AG Düsseldorf I*), and in other cases it was alleged that the taking parent's half-sister or mother were also a target of abuse (*Kovacs, In re. F*) or that relatives of the taking parent received threatening phone calls (*Suarez*). A number of cases also included allegations of sexual assault or rape (e.g., *Nunez, Kovacs, Matzke, Re J, Re W (2004), DT v. LBT*).

45. It was reported in a number of cases that the mother (and child / children) had to take refuge in the requesting country at a women's shelter or were constantly moving among refuges (*S.E.H., H.J., Mander, Re H*).

46. In a number of cases, the alleged domestic violence included allegations of patterns of alcohol or drug abuse (e.g., *Pollastro, E.A.K., L.J.G., AG Frankfurt I, Ryan, Mahler, Re M (1993), Re H, Re W (2010)*) on the part of the alleged abuser or, in several cases, by both parents (*T.M.M., Sierra, OLG Nürnberg*). Psychiatric or psychological problems of the allegedly abusing parent were noted in several instances (e.g., *W. v. G., OLG Frankfurt II*).

47. In a number of cases it was indicated or alleged that the taking parent had involved the police or sought and obtained police reports in relation to violent incidents (*Bassi, Mander, Krishna, In re. F, OLG Nürnberg*), had obtained protective orders against their partners (*K.M.A., Walsh, Suarez, Sierra, Achakzad, In re. F*) and also that alleged abusers had violated restraining orders (e.g., *Walsh, Mander*). In one case it was presented that the person alleging abuse called the police to intervene but the police failed to take action (*Kovacs*). In a number of cases criminal charges against the applicant parent were pending (*AG Köln, Lombardi*), or had previously been lodged (*Krishna, Re M (1996)*⁶⁵) and one applicant parent had been previously convicted of murder (*Re M (2000)*).

48. It was sometimes unclear whether the children were "witnesses" to the alleged violence, or would have been old enough to be considered as witnesses in the usual sense of the term. For instance, in the case of very young children / infants at the time of the alleged abuse the mother alleged that she was beaten or attacked while holding the child (*E.A.K., Baran, Blondin, Lombardi, Kovacs*), and / or while pregnant with one of her children (*Walsh, Van de Sande, Blondin, Lombardi, Kovacs*).

49. Several cases in the sample (e.g., *R.K. v. Ch.K., L.J.G., F. v. M, Tabacchi, Mander*) specifically reported a father alleging or cross-alleging violence towards him (with the exception of *Tabacchi*,⁶⁶ details of the specific nature of the allegations were not elaborated upon). In the majority of cases in the sample alleging intimate partner or spousal violence, the detailed allegations were of the father as alleged primary perpetrator against a mother.

50. It is interesting to note that in a number of cases, domestic violence was alleged to have occurred before the international abduction (e.g., *Plonit, 1233/95-B*), although domestic violence issues may not have been the basis of a non-return decision (the *Plonit* court found exceptions under Arts 12(2) and 13(1) a) of the Convention satisfied) or non-enforcement of a prior return decision (in *1233/95-B* the taking parent had

⁶⁵ *In Re M (1996)*, the taking parent had lodged a complaint with police in the requesting State with respect to an incident and the parent-applicant had been charged with assault and imprisonment. The case was heard three years after the events and resulted in acquittal, as the prosecutor was without the taking parent's evidence (who was by then in the requested State) and without the evidence of any other witness.

⁶⁶ In *Tabacchi* it was alleged that the mother had also thrown household objects, without injury to others.

concealed the child for eight years subsequent to a return order and the child then objected to return under Art. 13(2)).

51. When abuse was alleged to be towards children alone, allegations were usually concerning sexual abuse, sometimes by a new partner of the left-behind parent (e.g., *D. v. G., Paris II*). When the abuse was towards both a parent and children, it was often unspecified what the abuse was towards the child or children. When specified, it included descriptions of harsh physical disciplinary treatment (e.g., *AG Düsseldorf I, Foster, Matzke, Re K, Re C* [hitting child with a fist and belt buckle]) or other physical abuse including tying the child up (*H.J.*), or wrapping an electric wire around a child's neck (*Blondin*). In one case a parent's generalised "aggression" was alleged, as was sexual abuse of one of the children (*U/NL960145/II.ZK*).

4) Burden of proof and evidentiary standard

52. Concerning the issue of who is to bear the burden of proof under Article 13(1) *b*), the Convention text and Explanatory Report are clear that the "person, institution or other body which opposes return" must "establish" the content of sub-paragraph *b*). In the context of the main fact pattern of domestic violence allegations found in the present case law sample, this would be the parent who has taken the child in question across international borders. While no case law analysed in this study contradicts this plain reading of the Convention text, courts showed themselves to be of different views as to whether they should take a more or less active role in ascertaining the validity of the allegations raised by the taking parent (please see further discussion of this issue below, at paras 76 *et seq.*).

53. The evidentiary standard *per se* for establishing grave risk under Article 13(1) *b*), which is not specified in the Convention text (other than stating that exceptions must be "established"), when discussed in the case law sample, varied among jurisdictions, and in many instances was not directly indicated or affirmed (with some courts only saying, for instance, that "the hurdle is a high one"; *K.M.A.*). In United States jurisprudence, it is accepted that Article 13(1) *b*) allegations should be proven by "clear and convincing evidence," by way of implementing legislation.⁶⁷ In Canadian jurisprudence, the general civil standard, "on a balance of probabilities" is applied, and it was stated in several cases that there must be "considerable evidence" to meet the grave risk test in relation to this standard (*Pollastro, Kovacs*). United Kingdom (England and Wales) courts required that the evidence be "clear and compelling" (see, for instance, *Re C, DT v. LBT*). Courts in other jurisdictions also noted that this defence should be proven by clear and compelling evidence (*P.B.*) or required a high degree of cogency (*L.A.S.M., E.A.K.*).

54. In some cases appellate review courts (e.g., *Walsh*) affirmed that trial courts had erred in applying too high an evidentiary standard. In one jurisdiction, several courts affirmed that the difficulty of applying the grave risk defence (including, of course, its evidentiary standard) lay not in its construction (as articulated in implementing legislation), but rather, in its case-by-case application (e.g., *Mander, H.Z.*).

⁶⁷ *International Child Abduction Remedies Act* (ICARA), 42 U.S.C. S. 11603(e)(2)(A). The evidentiary standard mandated by ICARA in relation to Art. 13(1) *b*) (and Convention Art. 20) has been critiqued as a uniquely high standard, as ICARA does not apply such a high evidentiary standard to the other exceptions of Arts 12 and 13 (which must be proved by "a preponderance of the evidence"). See Weiner, *supra*, note 4, p. 82.

55. Finally, it should be noted that there seemed to be a general absence in the case law sample of significant reference to Article 13(3) of the Convention,⁶⁸ which, according to the Explanatory Report, is “procedural in nature and seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child’s habitual residence[...] [s]uch information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs [13(1) and 13(2)] of this article”.⁶⁹

5) Interpretations of “grave risk”

56. Judicial practice evidenced a range of interpretations as to what was understood by the term “grave risk” under Article 13(1) *b*) of the Convention, with, however, the majority of judges asserting that the exception should be restrictively or “narrowly construed” (e.g., *P.B., Tabacchi*) and / or is subject to a “high threshold” (*Pollastro*), or “a very high standard” (*In re. F*), “difficult to surmount” (*Re H*), and linking the evaluation of grave risk to the seriousness of the harm that the child could confront upon return.

57. On the latter theme, judges made a number of statements, including: that the physical or psychological harm must be “of a substantial or weighty kind” (*Gsponer*); the “risk must be weighty and one of substantial harm” (*Suarez*); risk must be “more than an ordinary risk and must not only be a weighty one, but it must be one of substantial and not trivial harm” (*Kovacs*); that the degree of harm must be “substantial and to a level comparable to an intolerable situation” (*Bassi*); that the “gravity of risk involves not only the probability of harm, but also the magnitude of the harm if the probability materialises” (*Van de Sande*); and that “the words ‘otherwise place the child in an intolerable situation’ indicate that the harm that is contemplated [...] is harm of a serious nature” (*Sonderup*) or indicates the “severe degree of psychological harm” necessary (*Re M (1993)*). One judge stressed that it is not necessary that “the risk be ‘immediate’; only that it be grave” (*Walsh*).

58. Furthermore, some judges emphasised that the possible harm must exceed the difficulties that would normally be expected on taking a child away from one parent and transferring him or her to another (*Tabacchi, AG Frankfurt I*) or the “inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence” (*Re C*). One judge expressed this idea in the following way: grave risk of harm refers to situations where “the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation,” but not “situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child’s preferences” (*Miltiadous*).

59. Several judges in the case law sample found it important to emphasise that the grave risk evaluation could not involve a best interests test as was applied in a child custody case or otherwise (*Mahler, W. v. S., Y.D.G. v. T.G.*), yet some also emphasised that the grave risk exception indeed provided for “exceptional cases in which the force of the child’s interests and needs took precedence over the gravity of the abduction” (*Y.D.G. v. T.G.*).

60. A number of judges asserted that a pattern of sustained domestic violence or violent behaviour in the past or the future would be necessary to make a finding of grave

⁶⁸ With the exception of *1233/95-B, T.M.M. v. M.D.*, and *Sonderup* where this Article is clearly mentioned.

⁶⁹ *Supra*, note 48, p. 461.

risk, rather than isolated incidents of family violence (*Katsigiannis, Struweg*). One judge emphasised that the fact that if returned, the children “would be exposed to an ongoing and chronic situation” where they “live in fear” and are constantly moving without any form of security, in connection with alleged past domestic violence, to be contributory to the finding of a grave risk (*Mander*).

61. In several cases in the sample it was clearly stated that harm to the primary care-giver was or could be harm to the child (e.g., *Achakzad, DT v. LBT*) or that consideration of harm to the taking parent, as well as to the child, is relevant to the evaluation of grave risk (*Ostevoll*). However, in other instances, the opposite was affirmed (*Tabacchi, Charalambous, Nunez*). Courts stated correlations between harm to the care-giver and to a child in a number of ways. *Mahler* expressed the relevant test related to the well-being of the primary care-giver in the following terms: “How [the primary care-giver] views the prospect of return and its tolerability, is not the test, as important as the primary care-giver’s state of mind may be in the long term for the children”. *DT v. LBT* stated that “[p]rimary carers who have fled from abuse and maltreatment should not be expected to return to it if this will have a seriously detrimental effect on the children”.

62. Another court articulated five factors it applied to find that the abuse of a parent was sufficient to find a grave risk of harm to the child (*Walsh*):

1. the father’s violent and uncontrollable temper, which continued in the children’s presence;
2. fights / attacks against an adult son showed that his violence was not hampered by the parent-child relationship;
3. the father had attacked people much younger than he;
4. credible social science literature on correlations between spousal abuse and child abuse; and
5. federal and state law recognising increased risk to children of physical and psychological injury when in contact with spousal abusers.

63. In one case (*S.E.H.*), the court, in finding the presence of grave risk upon potential return, placed significant weight on the fact that the father “appeared unwilling to admit his behaviour towards his family or to appreciate the difficulties for the children”.

64. In a number of cases dealing with different types of family violence and abuse, the primary carer’s ability or willingness to return with the child and to make arrangements for the child’s life circumstances could be determinative of whether the child could face a grave risk of harm (e.g., *S96/2489, Hadissi, Ro v. Ro*). For instance, in *Hadissi*, the court found that the fact that the child would return with the mother and would not live with father was enough to obviate a grave risk of harm.

65. One case in the sample (*Pennello*) clearly contradicted a previous strain of judicial practice concerning primary carer abductions, namely “that a parent should not be permitted to create a psychological situation and then to rely on it”⁷⁰ (i.e., by refusing to return with the child). The *Pennello* court found that the lower court should have

⁷⁰ United Kingdom – England and Wales case, *C. v. C. (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654 [INCADAT cite: HC/E/UKe 34].

considered the question posed by Article 13(1) *b*) from the child's point of view, if the child were to have been sent back alone as a result of a return order — a situation which would be particularly dangerous for a young child “on the threshold of life” (see also *Re M (1999)*, finding that a “wholly dependent” child of 2.5 years should not be parted from his or her primary carer).

66. Several judges (*e.g.*, *Murray* and *H.Z.*) suggested that the taking parent was free to return with her children to another part of the requesting country if she feared domestic violence in the location of her previous residence, or that in general a return to the requesting country to a location remote from the alleged abuser would obviate concerns of grave risk.

6) References to “psychological harm” or “intolerable situation”

67. This research question⁷¹ was included as there is some indication in the *travaux préparatoires* to the Convention⁷² that “intolerable situation” was intended to refer, perhaps among other things, to situations of family violence where the child may not be the direct target of physical or psychological abuse. Similarly, harm of a purely psychological nature may be commonly alleged in these same factual circumstances. Therefore, it was thought important to chart allegations and specific judicial references and commentary pertaining to psychological harm and intolerable situations.

68. While psychological harm or the presence of an intolerable situation was alleged in a substantial number of cases in the sample, in many cases judges found that the possible harm did not rise to the “serious” level necessary to find grave risk (see discussion above, paras 56 *et seq.*), for instance in *Sonderup* where the main harm foreseen upon the child’s return was “the natural consequence of her removal”, despite pre-abduction instances of domestic violence towards the taking parent.

69. A number of parties argued that the parent’s situation of distress or her perception of intolerability as a result of domestic violence and abuse would be inextricably linked to the child’s psychological well-being. For instance in *Murray* it was argued that a return would expose the children to a grave risk of psychological harm and place them in an intolerable situation because if their mother were to be subject to violence this would in turn have a “grave effect upon their welfare” and, in addition, the mother had no support from family in the requesting State.

70. While such arguments were not always successful, as was the case in *Murray* (likewise in *Ryan*), courts often affirmed the validity of assessing the presence or absence of an intolerable situation with respect to the primary carer’s well being, as the child’s “interests are inextricably tied to their mother’s psychological and physical security” (*Ryan*). *Re W (2004)* noted that “it is well recognised, both in the domestic and the international jurisdictions, that in the context of domestic violence, the position of the child is vitally affected by the position of the child's mother”.

71. In cases where return was denied based, at least in part, on such arguments (*Harris, Pennello*), judges additionally sometimes commented on such issues as whether a mother would return to unsatisfactory living arrangements, that she would not have access to social security benefits and would have no family support (*Harris*) and / or commented on the fact of “total dependence” and inextricable linkage of interests of

⁷¹ See Question 5 of Annex III.

⁷² See *supra*, para. 35, for discussion of this possibility with reference to a passage of the *Actes et documents* of the Convention.

children particularly of a “tender age” with their primary care-givers (*Pennello, Re M (1999)*).

72. In *Pennello* the appellate court found it sufficient that from the mother's perspective cohabitation with the father had become physically and psychologically intolerable (no “established pattern of domestic violence” had been made out), which in the court’s eyes justified her unwillingness to return with a young child (a return order of the lower court was quashed).

73. In a number of cases, children directly expressed the anxiety caused to them by the fear that their father would hurt their mother. In *Bassi* the court accepted that the children would be frightened by being returned to their father but found that it was not sufficient to establish a grave risk of psychological harm.

74. A number of courts found that situations foreseen on return that would “reinstate the child in a highly stressful and psychologically damaging environment” (*Krishna*) were a basis to find the grave risk threshold met. In another case involving generalised stressful circumstances that would be foreseen to surround the child (*AG Frankfurt I*) and thus place him in an intolerable situation, a number of factors and symptoms were noted: the mother's economic situation was found to be unstable; the child was disturbed due to the tensions between his parents; he had difficulty sleeping, he wet his bed, and showed aggressive behaviour. It was found that even the accompaniment of the child’s mother upon return would not alleviate the child’s “extreme stress” were he to be returned. (See also *In re. F*, where symptoms of bed-wetting, nightmares and aggression of the child re-started when the child was told of possible return to the requesting State.)

75. One court noted that the recurrence of a defined and diagnosable psychological impairment (Post-Traumatic Stress Disorder, or PTSD) was encompassed in the meaning of a “grave risk of psychological harm,” even if it were to be construed narrowly (*Blondin*).

7) Findings made on domestic violence allegations and evidentiary basis of findings

a) Findings on domestic violence

76. At one end of the spectrum, several courts expressed the view that the court of habitual residence was best placed to investigate allegations of family abuse, and that any investigation into the veracity of the allegations should be deferred, as a matter of “comity,” practicality, or otherwise, to a court of the habitual residence of the child (see *Murray, S96/2489, W. v. G.*). Another strain of judicial practice did not find it necessary to make findings on the veracity of allegations of violence but rather placed the emphasis on assessing the presence or absence of risk. For instance, *Re K* stated that the court was tasked with “assessing risk, not resolving issues of fact”. Some courts, while making no finding on specific allegations of past violence, indicated that the allegations were “probable” (in one case based on affidavits of both of the parties) and thus were sufficient to make a grave risk determination (e.g., *Mander*).

77. However, other courts contradicted such an approach, stating that, in order to ascertain the presence or absence of a grave risk upon the possible return of the child, the requested court had a duty to actively investigate the veracity of the allegations

(*D. v. G.*). Such investigation may include, if necessary and appropriate, the engagement of an independent expert, generally an expert psychologist (for instance see *D. v. G.*, *Y.D.G. v. T.G.*). As one court noted, in its view, a court must investigate once serious allegations have been made, unless the allegations are clearly “incredible or unreliable” (*D. v. G.*).

78. Other courts seemed to place emphasis on a vigorous adversarial process in the assessment of the Article 13(1) *b*) defence, underlining the duties of the parties to autonomously present thorough evidence (for instance, *K.M.A.*, *L.A.S.M.*, *H. v. C.*, *Re K.*).

79. Courts represented in the case law sample which did take it upon themselves to make findings on domestic violence allegations, made a variety of findings, concerning sustained patterns or individual incidents of violence and abuse, based on a variety of evidentiary sources. It is of course impossible, without also doing an analysis of the evidentiary material itself, to enquire more deeply into the bases of the allegations of violence, as reported case law is often sparse on details of the content of the evidence presented, particularly at appeal levels. Furthermore, when a judge, for instance, makes a finding on a domestic violence incident and pattern, yet affirms that the pattern does not rise to the level necessary to constitute a grave risk (see discussion in Section II.5, above), it is, again, not always possible to assess the basis of this determination on information included in the written judgment alone. Much judicial discretion is involved in these fact-sensitive and thus evidence-dependent exercises.

80. In the case law sample, it was sometimes unclear the extent to which allegations of domestic violence were investigated or considered by the presiding judge before making a determination of the veracity or importance of the allegations (*i.e.*, what probing and examination of the evidence took place).

81. Nonetheless, it is possible, in this section, to catalogue: 1) the range of evidence upon which the judicial actors relied; 2) to what sort of scrutiny this evidence was subjected when this is reported; and 3) any general judicial commentary on what was seen as the appropriate evidence-base and judicial practice in dealing with evidence in Hague return cases involving domestic violence allegations under the Article 13(1) *b*) defence.

b) Types of evidence relied upon

82. In a range of cases across a number of jurisdictions “affidavit evidence” featured prominently and it was acknowledged by one court that this type of evidence would very often be a form of evidence relied upon in Article 13(1) *b*) cases (*Pennello*). These would frequently be submitted by the taking parent and the parent requesting the return of the child (*i.e.*, the contesting parties). In the case law sample, this affidavit and / or testimony evidence was sometimes accompanied by testimony or submissions from family members of either party (*Finizio*, *Van de Sande*) and, less frequently, third-party witnesses (*Pollastro* [confirming injuries of the mother]; *Miltiadous*).

83. Other evidence included medical documentation of injuries (*Pollastro*, *Re M (1996)*), evidence of multiple threatening phone calls (*Pollastro*), photographs from incidents / injuries (*Achakzad*, *Walsh*, *Re M (1999)*), information concerning an investigation from

New York Administration of Child Services (*Suarez*), social welfare reports (*T.M.M.*), evidence of criminal charges against the father (e.g., *Lombardi*; while he was affirmed to be “innocent until proven guilty,” it appears that the presence of the charges were persuasive), documentation obtained from the requesting State’s Ministry of Justice regarding the parent’s criminal conviction (*Kovacs*), police reports, and evidence of an applicant parent violating undertakings / restraining orders (*Walsh*).

84. Testimony of experts, who were either independent or introduced by one of the parties, featured prominently in many cases (for this type of evidence, see further discussion, below, under Section II.8).

85. In one case (*Bassi*), courts found that the fact that the mother had continued to allow the children to visit the father prior to their removal contradicted the mother’s assertion that the father’s past violence would constitute a grave risk in the future, in addition to the fact that the older child did not believe that the father would hurt them. Other courts also found that the mother’s past resumption of cohabitation (*Mezei*) or previous behaviour of leaving the children in the sole care of the father against whom there were allegations (*U/NL960145/II.ZK, F v. M*), were influential factors in undermining the case of the parent seeking to invoke the Article 13(1) *b*) defence.

86. It is important to note that the testimony of the child or children in question often featured significantly in the case law sample,⁷³ and was often important when, for instance, their testimony contradicted that of the taking parent (*L.A.S.M., Bassi, Ryan*) or supported the case for non-return (see for instance *Ostevoll, Simcox, S.E.H., Re W (2010)*). A number of cases underlined the importance that it be assessed whether one of the parents had unduly influenced the child’s testimony (*S.E.H., Mezei, Re W (2010)*). One judge noted that it was not necessary that the judge interview the child in person him or herself, but was free to conduct this interview through ordering a psychological report (*P. v. P.*), although other judges chose to hear the children directly, *in camera* (*Ostevoll*, along with psychologists’ testimony), and / or with the parties present (*T.M.M.*). As a result, cases which raised an Article 13(1) *b*) defence often also raised Article 13(2) (objections of the child to return) as a separate defence (*Mezei, T.M.M., G. v. B., P. v. P., Re J, Re W (2010)*, among others), often with the child’s fear or reporting of domestic violence being a basis for their objection.

c) Scrutiny of evidence

87. The majority of cases contained combinations of different types of evidence which were then assessed as a whole, according to normal judicial practice. Standard issues pertaining to defects in evidence were generally apparent in the case law sample, such as inconsistency between sources of evidence, corroboration or lack of corroboration by third party evidence or testimony, when available, and witness credibility issues.

88. In one case, a court found a mother’s uncontested affidavit to be sufficient to support allegations of domestic violence (*P.F.*), and other courts sometimes seemed similarly to credit a parent’s affidavit evidence alone (*Pennello*).

⁷³ Art. 12 of the UNCRC provides that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child [...]” and “shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child [...]” See also Committee on the Rights of the Child, General Comment No. 12 (2009), *Article 12: The right of the child to be heard*.

89. Credibility issues of the relevant parent or other witness (especially when a family member) were often important and commented upon in case law. For instance in *Kovacs*, evidence of the mother's "moral character" (evidence of prostitution and criminal record for robbery) was important, as was the fact that a mother's allegations of domestic violence had "grown and expanded" during litigation in another case (*Hadissi*). Several courts found an applicant's "panicked" response to allegations of violence (*Achakzad*) or his "evasive" or "hostile" testimony (*Miltiadous*) as indicative of a lack of credibility.

90. In one case (*Achakzad*), the motives of the parents for the child abduction and for the allegations and / or denials of the violent behaviour were considered in detail: for instance, the mother was found to have no other motive besides the alleged domestic violence to leave the place of the child's habitual residence (as the departure resulted in a significant decline in her standard of living), while the father had a motive to lie about the alleged abuse due to his fear of harm to his prospects of becoming a police officer and given his "outmoded chauvinist values".

91. There was no set pattern in the case law sample as to whether the evidence presented was or was not tested by cross-examination. When the evidence was not subject to cross-examination, it was sometimes unclear whether the court had refused to allow cross-examination as a matter of practice or the parties declined to undertake cross-examination (although it was stated in *Harris* that the latter was the case).

d) Judicial views concerning appropriate practice in treatment / assessment of the evidence

92. As mentioned above (para. 76), in a number of cases judges refrained from making any determination on the veracity of domestic violence allegations, stating that this was the duty of the court of habitual residence, with one judge stating that when evidence was not subject to cross-examination, to make any determination based on untested evidence would thwart the purposes of the Convention (and thus return was ordered; *Murray*). In *Re H* an appellate court overturned the court of first instance decision and noted that it had incorrectly made firm conclusions of fact based upon "contested and untested allegations".

93. A number of judges commented on the great value of independent expert evidence (see para. 97, below) in order to assess the veracity of allegations, particularly when contradictory affidavits may have been the essential evidence tendered, presumably often without the benefit of cross-examination.

94. Several courts commented that in their view in Hague Convention cases, in general, oral evidence should be used sparingly or in a limited fashion (e.g., *Re W (2004)*, *D. v. G.*). However, the court in the latter case, while affirming this general rule, suggested that in cases of serious allegations of harm this general rule should not govern, and he went on to remand the case to the lower court in order to seek evidence in the form of an independent expert's report (*D. v. G.*). The same court further commented that while expedition of Convention cases was necessary, the fundamental rules of evidence had to be respected (*D. v. G.*). One appellate court (in *Re W (2004)*) noted that judges are not prohibited from requiring oral evidence (where such evidence might be determinative), but the judge should first be satisfied that such further evidentiary exploration should hold the realistic possibility that it will establish an Article 13(1) *b*) case which is "embryonic" in the written submissions (see *DT v. LBT* in the same jurisdiction which unusually took the step of hearing full oral evidence from both parties).

95. One court clarified that in its view, the absence of police reports or medical records should not be dispositive of the success of the mother's defence, especially weighing evidence that there was a family pattern not to involve police in domestic violence incidents (*Achakzad*). However, in other instances, the opposite was the case and the absence of corroborative evidence could be determinative (e.g., *Re K*).

8) Expert evidence used to establish domestic violence allegations or protective laws in requesting State

96. Thirty-nine of the 92 cases included in the case law sample reported that some kind of expert evidence was led and / or relied upon to determine or assess the nature or existence of the alleged domestic violence and / or the grave risk foreseen towards the child upon return. However, there were no cases which clearly noted that expert testimony was led by parties regarding the protective laws in the requesting State, with several cases however (e.g., *Harris, Paris I, Re M (1993), Re M (2000)*) making mention of certification, evidence or information from the requesting State concerning the operation of its law in cases involving domestic violence and custody issues or social security benefits. One case (*Baran*) specifically expressed concerns about the evidentiary burdens that would be placed on those raising an Article 13(1) *b*) defence if they were obligated to present expert evidence on foreign law or conditions. In contrast, some courts noted that the respondent parent (*H.Z., H. v. C., Re M (2000), F v. M*) had failed to lead adequate evidence that the authorities or the legal system of the requesting State would be unable to provide her and the children with protection pending a custody decision.

97. Many judges seemed clearly to prefer court-appointed or independent experts / expertise (*Harris, D. v. G., Y.D.G. v. T.G., S.E.H.*), and expert evidence which was presented or presumed to be largely influenced by one of the parties was sometimes dismissed as not being a credible or persuasive source of evidence (e.g., *K.M.A., Hadissi, Sonderup*).

98. The types of experts relied upon included social workers (e.g., *Ch. M., T.B. v. J.B., Re H, Re J, Klentzeris*), child counsellors (*Matzke*), psychologists (e.g., *Rouen, Mahler, Ch. M., H. v. C., Nunez, Tabacchi, Ostevoll*) reports from staff at hospitals and a crisis centre (*Harris*), and physicians (*Pollastro, Ch. M.*).

99. Diagnoses and symptoms of children noted by experts included PTSD (*Kovacs, Walsh, Ostevoll, Miltiadous, Blondin, Simcox*), children's trouble to eat and sleep for fear of return to requesting State (*Walsh*), a child's agitated state (*Pollastro*), that child witnessed spousal abuse and was scared by it (*Miltiadous*), that the children had been abused (*Ostevoll*), that the children did not show signs of being abused (*L.A.S.M.*), that the child had "good psychological defenses" despite the disturbed family background (*Foster*), the child's fear / anxiety about return (*Ch. M., Re K, Re C*), aggressive and uncommunicative behaviour at school (*Ch. M.*) and the quality of the child's relationship with the father (*G. v. B., OLG Nürnberg*). Experts (particularly doctors and psychologists) also presented views as to whether return would be damaging to the child (*Kovacs, Ostevoll, Mezei*), including because of separation from the mother (*OLG Nürnberg*).

100. Experts also sometimes diagnosed the taking parent with PTSD (*Tabacchi*) due to victimisation by domestic violence, or commented on the parent's state of mind and the

risk of return to her stability (*H. v. C.*). One case in the sample noted that a psychological examination of the father was undertaken (*Rouen*). In one case where the left-behind mother was alleged to be drug addicted and abusive towards the child, a psychological and drug test of this parent was carried out (*Bordeaux*).

101. In several instances, references were made to social science literature / expertise. In *Walsh* it was noted that “credible social science literature establishes that serial spousal abusers are also likely to be child abusers” (see also *Miltiadous, Ostevoll*).

9) Measures of safe return and investigation of protective facilities available in the requesting jurisdiction⁷⁴

102. One view of what might be called “comity” considerations seemed to prevent some judges from ordering conditions or investigating effectiveness of potential protective measures upon return of the child and an accompanying parent (see *Gsponer, Murray, Bassi*). One judge noted that it would be “presumptuous and offensive in the extreme” to conclude that the authorities in the requesting State would not be capable of protecting the returning child and parent (*Murray*). However, in some jurisdictions, it was reinforced that it was incumbent upon judges to investigate whether protective measures or conditions are available in the requesting jurisdiction before a decision on return is made (*Van de Sande, Blondin, Simcox*), and several other courts were very clear that these investigations were conducted (e.g., *Harris, Re M (2000), AG Düsseldorf II, Paris I, Bordeaux* [the three latter cases decided under the Brussels II a Regulation]⁷⁵).

103. One Chief Justice (in *Cooper*) expressed the view that there was arguably a legal obligation found in Article 7 of the Convention that requesting States should accept direct responsibility for the welfare of children after a successful return application under the Convention. The Chief Justice stated further the opinion that:

“[...]there is a problem about the present operation of the Hague Convention in that [acceptance of the direct responsibility for the welfare of children] is not the practice of the receiving States [...] [and] [...] the fact is that the Convention is an agreement between the relevant States and the children are returned pursuant to that agreement [...] [i]n such circumstances, particularly in circumstances where there are allegations of violence or child abuse, it seems to me more than time that the receiving States accepted a more positive obligation for the welfare of children so returned”.

104. The above comments notwithstanding, a number of judges found that, given the severity of the abuse alleged (which they had found to be credible), possible undertakings, conditions and protective facilities, even if they were offered or existed, would be insufficient to protect the returning child and / or accompanying parent (*Harris, Blondin, Paris I, AG Düsseldorf II, Klentzeris*). There was at least one finding that the foreign authority had been shown to be unwilling or unable to respond to the abused parent’s complaints (*Miltiadous*). In one case, the concern was not whether the foreign authorities would issue protective orders but rather whether the alleged abuser would

⁷⁴ For reference to the role of Central Authorities in connection with this topic, please see Section III.2, paras 125 to 127.

⁷⁵ See below, Section V.2, for a discussion of the “Brussels II a” Regulation, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and in particular, Art. 11(4) of this Regulation.

violate them, as he had a history of fleeing criminal charges and had violated a previous barring order (*Walsh*).

105. In one case (*Simcox*), the court set out a schema in relation to evaluating the appropriateness of undertakings, proposing three broad categories of return cases:

- 1) cases with minor abuse allegations that would not rise to the level of "grave risk," such that undertakings would be irrelevant;
- 2) cases where there is "credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect", such that undertakings would be insufficient; and
- 3) cases that fall in the middle, where abuse is "substantially more than minor, but is less obviously intolerable". In these cases, the question of applicability of undertakings will be fact-based, based on factors including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would "sufficiently ameliorate the risk of harm to the child caused by its return".

a) Nature of undertakings and conditions ordered

106. The types of undertakings and conditions that judges noted or ordered upon the return of the child in the case law sample were varied and, indeed, very much based on factual circumstances particular to each case (and, of course, based on the individual judge's discernment about what would be possible, reasonable, or necessary to order and, in some cases, what the left-behind parent had offered to undertake).

107. Measures found in the case law sample included agreement or undertakings from the applicant parent to pay for the travel or airfare of the returning parent and children (e.g., *Finizio, OLG Nürnberg, Suarez*), to pay maintenance for an undetermined or set time to the returning parent and child, sometimes including for the use of a vehicle (e.g., *Katsigiannis, Rouen, Suarez, Sonderup, Re C*), to provide appropriate housing for the mother and child (sometimes clarifying that it should be in a separate residence) (*Finizio, Ro v. Ro, Re K, Re C*), to vacate the family residence in order that the returning parent and child / children could live there (*Katsigiannis, Struweg, A.S.*), that the applicant parent drop or not initiate criminal charges against the taking parent (*Sonderup, Tabacchi, Re C, Re M (2000)*) and / or refrain from other legal proceedings (e.g., *Struweg, Re W (2004), F v. M*), that the applicant parent should not annoy, harass or molest the returning parent or should co-operate with the foreign authorities to put these protective orders in place (*Finizio, F v. M*) or should not use violence against the parent or seek or exercise leave from prison until the custody hearing (*Re M (2000)*), or contact that parent (*Ro v. Ro*), and that the applicant parent provide a sum of money if the foreign court was not seised of custody proceedings by a set date (*Finizio*) or should bring custody proceedings as soon as possible (e.g., *Suarez, Matzke, Re K*). Some courts co-ordinated interim orders or arrangements in the receiving State concerning temporary custody or access issues upon return, usually specifying that the taking parent should be the interim custodial parent (e.g., *E.A.K., Suarez, Bordeaux, W. v. S., H. v. C.* [including supervised access for the father]), and / or stipulated that the applicant parent should not remove the child from the mother's care or seek a passport for the child (*Re W (2004)*). One applicant was to file an undertaking with the foreign court not to move to a third country (*Hadissi*).

108. In several cases it was noted that concrete protective measures would be or had been taken by receiving State authorities (*Re H, Bordeaux* [a case subject to the Brussels II a Regulation]⁷⁶) or that the Central Authority in the requesting State would be able to assist in the follow-up of the undertakings / conditions (*Sonderup*).

109. It was noted in several cases that the child would be accompanied by or placed with the father during or after return (or a person determined by him, *AG Köln*), if the mother refused to accompany the child (*P.B., L.A.S.M.*).

b) Judicial efforts to make undertakings more effective

110. Some judges made the return of the child conditional upon the performance of undertakings by the applicant. In several cases it was recorded that the applicant did not fulfil the conditions imposed upon him, and thus return was not enforced (see, for example *Ro v. Ro*, where the applicant parent failed to deposit the monetary sum required by the court, and also *Re W (2004)*).

111. One court (*P.F.*) emphasised a strict approach to voluntary undertakings and stated that an expressed general willingness of the applicant to agree to undertakings was insufficient and what was needed was rather proof that the applicant “had made the appropriate provisions by producing, for example, money necessary for their [the mother and children’s] maintenance, money necessary for the purchase of the airline tickets for their journey, and evidence that he had established a residence separately from his own for them to which they had a proper title and in respect of which rent in advance had been paid,” in effect placing an active obligation on the applicant to establish that specific measures had been taken prior to a judicial determination of return or non-return.

112. The court in *Sonderup* required that the applicant act on a number of undertakings (including refraining from criminal or other legal charges towards the abducting parent, providing financial and other material support, co-operating with child services authorities, etc.) by obtaining an order, at the appropriate court in the requesting State, mirroring, “insofar that it is possible” the order by the requested court. Such a “mirror order” then had to be communicated to the requested court. In *Re W (2004)*, enforcement of a return order was likewise made conditional upon the putting in place of a number of mirror orders of undertakings in the court of the requesting State. The *Katsigiannis* court required that the Central Authority in the requesting State acknowledge receipt of its court order with undertakings, and that the requested Central Authority and counsel to both parties be advised of steps followed in compliance with the order.

c) Other measures deemed important by judges for return

113. There was generally sparse mention of formal “mirror orders” being required by judges upon a return decision in the case law sample, and aside from the details provided in such cases as *Sonderup* and *Re W (2004)*, it was reported that only one other applicant was required by a court to seek mirror orders of undertakings in the requesting State (*Re M (2000)*); it appears that the obtaining of the mirror order was not a condition of return in this case.⁷⁷ One judge (*Y.D.G. v. T.G.*) commented that the delay caused by seeking to obtain mirror orders would harm the child (and thus declined

⁷⁶ *Ibid.*

⁷⁷ In *Pennello*, the court of first instance had “ordered the return of the child, subject to undertakings being made and mirror orders being entered in New Jersey”. The respondent parent successfully appealed this decision.

to order them), and another court (*DT v. LBT*) found the applicant's assertion that he would seek a mirror order of undertakings was not to be trusted.

114. One court, by way of communications made by a Family Advocate, ensured that enquiries were made to the relevant court, via the Central Authority in the requesting State, regarding a specific time-line as to when a custody determination in the State of habitual residence would be made (*Sonderup*). The court noted that it was "clearly in the interests of [the child] that certainty as to her custody and guardianship be settled at the earliest possible time".

115. One court (*Ryan*) noted that it undertook direct judicial communications with a judge in the requesting jurisdiction (with parties' counsel present) in which the latter judge assured the judge of the requested State that the returning parent would get a "fair custody and access hearing" in the jurisdiction of the child's habitual residence.

10) Other observations (e.g., access to justice or domestic violence victims' programmes for returning parent, follow-up on undertakings or the outcome of the return circumstances)

116. There was little mention in the case law sample of access to justice issues upon the return of the accompanying parent (aside from undertakings or comments regarding the speed of custody proceedings), and in general, there also were very few comments regarding intentions to follow-up upon the return of the child and accompanying parent. In *Sierra* a judge states that: "I am assuming that the child and spousal support orders made in the Florida Court are being honoured".

117. In *Murray* the mother submitted that she and the children would have to stay in a refuge on their return. This was not explored further by the court and specific measures for protection or more adequate accommodation upon return were not discussed.

118. In *Harris*, where return was refused based on a grave risk defence, the court noted that appropriate recognition must be afforded to "the serious and invidious nature of domestic violence, its effect on the victim and the corresponding actual or potential effect on a child, or the consequences of requiring the returning child (and perhaps a primary care-giver) being isolated and living in impoverished circumstances until parenting proceedings are determined". In *DT v. LBT*, it was noted that the mother had "at long last taken the momentous step" of separating from the father, and that if she returned to the requesting State with the children and was convinced to reconcile with the father, "the consequences for the children of the parents reuniting would be disastrous".

11) Other jurisprudence: recent European Court of Human Rights case law

119. It should be noted that several recent decisions of the European Court of Human Rights (the ECHR), namely *Neulinger and Shuruk v. Switzerland (Application 41615/07)* and *Raban v. Romania (25437/08)*, may affect or influence the application of Article 13(1) *b*) and future development of case law in this area, at least among jurisdictions which are subject to the ECHR. Some commentators have suggested that the reasoning in *Neulinger* and *Raban* might be construed to suggest that a comprehensive "best interests of the child" test should be conducted by the requested

jurisdiction upon the consideration of a return application under the 1980 Convention, at least in the context of an Article 13(1) *b*) defence. However, at present significant ambiguity remains as to whether this indeed is the consequence of this recent ECHR jurisprudence.⁷⁸

III. The role of direct judicial communications and Central Authority co-operation

120. The case law sample analysed in Section II, above, seems to indicate (by absence of explicit mention in the majority of cases)⁷⁹ that the Central Authority network and that of the International Hague Network of Judges are support mechanisms which are perhaps not being used as much as they could be in cases where domestic violence issues are raised.

1) International Hague Network of Judges and judicial communications

121. Two cases found in the course of this research expressly described that direct judicial communications were used to resolve a number of “safe return” issues in a Convention return proceeding involving domestic violence allegations.⁸⁰ In *Ryan* (*supra*, para. 115), it was noted that direct judicial communications had occurred in order to discuss the deferral of the taking of jurisdiction pending the Hague application and to receive assurances that the returning parent would get a fair custody hearing upon return. It is useful here to summarise more extensively one judge’s description of the other case found, reported in *The Judges’ Newsletter on International Child Protection*,⁸¹ to illustrate some of the dynamics and potential of judicial communications in these circumstances.

122. The requested judge reported that the taking mother accepted that the children in question had been “wrongfully abducted” and “raised very significant issues about domestic violence both in respect of her and in respect of the children”.⁸² The requested judge, with agreement of the parties, initiated and carried out direct judicial communications to assist in establishing “what arrangements could be made in the other State to secure the protection of the children in the event that [the judge] ordered their return”.⁸³

123. The requested judge formulated a set of questions to the International Hague Network judge in the requesting State with a view to “identifying the means by which the

⁷⁸ See for instance, United Kingdom – England and Wales, Court of Appeal case *Eliassen and Baldock v. Eliassen*, [2011] EWCA Civ 361, which will be heard by the Supreme Court of the United Kingdom commencing the week of 23 May 2011. The Court of Appeal stated that with a “proper understanding” of *Neulinger* and *Raban* “the judge evaluating grave risk of harm in the context of an Article 13[1](b) defence must weigh the immediate and not the ultimate best interests of the child” (at para. 69). Lady Justice Black held that she did not see “*Neulinger* as requiring a change to the present approach to Hague Convention applications in this jurisdiction or to the existing jurisprudence upon the basis of which our courts make their determination of such applications” (at para. 125). In *Maumousseau and Washington v. France* (application 39388/05) the ECHR stated that the Court was “entirely in agreement with the philosophy underlying the Hague Convention” and that it was “therefore a matter [...] of restoring as soon as possible the *status quo ante* in order to avoid the legal consolidation of *de facto* situations that were brought about wrongfully, and of leaving the issues of custody and parental authority to be determined by the courts that have jurisdiction in the place of the child’s habitual residence” (at para. 69).

⁷⁹ It is of course possible that courts are using judicial networks and communications and the Central Authority network but not explicitly reporting this in their judgments.

⁸⁰ Additionally, in *Re C*, the requested court seemed well-apprised of past and future scheduled proceedings in the courts of the requesting State and therefore Direct Judicial Communications may have been employed.

⁸¹ A case requesting return to Malta from the United Kingdom – England and Wales, the details of which were reported in Judge Andrew Moylan, *supra*, note 3, Vol. XV, Autumn 2009, p. 17. Note that the instant case described is one subject to the Brussels II a Regulation, subject to Art. 11(4) of that Regulation. Please see discussion of this Regulation and Art. 11(4) *infra*, Section V.2.

⁸² *Ibid*, p. 19.

⁸³ *Ibid*.

mother and the children's positions could be safeguarded in the event of their return": "[h]ow was a child protection investigation instituted; could such an investigation be put in place in the event of the return of the children; how quickly could orders be made, by agreement, against the father relating to his behaviour and to the occupation of the family home and also as to the residence of the children?"⁸⁴ A prompt response was received from the foreign judge, which: a) identified the relevant agency concerned with child protection in the requesting State; b) "made clear that child protection measures could be initiated expeditiously when and if required"; and c) also made clear that other orders (of protection) could also be made expeditiously.⁸⁵

124. The requested judge notes that when the case next returned to court, it was resolved by agreement of the parties (with an agreed arrangement of return of the children and the petitioner father giving "a number of binding promises" to the court), a resolution that, in the judge's view, "was very substantially promoted by the information supplied" by the foreign judge. The requested judge further noted that the communication had also provided him with the "necessary degree of what might best be described as comfort not only to me but also, perhaps more importantly, to the mother, that a proper protective structure was available so that she felt able to agree to return with the children".⁸⁶

2) Central Authority collaboration

125. It is unclear in the instant case law sample, due to lack of explicit or extensive discussion in case reports, other than in passing (with, however, such notable exceptions as *Katsigiannis* and *Sonderup*),⁸⁷ how frequently Central Authority co-operation obligations are used in cases where domestic violence allegations are raised.

126. Article 7(2) d) of the 1980 Convention meaningfully supports the "procedural" / evidentiary mechanism of Article 13(3) (discussed *supra*, para. 55) by stating that Central Authorities designated under the Convention have duties "to exchange, where desirable, information relating to the social background of the child," either directly or through an intermediary. Additionally under Article 7(2) h) of the Convention, Central Authorities have a duty to "provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child".

127. On the topic of the "The Role and Functions of Central Authorities," the 2006 Fifth Meeting of the Special Commission to review the operation of the 1980 Convention concluded and recommended, under the heading, "Ensuring the safe return of children"⁸⁸:

The Special Commission reaffirms the importance of Recommendation 1.13 of the Special Commission meeting of 2001:

"To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ It should also be noted that a specific research question with respect to use of and collaboration between Central Authorities was not included in the case law analysis.

⁸⁸ *Supra*, note 59, Conclusion and Recommendation No 1.1.12, at. p. 5.

It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information in respect of legal, financial, protection and other resources in the requesting State, and facilitate timely contact with these bodies in appropriate cases. The measures which may be taken in fulfilment of the obligation under Article 7 h) to take or cause to be taken an action to protect the welfare of children may include, for example: a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger; b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child; c) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.

It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent".

The Special Commission affirms the important role that may be played by the requesting Central Authority in providing information to the requested Central Authority about services or facilities available to the returning child and parent in the requesting country. This should not unduly delay the proceedings.

IV. Interaction of the 1980 Convention with the 1996 Convention and domestic violence issues

128. 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* (hereinafter the "1996 Convention") addresses a very wide range of international child protection issues. Its inclusion of a Central Authority network alongside an international legal framework of broad scope offers much promise for the effective protection of vulnerable children across international borders. The 1996 Convention and the 1980 Convention are designed to operate in a complementary manner, and in this regard may offer some further tools, at an international level, for judges who deal with domestic violence issues under the 1980 Convention.

129. First, under the 1996 Convention, an authority in a requested State under a 1980 Convention return application may, "in all cases of urgency," take "any necessary measures of protection" for the benefit of a child (Art. 11(1)).⁸⁹ This could conceivably include measures to protect both the child and a taking / accompanying parent who is the victim of domestic violence, where this is considered as a necessary element in protecting the child.⁹⁰ The 1996 Convention's provisions on enforcement allow that any urgent measures of protection taken by the judge in the requested State will be recognised by operation of law (Art. 23) and then enforceable in the country of return

⁸⁹ For a discussion of Art. 11 measures under the 1996 Convention and their interaction with the 1980 Convention, see "Revised Draft Practical Handbook on the Operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children", Prel. Doc. No 4 of April 2011 for the attention of the Special Commission of June 2011 at pp. 41-46 and pp. 87-90. Available on the Hague Conference website, < www.hcch.net >, under "Specialised Sections" then "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" then "Preliminary Documents".

⁹⁰ The Explanatory Report to the 1996 Convention states that "[t]he Commission deliberately abstained from setting out what measures might be taken on the basis of urgency in application of Article 11. This is indeed a functional concept, the urgency dictating in each situation the necessary measures". The Explanatory Report further elaborates that "[i]t might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child". See P. Lagarde, "Explanatory Report on the 1996 Hague Child Protection Convention", *Proceedings of the Eighteenth Session*, Tome II, *Protection of children*, The Hague, SDU, 1998, at para. 70 and para. 68. This document is available on the Hague Conference website at < www.hcch.net > under "Publications" then "Explanatory Reports".

"upon the request of an interested party" (Art. 26(1)) and will continue to be in force until such time as the authorities there are able themselves to put in place "measures required by the situation" (Art. 11(2) and (3)). However, some commentators have noted that the Article 11 mechanism in the 1996 Convention will be of value in cases of domestic violence: 1) "only to the extent that the authorities of the habitual residence are equipped to have the judicial orders concerning domestic violence respected, which, unfortunately, is not always the case";⁹¹ 2) to the extent that the judge in the requested State is of the view that the situation is one of "urgency" within the meaning of Article 11, as the meaning of this term is not defined in the Convention;⁹² and 3) if the Article 11 urgent measures taken by the requested State authorities are fully continued or enhanced by the requesting State authorities, as the measures will lapse when the authorities of the State of habitual residence take the "measures required by the situation" (Art. 11(2)) ("...[s]ome are concerned that these authorities might order measures less demanding on the abuser, either because of nationalistic sympathy or because the victim is not there to let her point of view be known").⁹³

130. Article 34 of the 1996 Convention additionally allows competent authorities contemplating a measure of protection to request an authority of another Contracting State, which has information relevant to the protection of the child, to communicate such information. This provision may further support judicial actors in obtaining cross-border information with respect to allegations or findings of domestic violence where return is opposed, or in a later, eventual custody, access or relocation determination.⁹⁴

131. Another valuable feature of the 1996 Convention is the requirement that the Central Authority must take steps to furnish "information as to the laws of, and services available in, their States relating to the protection of children".⁹⁵ This represents a broader array of information exchange which may affect "safe return" issues; under the 1980 Convention, the Central Authority is only obligated to provide "information of a general character as to the law of their State in connection with the application of the Convention".⁹⁶

132. However, a suggested limitation of the 1996 Convention in this context is that issues of domestic violence and the necessity in some circumstances also to protect the parent of a child are not explicitly recognised in the Convention text.⁹⁷

⁹¹ See Chamberland, *supra*, note 3, Vol. X, Autumn 2005, pp. 73-74.

⁹² The Explanatory Report to the 1996 Convention notes that the notion of "urgency" has been left undefined and also notes that it ought to be "construed rather strictly". *Supra*, note 90, para. 68.

⁹³ *Supra*, note 91 and Weiner, *supra*, note 4, pp. 682-692.

⁹⁴ See *supra*, note 89, p. 89.

⁹⁵ Art. 30(2) of the 1996 Convention.

⁹⁶ Art. 7(2) e) of the 1980 Convention.

⁹⁷ See Weiner, *supra*, note 4, pp. 686-690, who notes that this problem in the operation of previous United States of America child custody conflicts of jurisdiction legislation (the "UCCJA") led policy-makers to insert language concerning harm to a parent or sibling to the family violence provisions of new legislation (see discussion of the "UCCJA" and the "UCCJEA", *infra*, in Section V.1 of this paper). At the same time, it should be said that the Convention was not drafted to define the circumstances in which a measure for protection of a child would be needed (see *supra*, note 90). There is nothing in the Convention to prevent a judge from taking a broad view of the measures which may be needed where domestic violence is an issue.

V. Models within national legislation or regional instruments

1. UCCJEA (USA)

133. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)⁹⁸ of the United States National Conference of Commissioners on Uniform State Laws (now enacted in 52 US jurisdictions)⁹⁹ is one interesting model of a conflicts of jurisdiction instrument which seeks to expressly integrate the concerns of victims of domestic violence moving across jurisdictional boundaries because of safety concerns.

134. In 1997, the UCCJEA amended and enhanced the 1968 Uniform Child Custody Jurisdiction Act (UCCJA).¹⁰⁰ An outcome of this amendment was to bring the UCCJA into better harmony with such United States of America federal legislation as the Parental Kidnapping Prevention Act (PKPA)¹⁰¹ and the Violence Against Women Act (VAWA).¹⁰²

135. The VAWA recognises that “domestic violence victims often leave the State where they were abused and need continuing protection in their new locations” and thus provides for, among other things, interstate enforcement of protection orders.¹⁰³ Neither the PKPA nor the UCCJA addressed “key concerns” of domestic violence victims “who must litigate child custody interstate”.¹⁰⁴ The UCCJEA addresses these concerns with a number of provisions, including protecting against the disclosure of a victim’s address, expanding the taking of emergency jurisdiction to cases in which a parent or sibling is at risk (with the requirement of immediate, mandatory judicial communication in this case),¹⁰⁵ and requiring courts to consider domestic violence in their inconvenient forum analysis (including an analysis of which state can best protect the parties and the child).¹⁰⁶

136. Despite the features added to the UCCJEA for victims of domestic violence, while acknowledged as improvements on previous legislation, a number of remaining gaps as regards comprehensively protecting victims of domestic violence have been suggested.¹⁰⁷ Notwithstanding such concerns, the UCCJEA is one example of conflicts of jurisdiction legislation which seeks to balance between a “home state” / habitual residence priority policy objective (to address parental kidnapping, forum shopping, conflicting decisions, etc.) and the explicit policy goal of recognising and protecting victims of domestic violence.

⁹⁸ Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9 (1A) U.L.A. 657 (1999).

⁹⁹ At < [http://www.nccusl.org/LegislativeFactSheet.aspx?title=Child Custody Jurisdiction and Enforcement Act](http://www.nccusl.org/LegislativeFactSheet.aspx?title=Child+Custody+Jurisdiction+and+Enforcement+Act) > (last consulted 1 May 2011).

¹⁰⁰ Uniform Child-Custody Jurisdiction and Enforcement Act, 9(1A) U.L.A. 271 (1999).

¹⁰¹ Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1980).

¹⁰² Violence Against Women Act of 1994; Violence Against Women Act of 2000, 18 U.S.C. § 2265, 2266.

¹⁰³ Patricia M. Hoff, “The Uniform Child-Custody Jurisdiction and Enforcement Act”, *Juvenile Justice Bulletin*, US Department of Justice, December 2001, p. 3.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, pp. 3 and 6. See UCCJEA Sections 209(e) and 204.

¹⁰⁶ UCCJEA Section 207(b)(1) reads, “whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child”, and is the first listed enumerated relevant factor.

¹⁰⁷ See Zorza, *supra*, note 20.

2. Brussels II a Regulation (European Union)

137. The Brussels II a Regulation,¹⁰⁸ applicable as of 1 March 2005, acts in a supplementary manner to the 1980 Convention in cross-border child abduction cases between European Union Member States (with the exception of Denmark). It contains additional provisions not found in the 1980 Convention which might affect the application of the Article 13(1) *b*) grave risk exception.

138. Article 11(4) of the Brussels II a Regulation provides that a court hearing a return application from another Brussels II a State cannot refuse to return a child under Article 13(1) *b*) of the 1980 Convention if “it is established that adequate arrangements have been made to secure the protection of the child after his or her return”. Thus, this provision mandates that judges will be able to assess and / or enquire into whether “adequate arrangements” have been made in advance of a return order.¹⁰⁹

139. Judges in Brussels II a jurisdictions have found that they can still, however, refuse return of a child under the Article 13(1) *b*) grave risk exception when, notwithstanding arrangements intended to mitigate harm upon return, these arrangements would not be adequate. For instance, in a case heard by the Court of Appeal of the United Kingdom (England and Wales), subject to the Brussels II a Regulation, *Klentzeris v. Klentzeris*,¹¹⁰ the court upheld a non-return decision of the trial judge, who had “concluded that in the light of the welfare officer’s clear view that the children would likely be psychologically and emotionally damaged by a return, and that this would not be ameliorated by the mother accompanying them, he would exercise his discretion and not make a return order”.¹¹¹

¹⁰⁸ *Supra*, note 75.

¹⁰⁹ The provision is silent as to who might be tasked with “establishing” the fact of adequate arrangements. In our case law sample, judges applying this provision (e.g., AG Düsseldorf II, Paris I, Bordeaux, *Klentzeris*) appeared to take a rather active role in communicating with foreign authorities and / or investigating / ensuring that very practical arrangements would in place for safe return, and not accepting the mere existence of protective laws. The *Practice Guide for the application of the new Brussels II Regulation* (European Commission, 2005), at p. 42, notes that “[t]he 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” and notes that “[i]t is not sufficient that procedures [for the protection of the child] exist in the Member State of origin [...] but it must be established that the authorities in the Member State of origin have taken concrete measures.”

¹¹⁰ *Klentzeris v. Klentzeris* [2007] 2 *FLR* 996 [INCADAT cite: HC/E/UKe 931], included in the case law sample analysed in Section II, *supra*.

¹¹¹ *Ibid* (INCADAT summary). It should be noted that, in a case where the Regulation applies and where a non-return decision on the basis of Art. 13(1) *b*) has been issued, Art. 10 of the Regulation ensures that, notwithstanding the non-return decision, unless the strict conditions in Art. 10 are established, the court of the Member State of the habitual residence of the child immediately before the wrongful removal or retention will retain jurisdiction in respect of the child. This retention of jurisdiction includes having what is, in effect, a “final say” regarding the return of the child. Further, any subsequent decision by this Member State requiring the return of the child will be directly enforceable in the jurisdiction which had refused return (Art. 11(8)); see also *Povse v. Alpage* Case C-211/10 PPU (1 July 2010)). Arts 11(6)-(7) of the Regulation are designed to ensure that the court re-considering the question of return has before it all the relevant information upon which the non-return decision was based. Art. 42(2) *c*) of the Regulation also refers to the fact that a judge should not ‘certify’ such a subsequent decision as directly recognisable and enforceable under the Regulation unless, “the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.” In *Klentzeris* Thorpe L.J. noted that, despite the English non-return decision on the basis of Art. 13(1) *b*), proceedings for residence / return of the children had already been issued by the father in the requesting State (relying on Art. 11 of the Regulation). In response, Thorpe L.J. stated, “I can only express the hope that the judge in the Court of First Instance of Athens [the requesting State...] will pay due regard to the written report and the oral evidence of ... [the court welfare officer], and the assessment of that evidence by a judge with...enormous experience and [...] high specialist expertise.” Arguably, a similar situation could arise under the 1996 Convention, in connection with a 1980 Convention 13(1) *b*) return refusal based on domestic violence issues, as a result of the jurisdictional rules of 1996 Convention Art. 7. In what would be roughly parallel circumstances, Section 207 of the UCCJEA provides that the “home state” court which retains jurisdiction (according to the home state priority rules of the legislation) may decline jurisdiction “at any time” in an “inconvenient forum” analysis based on which state is best able to protect the parties and the child when domestic violence “has occurred and is likely to continue” (see *supra*, note 106) and additionally, the jurisdiction of courts taking temporary emergency jurisdiction in cases involving domestic violence may ripen into continuing jurisdiction if the “home state” court declines its continuing exclusive jurisdiction in accordance with Section 207 (judicial communications are either “strongly suggested” or required in the respective scenarios).

140. While the wording of the Article 11(4) provision seems to indicate an expansive definition of what might constitute “arrangements”, it by no means clarifies what is specifically meant (would it, for instance, be consistently read to include legal measures like restraining orders protecting a parent, social security or maintenance payments for a parent and child, arrangements for a swift custody hearing upon return of the parent and child, etc.). This definition may vary according to jurisdiction and the individual sitting judge. Thus it is unclear whether arrangements for a child to return, for instance, to foster care without the return of a primary carer or for the returning parent and child to live in a refuge house for victims of domestic violence would be considered “adequate”. Further, like provisions in the 1980 and 1996 Conventions, Article 11(4) does not make any specific reference to domestic violence issues or potential harm to an accompanying parent and thus judges would have to apply their own extrapolation of its terms in order to encompass the protection of parents in appropriate circumstances.

VI. Other relevant research¹¹²

1. 2010 study on Hague Convention cases and domestic violence

141. *Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases*¹¹³ is a recent report (hereinafter “the Report”) which presents research undertaken, prepared and overseen by a cross-disciplinary team of academics, social workers, lawyers and judges, many of whom possess significant expertise on the topic of domestic violence.¹¹⁴ A full summary of the research results of this study cannot be presented in this Paper (a short summary is presented in Annex I of this Paper), and readers are referred to the full Report document.¹¹⁵

142. The Report includes a study of 47 published United States of America 1980 Convention cases and also analyses information from interviews with 22 “taking parents” who self-identified as victims of domestic violence and who were respondents to Hague return proceedings in United States courts. The Report notes that most of the taking parents in the study reported having experienced serious domestic violence in the requesting State (leading them to believe that their and their children’s lives were in danger), and many of the taking parents also reported having experienced “coerced

¹¹² T. Kruger, *International Child Abduction: The Inadequacies of the Law*, Oxford and Portland Oregon: Hart Publishing, 2011 (pre-publication version), is another recent notable study, containing both qualitative and quantitative information regarding the families involved in international child abduction matters in Belgium. The study notes family violence issues in a number of parental case studies (see pp. 63-64 and p. 215) and notes violence between parents as one “warning sign” which may indicate the risk of an abduction (p. 224).

¹¹³ See, *supra*, note 5.

¹¹⁴ See *ibid*, pp. iii-iv, for acknowledgments to those who assisted with the Report, and for information on the main authors of the Report see < <http://www.haguedv.org/about/staff.html> > (last consulted 1 May 2011).

¹¹⁵ Available at < <http://www.haguedv.org/reports/finalreport.pdf> > (last consulted 1 May 2011).

habitual residence” that led them to live in the requesting State. The research presents other information related to the challenges and hardships faced by these taking parents both in the requested State when responding to a return application and, if their case was subject to a return order (54.5% of the cases), in the requesting State upon return.

2. Reunite 2006 study, “International child abduction: the effects”

143. A notable effort to study the short and long-term effects of international child abductions was undertaken by the United Kingdom-based charitable organisation, Reunite.¹¹⁶ A two-year study¹¹⁷ followed the experiences and impressions of 10 abducted children and 25 parents directly involved in international child abductions. While the sample size of this research is also relatively small, the findings of the study, like the 2010 Report discussed above, give further qualitative information potentially relevant to the current analysis.

144. The 2006 Reunite study noted that lack of access to legal aid and financial resources to litigate custody or other issues, including the enforcement of undertakings upon return to the country of habitual residence, could be a serious problem for accompanying parents.¹¹⁸ It was also noted that a dynamic of litigation undertaken primarily for spurious or harassment purposes (encouraged by the fact that the left-behind parent would not have to pay for proceedings) might be at play by some left-behind parents in filing 1980 Convention return applications such that “the left-behind parent was simply playing ‘a trump card’ which had been provided by the Hague Convention but with no desire or intention of daily, or even frequent involvement with the child upon return”.¹¹⁹ The Reunite study also reports that many parents, both abducting and left-behind, noted “the non-enforceability of provisions in return orders” and the “lack of respect which would be paid to undertakings given by the left-behind parent” in the State of habitual residence of the child upon return.¹²⁰

145. A previous study carried out under the auspices of Reunite¹²¹ found that in 12 Convention cases in which return orders were made and undertakings were given, *all* of the six undertakings given relating to violence / non-molestation were broken, and undertakings in general were broken in 66.6% of the cases.¹²²

VII. Conclusions

146. Understanding of and effective strategies to deal with various types of family violence dynamics have significantly evolved in a number of national jurisdictions over the past decades,¹²³ and there has also been significant international and regional activity

¹¹⁶ See < <http://www.reunite.org/> >.

¹¹⁷ Freeman, *supra*, note 28.

¹¹⁸ *Ibid*, pp. 39 to 42.

¹¹⁹ *Ibid*, p. 39.

¹²⁰ *Ibid*, pp. 39-40.

¹²¹ Reunite Research Unit (led by M. Freeman), *The Outcomes for Children Returned Following an Abduction*, September 2003, Leicester.

¹²² *Ibid*, pp. 30-31. The study notes that “[t]he fact that in 50% of those cases in which undertakings were given [in the study sample] those undertakings included one relating to violence may be an indication of the background against which these abductions took place” (at p. 30).

¹²³ The influence of these evolutions, including the application of regional legislation such as the Brussels II a Regulation, is undoubtedly seen in some of the more modern cases including in the case law sample discussed in Section II of this paper. Further, it may be the case that relatively recent concentration of jurisdiction efforts in a number of States have assisted in the handling of these complex cases.

concerning family and intimate partner violence in recent years. As we have seen, according to judges, scholars, and other sources (see *supra*, paras 1 and 3), family violence, and the dynamic of a taking parent fleeing from a situation of violence, abuse or danger (for her own and / or her children's safety and well-being) is noted as a common scenario and / or a commonly alleged scenario,¹²⁴ or a scenario seen predictably in at least a minority of 1980 Convention cases.¹²⁵ Judges have noted that dealing with cases involving allegations of domestic violence under the Convention is "difficult" or "hard".¹²⁶ Decision-makers hearing these cases must, among other things, deal with complicated evidentiary matters in a cross-border setting and often complex issues of assessing risk to and safety of persons across international boundaries, with respect to diverse requesting jurisdictions. All this must be done in proceedings which "use the most expeditious procedures available".¹²⁷

147. The discussion of the case law sample above shows a broad range of practices employed across jurisdictions (and indeed, within jurisdictions) in situations where various patterns or incidents of domestic violence are alleged or found to be present. Judges have employed diverse approaches to the treatment and assessment of evidence, to notions of harm and risk under Article 13(1) *b*), to what would constitute an "intolerable situation" to a child, to the use of expert testimony or evidence, to the use and content of undertakings, conditions and mirror orders upon a return order, to the use of Direct Judicial Communications and Central Authority support, and other issues.

148. While it is clear that much thought has been given by the judiciary to the management of domestic violence allegations in Hague return cases, the wide variety of practices revealed by this research suggests the need to work towards greater clarity and consistency in approach. In order to achieve this and to move towards some concept of "best practices," further discussion and study of a number of factors are needed, and in particular, the following: evidentiary "best practices" in cases involving allegations of domestic violence; the nature of the harm done by family violence to children, whether or not they are direct victims or exposed as witnesses or otherwise;¹²⁸ the evaluation of risk and harm thresholds for these cases with respect to the functioning of Article 13(1) *b*); the careful and appropriate use of enforceable undertakings, conditions and mirror orders for cases where return is appropriate (and indeed, when return even with undertakings or other conditions / orders would *not* be appropriate);¹²⁹ a

¹²⁴ See *supra*, para. 9.

¹²⁵ Lack of basic statistical data and important ambiguities concerning this topic, however, persist, and further research into the prevalence and dimensions of this issue in the global functioning of the 1980 Convention, particularly cross-disciplinary analysis including both family violence specialists and legal experts, is likely desirable.

¹²⁶ Chamberland, *supra*, note 3, Vol. XII / Spring-Summer 2007, p. 28, and Boshier, *supra*, note 8, p. 10, citing United Kingdom – England and Wales case, *R W (Abduction: Domestic Violence)* [2005] 1 *FLR* 727 at para. 42, per Wall LJ.

¹²⁷ Art. 2 of the 1980 Convention.

¹²⁸ Experts on domestic violence have suggested approaches to establishing grave risk of harm to a child by first establishing "the level of violence in the family", followed by a number of steps to establish how this violence may harm children or put them at risk. See Shetty and Edleson, *supra*, note 19.

¹²⁹ Lewis notes that research has shown that "criminal or civil and legal sanctions" have little deterrence for batterers (*supra*, note 4, p. 23), and other scholars have argued that undertakings are "not helpful remedies to victims of domestic violence" and "[a]s currently applied" are "dangerous, unfair, and inefficient" (R. Hoegger, "What if she leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy", 18 *Berkeley Women's Law Journal* 181, at 183).

clarification of how harm or potential harm to a parent, particularly to a primary care-giver (including a potential situation of impoverishment, lack of adequate accommodation, lack of employment, lack of family support, access to the courts and to a fair custody hearing, etc. upon return) should be addressed; potential follow-up mechanisms after a return order (discussion of which was notably absent for the most part in the above case law sample); and other matters. From this research, it would also seem that effective and efficient use of cross-border co-operation and communication could be further employed in these circumstances, including the existing 1980 Convention Central Authority mechanisms (including the use of Art. 13(3) of the Convention), the International Hague Network of Judges, and the 1996 Convention, where applicable.

149. Hague return proceedings must be conducted expeditiously and the proper management of domestic violence allegations should not compromise a swift disposal of the return application, which is strongly in the interest of the child and the family. More consistency and clarity in dealing with cases where domestic violence is raised as a defence under Article 13(1) *b*) could assist in keeping return (and access) procedures under the Convention expeditious, without depriving the taking parent of the opportunity to present, or to have presented (for instance, in accordance with Art. 13(3) of the Convention), adequate evidence and to seek relief or protection where needed. Indeed, clear guidance on the effective and expeditious handling of these cases could reduce appeals and other legal challenges.¹³⁰

150. Further clarity on such matters may also assist in ensuring that there is a proper balance between the number of important policy objectives of the Convention, for instance, to reinforce the legitimate and appropriate custody and access rights of parents across jurisdictions and to avoid conflicting decisions in this respect, the right of a child as far as possible to maintain contact with both parents (where appropriate) and to have long term custody, access and relocation decisions decided, in general, in the jurisdiction of the child's habitual residence. These policy goals should be seen alongside the strong censure of family violence and intimate partner abuse found in current international and regional law.¹³¹ As noted in the above discussion of excerpts from the Explanatory Report and the *travaux préparatoires* of the Convention, there already exists within the Convention the potential to balance these interdependent policy goals.

151. The Permanent Bureau suggests, as one possible way of taking these matters forward, that work be commenced on the development of principles or some kind of practice guide on the management of domestic violence allegations in Hague return proceedings. Consideration might be given to the establishment of a group of experts, including in particular members of the judiciary as well as Central Authority experts, and other cross-disciplinary experts in the dynamics of domestic violence, to assist the Permanent Bureau in developing such principles or guide.

¹³⁰ Shetty and Edleson, *supra*, note 4, at p. 120, quote research in one jurisdiction showing a disproportionate number of Convention appeal cases (seven of nine over six months) involving allegations of domestic violence.

¹³¹ *Vienna Convention on the Law of Treaties*, *supra*, note 49, Art. 31(3)(c). Treaties should be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties".

ANNEXES

Summary of: Multiple perspectives on battered mothers and their children fleeing to the United States for safety: A study of Hague Convention cases¹

Scope of research undertaken

1. Members of the Report research team conducted in-depth interviews² with a total of 22 “taking mothers” who were respondents in Hague return applications in United States of America federal and state courts and who reported to be victims of domestic violence in their family situations. The research team also interviewed 23 attorneys representing both respondents and applicants in these cases, and five “specialists” (such as expert witnesses).³ An analysis of 47 published US 1980 Convention cases involving allegations of domestic violence was also included in the Report.

2. The general situation of the 22 mothers interviewed is summarised by the Report in the following way:

“Battered mothers who fled across borders to the U.S. to receive help from their families were often victims of life threatening violence, and their children were frequently directly or indirectly exposed to the father’s violence. The women sought but received little help from foreign authorities or social service agencies [in the requested State]... [they] often faced U.S. courts that were unsympathetic to their safety concerns and subsequently sent their children back to the custody of the abusive fathers in the other country, creating potential serious risks for the children and mothers.”⁴

3. The Report acknowledges a number of limitations⁵ to the research conducted and sought to be a qualitative or “deeply descriptive” study based on narrative interviews with respondents subject to Hague applications, and not to be a “prevalence” study (*i.e.*, the Report did not seek to find out the percentage of US 1980 Convention applications where domestic violence allegations were raised or found to be present).⁶ The Report notes the benefits of qualitative studies in order to, among other things, develop knowledge about phenomena which are poorly understood, and to reach “hidden populations”.⁷ One important finding of the Report was that continued research on child abduction and its relationship to domestic violence is needed.⁸

¹ See Edleson *et al.*, *supra*, note 5, and introduction in Section VI.1 of this Paper.

² *Ibid*, p. 52.

³ *Ibid*, p. vii.

⁴ *Ibid*, pp. vii-viii.

⁵ See a discussion of general Report limitations at *ibid*, pp. 56-59. The small sample size is stated to be largely a product of the way the mothers had to be recruited for the study, in accordance with human subject protocols. The researchers, in accordance with ethical guidelines, could only recruit participants for the study indirectly, by methods such as in the first instance through their lawyers, and then through voluntary self-referral via a website (*ibid*, p. 45). By the nature of the recruitment process women who did not have legal advice were excluded, as were women who did not self-define as victims of domestic violence or those involved in out-going cases to other jurisdictions where the United States was the requesting State. The Report only integrated the father’s perspectives indirectly through attorneys representing them, due primarily to safety concerns of the interviewee-mothers. The narrative interview approach with the respondents, while facilitating discussion of traumatic events, could not fully capture all the details of the mothers’ experiences (for example, there were specific “interview probes” which directly questioned the occurrence of physical violence towards the mother and child, but no probes that specifically asked about sexual abuse and other abuse dynamics, and thus this latter information is likely under-represented) (at p. 58).

⁶ *Ibid*, pp. 36-37.

⁷ *Ibid*.

⁸ *Ibid*, p. 302 and pp. 318-319.

Key issues raised by the Report

4. The study found that most of the mothers in the study had experienced “serious physical and sexual assaults, coupled with life threatening behaviors by their husbands that led these mothers to believe that their and / or their children’s lives were in danger”.⁹ Forty percent of these mothers reported that their choice of residence (the residence immediately before the removal of the child) “was coerced, forced or the result of deception by their husbands, leading to questions about the intentions of parents when establishing a child’s habitual residence”.¹⁰ A number of the mothers were reported to have undertaken measures such as leaving their abusive partners and obtaining custody of their children from the foreign court, “only to face continued violence and threats from their husbands when they remained in the other country”.¹¹

5. It was reported that most of the respondent mothers relayed that they made multiple efforts to engage “informal and formal help in the other country, prior to leaving the country, with little success and sometimes resulting in further reinforcement of their violent husbands’ positions by the authorities”.¹² “In almost all cases,” irrespective of whether the respondent mothers were US citizens or immigrants, their departure to the US was a strategy to avail themselves of the “emotional and financial support” of family residing in the US.¹³

6. It was suggested that courts and other system actors in the requested State (in the study, the US) were not sensitive to the mother’s safety concerns, and a majority (54.5%)¹⁴ of mothers had their children returned to the requesting State, which “most of the time” (in seven out of 12 cases where return was ordered)¹⁵ meant the “children’s return to a life with the mother’s violent husbands”.¹⁶

7. It was noted that mothers and children experienced “high levels of hardship”¹⁷ after return, with some fathers using the 1980 Convention return orders to “leverage their positions” in custody cases in the habitual residence of the child.¹⁸ Mothers may have been unable to work in the country of return due to immigration status, and almost half of the mothers and children returned were “victims of renewed violence or threats by the fathers”.¹⁹ Additionally, “[m]others reported that *none* of the court ordered or voluntary undertaking aimed at protecting them and/or their children upon return to the other country were implemented”.²⁰

8. The high cost of litigating Convention applications (with an average legal costs reported by respondent mothers at USD \$62,166)²¹ and disproportionate resources

⁹ *Ibid*, p. viii.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² *Ibid*, p. ix.

¹³ *Ibid*.

¹⁴ *Ibid*, p. ix and p. 155.

¹⁵ *Ibid*, p. 155.

¹⁶ *Ibid*, p. ix.

¹⁷ *Ibid*, p. x and p. 187. For instance, one woman, “Stephanie”, reported that “she is unable to support herself there because she does not have the legal status to work. Her husband is not paying child support, and she is not eligible for support from the other country’s government. As a result, her parents are providing a small amount of money each month to pay for rent and food. Stephanie supplements this small allowance with food donations from the church that has assisted her. She reports that her attorney said that her husband is trying to force her to return to the U.S. without her son by withholding child support payments. At the time of the interview, she remained in the other country in these circumstances, and was trying to obtain sole custody of her son, and the right to return to the U.S.”.

¹⁸ *Ibid*, p. x.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*, p. 231.

available for the applicant parent, were noted as major barrier for the adequate legal representation of the respondent mothers.²²

9. It was noted that the analysis of 47 published decisions showed that jurisprudence on the 13(1) *b*) grave risk defence had not incorporated “two decades of research on child exposure to domestic violence” concerning the harmful effects of domestic violence on children.²³

10. Finally, the Report urged that the interviews with mothers and attorneys, as well as the analysed judicial decisions, indicated that there was a clear need for “greater awareness among and training of attorneys and judges” principally in: “1) the meaning of all Articles in the Convention, including exceptions; 2) the social science literature on domestic violence and the effects of child exposure to abuse in the family; and 3) the experiences of mothers and children both before they leave to the US and then after Hague case decisions are made whether they remain in the US or return to the other country”.²⁴

²² Most mothers “were more often likely to locate an attorney on their own in a legal assistance agency or a small family law practice” (rather than applicants who were represented by attorneys in the “U.S. Department of State’s Attorney Network who were more likely to have access to larger firm resources”). *Ibid*, p. x.

²³ *Ibid*, xi.

²⁴ *Ibid*.

International and regional instruments and United Nations activity on violence against women / domestic violence

a) Convention on the Elimination of All Forms of Discrimination against Women

1. The United Nations *Convention on the Elimination of All Forms of Discrimination against Women* of 18 December 1979 (hereinafter "CEDAW") has, at present, 186 States Parties.¹ The Committee on the Elimination of Discrimination against Women, in its General Recommendation No. 12, Eighth Session, 1989,² has stated that Articles 2, 5, 11, 12 and 16 of the Convention "require the States Parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life".

2. The Committee, in subsequent General Recommendation No. 19,³ further clarifies that "discrimination under the Convention is not restricted to action by or on behalf of Governments," but rather States Parties must also "take all appropriate measures to eliminate discrimination against women by any person, organisation, or enterprise".⁴ The Committee further notes that States "may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".⁵

3. General Recommendation No. 19 makes a specific affirmation with respect to family violence stating that it is "one of the most insidious forms of violence against women [...] prevalent in all societies" and that:

"Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality."⁶

4. Specific recommendations in General Recommendation No. 19 to States Parties to CEDAW include taking such measures as: gender-sensitive training of judicial and law enforcement officers and other public officials; establishment of support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling; appropriate criminal penalties and civil remedies in cases of domestic violence; services to ensure the safety and security of victims of family violence; rehabilitation programmes for perpetrators; and preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.

¹ At < http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en > (last consulted 1 May 2011).

² Available at < <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> > (last consulted 1 May 2011).

³ Eleventh session, 1992; available at *ibid*.

⁴ *Ibid*, General Recommendation No 19, para. 9.

⁵ *Ibid*.

⁶ *Ibid*, para. 23.

b) Examples of regional initiatives: Latin American Convention and the Council of Europe

5. The 1994 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (the "Convention of Belem do Para"), developed under the auspices of the Organization of American States, specifically addresses violence against women, and has 32 ratifications.⁷ The scope of the Convention covers the private sphere (Art. 1), and the violence included comprises "physical, sexual and psychological violence" (Art. 2) including in the "family or domestic unit or within any other interpersonal relationship" (Art. 2(a)). The Convention asserts that women have the right to "simple and prompt recourse to a competent court for protection against acts that violate her rights" (Art. 4(g)).

6. The Council of Europe Parliamentary Assembly has issued a specific Recommendation⁸ concerning "Domestic violence against women," which articulates the pervasiveness and severity of the problem, which is not restricted to "any particular social group or class" and "is the most common form of violence against women" with its consequences affecting "many areas of the lives of victims – housing, health, education, and the freedom to live their lives without fear and in the way they wish".⁹ The Recommendation also notes that "[s]tatistics show that for women between 16 and 44 years of age, domestic violence is thought to be the major cause of death and invalidity, ahead of cancer, road accidents and even war".¹⁰

7. Additionally, the Committee of Ministers of the Council of Europe has recently adopted a new comprehensive instrument, the *Council of Europe Convention on preventing and combating violence against women and domestic violence*, opened for signature on 11 May 2011. The Convention's purposes include to "protect women from all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence" (Art. 1(a)) and "to promote international co-operation with a view to eliminating violence against women and domestic violence" (Art. 1(d)). The instrument addresses, among other things, State obligations to exercise due diligence "to prevent, investigate, punish and provide reparation for acts of violence [...] that are perpetrated by non-state actors" (Art. 5(2)), measures to be taken by Parties on "Integrated policies and data collection" (Chapter II), "Prevention" (Chapter III), "Protection and support" (Chapter IV), provisions on substantive law covering a range of matters (Chapter V), "Investigation, prosecution, procedural law and protective measures" (Chapter VI), "Migration and asylum" (Chapter VII), "International co-operation" (Chapter VIII), and monitoring mechanisms in order to ensure the Convention's effective implementation (Chapter IX).

c) Recent resolutions of the General Assembly of the United Nations and other United Nations activity in the field of elimination of violence against women

8. Finally, there have been a significant number of recent Declarations¹¹ of the United Nations General Assembly (including a Declaration exclusively addressing domestic violence¹²), and other United Nations' endeavours on the global elimination of violence against women, including a 2008-2015 campaign of the Secretary General, "UNiTE to

⁷ At < <http://www.oas.org/juridico/english/sigs/a-61.html> > (last consulted 1 May 2011).

⁸ Recommendation 1582 (2002). Available at

< <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta02/erec1582.htm> > (last consulted 1 May 2011).

⁹ *Ibid*, para. 1.

¹⁰ *Ibid*, para. 2.

¹¹ See, for instance, *Intensification of efforts to eliminate all forms of violence against women* (A/RES/63/155, of 18 December 2008).

¹² *Elimination of domestic violence against women* (A/RES/58/147, of 22 December 2003).

End Violence,"¹³ a number of reports by the Secretary General to the General Assembly on this issue,¹⁴ and a new Secretary General's "co-ordinated database on the extent, nature and consequences of all forms of violence against women, and on the impact and effectiveness of policies and programmes for, including best practices in, combating such violence".¹⁵

¹³ See < <http://www.un.org/en/women/endviolence/> > (last consulted 1 May 2011).

¹⁴ For instance, see *General Assembly. In-Depth Study on All Forms of Violence against Women: Report of the Secretary General*, 2006. A/61/122/Add.1. 6 July 2006. Also, for a more recent Secretary General's report, see *supra*, note 44.

¹⁵ See < <http://www.un.org/womenwatch/daw/vaw/v-work-ga.htm> > (last consulted 1 May 2011), for a link to the Secretary General's database.

Research questions applied to case law sample

- 1) Requested State and name of case
- 2) Date, court / court level and requesting State
- 3) Nature of allegations of domestic violence (including whether (1) directed at parent and child; (2) at parent only with child as a witness; (3) at parent without child as witness; (4) at child only)
- 4) (1) Commentary on burden of proof and evidentiary standard? (2) Any interpretation of "grave risk"?
- 5) Any reference made specifically to "psychological harm or [...] intolerable situation"?
- 6) Findings made on domestic violence? If yes, evidentiary basis of these findings. Direct Judicial Communications used?
- 7) Expert evidence used re: (1) domestic violence allegations or effect of; OR (2) domestic violence laws in requesting State?
- 8) Outcome – return or non-return order and any additional conditions, etc.?
- 9) Was safe return investigated and / or facilitated? *E.g.*, undertakings and / or mirror orders, etc.? Assumption that protective facilities exist based on comity, or scrutiny of foreign situation? Direct Judicial Communications used?
- 10) Any other comment? *E.g.*, access to justice or domestic violence victims' programmes for returning (taking parent) considered? Follow up on undertakings or the outcome of the return circumstances?

Table of cases

Argentina

- 1) "*Ch. M., E c/ F. S., G. Z. s/ exhorto*", File 12.443/95, November 29, 1995
Short title: "*Ch. M.*"
Court: First Instance
INCADAT cite: N/A
Requesting State: Mexico
- 2) "*P. B. s/ pedido de restitución del menor D. P.*", File 94/10, May 13, 2010, 4th Nomination Court, Rosario
Short title: "*P.B.*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America

Australia

- 1) *Gsponer v. Johnson* (1989) FLC 92-001; 12 Fam. LR 755
Short title: "*Gsponer*"
Court: Appellate
INCADAT cite: HC/E/AU 255
Requesting State: Switzerland
- 2) *Murray v. Director, Family Services* (1993) FLC 92-416
Short title: "*Murray*"
Court: Appellate
INCADAT cite: HC/E/AU 113
Requesting State: New Zealand
- 3) *In the Marriage of S.S. and D.K. Bassi* (1994) FLC 92-4
Short title: "*Bassi*"
Court: First Instance
INCADAT cite: HC/E/AU 292
Requesting State: United Kingdom—England and Wales
- 4) *Cooper v. Casey* (1995) FLC 92-575
Short title: "*Cooper*"
Court: Appellate
INCADAT cite: HC/E/AU 104
Requesting State: United States of America
- 5) *Barry Eldon Matthews (Commissioner, Western Australia Police Service) v. Ziba Sabaghian* PT 1767 of 2001
Short title: "*Matthews*"
Court: First Instance
INCADAT cite: HC/E/AU 345
Requesting State: Germany
- 6) *State Central Authority, Secretary to the Department of Human Services v. Mander* No. (P)MLF1179 of 2003
Short title: "*Mander*"
Court: First Instance
INCADAT cite: HC/E/AU 574
Requesting State: United Kingdom—England and Wales

- 7) *H.Z. v. State Central Authority* [2006] FamCA 466
Short title: "H.Z."
Court: Appellate
INCADAT cite: HC/E/AU 876
Requesting State: Greece
- 8) *Harris & Harris* [2010] FamCAFC 221
Short title: "Harris"
Court: Appellate
INCADAT cite: N/A
Requesting State: Norway

Canada

- 1) *Hadissi v. Hassibi*, 1994 CarswellOnt 2076, [1995] W.D.F.L. 001
Short title: "Hadissi"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 2) *Finizio v. Scoppio-Finizio*, [1999] 124 O.A.C. 308
Short title: "Finizio"
Court: Appellate
INCADAT cite: HC/E/CA 752
Requesting State: Italy
- 3) *Pollastro v. Pollastro*, [1999] 43 O.R.3d 485
Short title: "Pollastro"
Court: Appellate
INCADAT cite: [HC/E/CA 373](#)
Requesting State: United States of America
- 4) *Mahler v. Mahler*, (1999) 3 R.F.L. (5TH) 428 (Man. Q.B.)
Short title: "Mahler"
Court: First instance
INCADAT cite: HC/E/CA 308
Requesting State: United States of America
- 5) *Katsigiannis v. Kottick-Katsigiannis*, [2000] 2000 CarswellOnt 4469
Short title: "Katsigiannis"
Court: First Instance
INCADAT cite: [upheld on appeal, HC/E/CA 758]
Requesting State: Greece
- 6) *Struweg v. Struweg*, [2001] S.J. No. 380 (Sask. Q.B. Jun 12, 2001)
Short title: "Struweg"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 7) *Kovacs v. Kovacs*, [2002] 59 O.R.3d 671
Short title: "Kovacs"
Court: First Instance
INCADAT cite: HC/E/CA 760
Requesting State: Hungary

- 8) *Sierra v. Sierra*, [2002] 2001 CarswellOnt 1869
Short title: "*Sierra*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 9) *Suarez v. Carranza*, [2008] BCSC 1187, 55 R.F.L. (6th) 382
Short title: "*Suarez*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 10) *Lombardi v. Mehnert*, [2008] W.D.F.L. 2608
Short title: "*Lombardi*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 11) *Matzke v. Matzke*, 2009 CarswellBC 3064
Short title: "*Matzke*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 12) *Achakzad v. Zemaryalai*, 2010 CarswellOnt 5562
Short title: "*Achakzad*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America
- 13) *Ryan v. Ryan*, 2010 Carswell Nfld 394 (N.L. T.D. Dec 07, 2010)
Short title: "*Ryan*"
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America

Chile

- 1) *Solicitud de restitución y entrega inmediata de las niñas L.A.S.M. y L.A.S.M.*, June 10, 2008, Family Court of Iquique
Short title: "*L.A.S.M.*"
Court: First Instance
INCADAT cite: N/A
Requesting State: Peru

China (Special Administrative Region of Hong Kong)

- 1) *D.v.G.* [2001] 1179 HKCU 1, 04 December 2001
Short title: "*D. v. G.*"
Court: Appellate
INCADAT cite: HC/E/CNh 595
Requesting State: Switzerland

Costa Rica

- 1) *Proceso especial de restitución internacional de la persoma menor de edad: E.A.K. (N° Unico 09-000433-0673-NA)*, May 7, 2010, Children and Adolescent Court of the First Judicial Circuit of San Jose
Short title: "E.A.K."
Court: First Instance
INCADAT cite: N/A
Requesting State: United States of America

Finland

- 1) *Supreme Court of Finland 1996:151, S96/2489*, 27 December 1996
Short title: "S96/2489"
Court: Superior Appellate
INCADAT cite: HC/E/FI 360
Requesting State: France

France

- 1) *T.G.I. d'Abbeville, 10 June 1993, W. v. G.*
Short title: "W. v. G."
Court: First Instance
INCADAT cite: HC/E/FR 298
Requesting State: United States of America
- 2) *Cour de cassation, Civ. 1ère, 25 janvier 2005*
Short title: "Cassation, 25 janvier"
Court: Superior Appellate
INCADAT cite: HC/E/FR 708
Requesting State: Italy
- 3) *Cour d'appel de Paris, 5 octobre 2005, No 2005/16526*
Short title: "Paris I"
Court: Appellate
INCADAT cite: HC/E/FR 1009
Requesting State: Hungary
- 4) *Cour d'appel de Saint-Denis de la Réunion, 2 May 2006*
Short title: "Réunion"
Court: Appellate
INCADAT cite: HC/E/FR 950
Requesting State: Mauritius
- 5) *Cour d'appel de Paris, 30 Mai 2006, No RG 06/00395*
Short title: "Paris II"
Court: Appellate
INCADAT cite: HC/E/F 1010
Requesting State: Netherlands
- 6) *Cour d'appel de Versailles, 20 June 2006, No 354*
Short title: "Versailles"
Court: Appellate
INCADAT cite: HC/E/FR 949
Requesting State: Czech Republic

- 7) *Cour d'appel de Bordeaux, 19 January 2007, No 06/002739*
Short title: "Bordeaux"
Court: Appellate
INCADAT cite: HC/E/FR 947
Requesting State: Spain
- 8) *Cour d'appel de Grenoble, 4 juin 2008, No 08/01779*
(upheld by Cour de cassation)
Short title: "Grenoble"
Court: Appellate
INCADAT cite: HC/E/FR 957
Requesting State: Italy
- 9) *Cour d'appel de Rouen, 30 octobre 2008*
Short title: "Rouen"
Court: Appellate
INCADAT cite: HC/E/FR 1002
Requesting State: Mexico

Germany

- 1) *Familiengericht Frankfurt (Family Court), 35 F 1162/98-52, 16 October 1998, 8 March, 1998 (decision date)*
Short title: "AG Frankfurt I"
Court: First Instance
INCADAT cite: HC/E/DE 324
Requesting State: United States of America
- 2) *Familiengericht Köln (Family Court), Beschl. 17.4.2002, 305 F 19/02*
Short title: "AG Köln"
Court: First Instance
INCADAT cite: N/A
Requesting State: Netherlands
- 3) *Familiengericht Düsseldorf (Family Court), Beschl. 28.5.2002, 268 F 1143/02*
Short title: "AG Düsseldorf I"
Court: First Instance
INCADAT cite: N/A
Requesting State: Italy
- 4) *OLG Nürnberg, Beschl. 7.7.2003, 7 UF 954/03*
Short title: "OLG Nürnberg"
Court: Appellate Court
INCADAT cite: N/A
Requesting State: United States of America
- 5) *Familiengericht Düsseldorf (Family Court), Beschl. 24.7.2009, 266 F 201/09*
Short title: "AG Düsseldorf II"
Court: First Instance
INCADAT cite: N/A
Requesting State: Poland
- 6) *OLG Karlsruhe, Beschl. 2.4.2009, 2 UF 17/09*
Short title: "OLG Karlsruhe"
Court: Appellate Court
INCADAT cite: N/A
Requesting State: New Zealand

- 7) *OLG Frankfurt a.M., Beschl. 27.05.2009, 1 UF 61/09*
Short title: "OLG Frankfurt II"
Court: Appellate Court
INCADAT cite: N/A
Requesting State: Greece

Hungary

- 1) *Mezei v. Bíró, 23.P.500023/98/5.* (27. 03. 1998, Central District Court of Budapest; First Instance); 50.Pkf.23.732/1998/2. 16. 06. 1998., (Capital Court as Appellate Court)
Short title: "Mezei"
Court: Appellate
INCADAT cite: HC/E/HU 329
Requesting State: Australia

Ireland

- 1) *P.F. v. M.F.*, unrep., Supreme Court of Ireland, 13 January 1993
INCADAT cite
Short title: "P.F."
Court: Superior Appellate
INCADAT cite: HC/E/IE 102
Requesting State: United States of America
- 2) *A.S. v. P.S. (Child Abduction)* [1998] 2 IR 244
Short title: "A.S."
Court: Superior Appellate
INCADAT cite: HC/E/IE 389
Requesting State: United Kingdom—England and Wales
- 3) *P. v. B. (No. 2) (Child Abduction: Delay)* [1999] 4 IR 185; [1999] 2 ILRM 401
Short title: "P. v. B."
Court: Superior Appellate
INCADAT cite: HC/E/IE 391
Requesting State: Spain
- 4) *T.M.M. v. M.D. (Child Abduction: Article 13)* [2000] 1 IR 149
Short title: "T.M.M."
Court: Superior Appellate
INCADAT cite: HC/E/IE 272
Requesting State: United Kingdom—England and Wales

Israel

- 1) *Civil Appeal 4391/96 Ro v. Ro*, 26 March 1997
Short title: "Ro v. Ro"
Court: Appellate
INCADAT cite: HC/E/IL 832
Requesting State: United Kingdom—England and Wales
- 2) *Family Appeal 548/04 Plonit v. Ploni*, 06 June 2004
Short title: "Plonit"
Court: Superior Appellate
INCADAT cite: HC/E/IL 838
Requesting State: France

- 3) *Family Appeal 592/04 R.K. v. Ch. K.*, Jerusalem District Court, 11 November 2004
Short title: "R.K. v. Ch.K."
Court: Appellate
INCADAT cite: HC/E/IL 837
Requesting State United States of America
- 4) *G. v. B.*, Court for Family Matters, Beersheva, 25 April 2007
Short title: "G. v. B."
Court: First Instance
INCADAT cite: HC/E/IL 910
Requesting State: Belgium
- 5) *Family Application 8743/07 Y.D.G. v T.G.*, Jerusalem Family Court, 01 November 2007
Short title: "Y.D.G. v T.G."
Court: First Instance
INCADAT cite: HC/E/IL 983
Requesting State: United States of America
- 6) *Leave for Family Appeal 2338/09 P. v. P.*, 03 June 2009
Short title: "P. v. P."
Court: Superior Appellate
INCADAT cite: HC/E/IL 1037
Requesting State: France

New Zealand

- 1) *H. v. C.*, (Unreported), FC Lower Hutt, FP No. 368/00, 09/03/2001
Short title: "H. v. C."
Court: First Instance
INCADAT cite: HC/E/NZ 537
Requesting State: Australia
- 2) *L.J.G. v. R.T.P. [child abduction]*, [2006] NZFLR 589
Short title: "L.J.G."
Court: First Instance
INCADAT cite: N/A
Requesting State: Australia
- 3) *H.J. v. Secretary for Justice*, [2006] NZFLR 1005
Short title: "H.J."
Court: Appellate
INCADAT cite: N/A
Requesting State: Australia
- 4) *K.M.A. v. Secretary for Justice*, [2007] NZFLR 891
Short title: "K.M.A."
Court: Appellate
INCADAT cite: N/A
Requesting State: Australia
- 5) *W. v. S.*, [2011] NZFLR 49
Short title: "W. v. S."
Court: First Instance
INCADAT cite: N/A
Requesting State: Australia

Norway

- 1) *S.E.H. v. H.E.H.*, 21 December 1998, transcript, Holt Court of Execution and Enforcement
Short title: "S.E.H."
Court: First Instance
INCADAT cite: HC/E/NO 343
Requesting State: Israel

South Africa

- 1) *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC), 12 April 2000 (decision date), Constitutional Court of South Africa
Short title: "Sonderup"
Court: Superior Appellate
INCADAT cite: HC/E/ZA 309
Requesting State: Canada
- 2) *Pennello v. Pennello* [2003] 1 All SA 716 (N), 14 February 2003 (decision date), Natal Provincial Division
Short title: "Pennello"
Court: Appellate
INCADAT cite: HC/E/ZA 497
Requesting State: United States of America

Spain

- 1) *Auto Juzgado de Familia Nº 6 de Zaragoza (España), Expediente Nº 1233/95-B*, 20 April, 2004
Short title: "1233/95-B"
Court: Appellate
INCADAT cite: HC/E/ES 899
Requesting State: United States of America

Switzerland

- 1) *Decision of the Cour d'appel du canton de Berne, S-359/1/2001, 02/10/2001*
Short title: "S-359/1/2001"
Court: Appellate
INCADAT cite: HC/E/CH 416
Requesting State: Spain
- 2) *Obergericht des Kantons Zürich (Court of Appeal of the Zurich Canton)*, decision of 28 January 1997, U/NL960145/II.ZK
Short title: "U/NL960145/II.ZK"
Court: Appellate
INCADAT cite: HC/E/CH 426
Requesting State: Canada

United Kingdom

- 1) *Re M (A Minor)*, (1993), unreported (transcript available)
Short title: "Re M (1993)"
Court: Appellate
INCADAT cite: HC/E/UKe 164
Requesting State: Australia

- 2) *Re K (Child Abduction: Child's Objections)* [1995] 3 FCR 473
Short title: "Re K"
Court: First Instance
INCADAT cite: HC/E/UKe 22
Requesting State: United States of America
- 3) *In re. F (A Minor) (Abduction: Custody Rights Abroad)* [1995] Fam. 224
Short title: "In re. F"
Court: Appellate
INCADAT cite: HC/E/UKe 8
Requesting State: United States of America
- 4) *Re M (Abduction: Acquiescence)* [1996] 1 FLR 315
Short title: "Re M (1996)"
Court: First Instance
INCADAT cite: HC/E/UKe 21
Requesting State: Greece
- 5) *Re C (abduction) (grave risk of psychological harm)* [1999] 2 FCR 507
Short title: "Re C"
Court: Appellate
INCADAT cite: HC/E/UKe 269
Requesting State: United States of America
- 6) *Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550
Short title: "Re M (1999)"
Court: Appellate
INCADAT cite: HC/E/UKe 263
Requesting State: South Africa
- 7) *Re M (Abduction: Intolerable Situation)* [2000] 3 FCR 693
Short title: "Re M (2000)"
Court: First Instance
INCADAT cite: HC/E/UKe 477
Requesting State: Norway
- 8) *T.B. v. J.B. (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515
Short title: "T.B. v. J.B."
Court: Appellate
INCADAT cite: HC/E/UKe 419
Requesting State: New Zealand
- 9) *Re H (children: abduction)* [2003] 2 FCR 151
Short title: "Re H"
Court: Appellate
INCADAT cite: HC/E/UKe 496
Requesting State: Belgium
- 10) *Re J (Children) (abduction: child's objections to return)* [2004] EWCA Civ 428
Short title: "Re J"
Court: Appellate
INCADAT cite: HC/E/UKe 579
Requesting State: Croatia
- 11) *Re W (A child)* [2004] EWCA Civ 1366
Short title: "Re W (2004)"
Court: Appellate
INCADAT cite: HC/E/UKe 771
Requesting State: South Africa

- 12) *Klentzeris v. Klentzeris* [2007] 2 FLR 996
Short title: "Klentzeris"
Court: Appellate
INCADAT cite: HC/E/UKe 931
Requesting State: Greece
- 13) *F v. M (Abduction: Grave Risk of Harm)* [2008] 2 FLR 1263
Short title: "F v. M"
Court: First Instance
INCADAT cite: N/A
Requesting State: France
- 14) *Re W (Abduction: Acquiescence: Children's Objections)* [2010] 2 FLR 1150
Short title: "Re W (2010)"
Court: First Instance
INCADAT cite: [Upheld on appeal, HC/E/UKe 1324]
Requesting State: Ireland
- 15) *DT v. LBT (Abduction: Domestic Abuse)* [2011] Fam Law 220
Short title: "DT v. LBT"
Court: First Instance
INCADAT cite: HC/E/UKe 1042
Requesting State: Italy

United States of America

- 1) *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374; Fed: 8th Cir. (1995)
Short title: "Nunez"
Court: Appellate Court
INCADAT cite: HC/E/USf 98
Requesting State: Mexico
- 2) *Krishna v. Krishna*, 1997 WL 195439; US. District Crt for N.D Cal. (1997)
Short title: "Krishna"
Court: First Instance
INCADAT cite: N/A
Requesting State: Australia
- 3) *Tabacchi v. Harrison*, 2000 WL 190576; Dist Crt for N.D. Ill, Eastern Div. (2000)
Short title: "Tabacchi"
Court: First Instance
INCADAT cite: HC/E/USf 465
Requesting State: Italy
- 4) *Walsh v. Walsh*, 221 F.3d 204; Fed: 1st Cir. (2000)
Short title: "Walsh"
Court: Appellate
INCADAT cite: HC/E/USf 222
Requesting State: Ireland
- 5) *Ostevoll v. Ostevoll*, 2000 WL 1611123; US. District Crt for S.D. Ohio, Western Division (2000)
Short title: "Ostevoll"
Court: First Instance
INCADAT cite: N/A
Requesting State: Norway

- 6) *Blondin v. Dubois II and IV*, 189 F.3d 240 and 238 F.3d 153; U.S. 2d Cir. (1999 and 2001)
Short title: "*Blondin*"
Court: Appellate
INCADAT cite: HC/E/USf 585
Requesting State: France
- 7) *Van de Sande v. Van de Sande*, 431 F.3d 567; 7th Cir. (2005)
Short title: "*Van de Sande*"
Court: Appellate
INCADAT cite: HC/E/USf 812
Requesting State: Belgium
- 8) *Simcox v. Simcox*, 511 F.3d 549; 6th Cir. (2007)
Short title: "*Simcox*"
Court: Appellate
INCADAT cite: N/A
Requesting State: Mexico
- 9) *Baran v. Beaty*, 526 F.3d 1340; Fed: 11th Cir. (2008)
Short title: "*Baran*"
Court: Appellate
INCADAT cite: N/A
Requesting State: Australia
- 10) *Foster v. Foster*, 654 F.Supp.2d 348; District Ct., W.D. Penn (2009)
Short title: "*Foster*"
Court: First Instance
INCADAT cite: N/A
Requesting State: Canada
- 11) *Miltiadous v. Tetervak*, 686 F.Supp.2d 544; U.S. District Ct for E.D. Penn (2010)
Short title: "*Miltiadous*"
Court: First Instance
INCADAT cite: N/A
Requesting State: Cyprus
- 12) *Charalambous v. Charalambous*, 627 F.3d 462; 1st Cir. (2010)
Short title: "*Charalambous*"
Court: Appellate
INCADAT cite: N/A
Requesting State: Cyprus