No. 20-1034

# In the Supreme Court of the United States

NARKIS ALIZA GOLAN, PETITIONER

*v.*

ISACCO JACKY SAADA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTION PRESENTED

The Hague Convention on the Civil Aspects of International Child Abduction generally requires that, upon petition, children wrongfully removed from their country of habitual residence be returned promptly, allowing the merits of custody disputes to be adjudicated in that country. Article 13(b) of the Convention provides an exception to that requirement where it is established that there is a grave risk that returning the child would expose him or her to physical or psychological harm. The question presented is:

Whether, after finding that returning a child would expose him or her to grave risk of harm, a district court is required to consider whether ameliorative measures would facilitate return before reaching a decision on a petition to return.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Treaty and statutes:

Treaty and statutes—Continued: Page



Miscellaneous:

Miscellaneous—Continued: Page

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## INTEREST OF THE UNITED STATES

This brief is filed in response to this Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

## STATEMENT

1. a. The Hague Convention on the Civil Aspects of International Child Abduction (Convention), *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force for the United States July 1, 1988), "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 560 U.S. 1, 8 (2010); see *Public Notice 957: Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10,494 (Mar. 26, 1986) (State Department analysis submitted to the Senate during consideration of Convention). Among the

Convention's purposes is "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State." Convention art. 1(a). A removal is "wrongful" if it breaches existing custody rights "under the law of the State in which the child was habitually resident immediately before the removal." *Id.* art 3(a).

If the court of a contracting state determines that a child has been wrongfully removed, it generally must order return of the child to the country of habitual residence "forthwith." Convention arts. 11, 12. The return remedy reflects the principle that "the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence," *Abbott*, 560 U.S. at 20, and that an abducting parent should not benefit from unilaterally attempting to change the forum, Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶¶ 16, 19 (Permanent Bureau trans. 1982), https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.

Consistent with this principle, the Convention specifies that "[a] decision * * * concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Convention art. 19. And once a contracting state has received an application for return, the Convention bars that state from deciding "the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application * * * is not lodged within a reasonable time." *Id.* art. 16. The Convention emphasizes the need for prompt decisions, providing that "[t]he judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children." *Id.* art. 11.

The Convention's return requirement is not absolute, however. The Convention recognizes various situations in which a contracting state "is not bound to order the return of the child." Convention art. 13; see also *id.* art. 20. As relevant here, Article 13(b) provides an exception where the respondent opposing the child's return "establishes that * * * [t]here is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." *Id.* art. 13(b). Even then, however, the Convention affords the court "discretion to order the child returned." 51 Fed. Reg. at 10,509.

b. To implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), Pub. L. No. 100-300, 102 Stat. 437 (22 U.S.C. 9001 *et seq.*), which establishes procedures for requesting return of a child wrongfully removed to or retained in the United States.[1]

The Act authorizes "[a]ny person" seeking return of a child under the Convention to file a petition in state or federal court. 22 U.S.C. 9003(b). The court "shall decide the case in accordance with the Convention." 22 U.S.C. 9003(d). Congress specified that "[t]he Convention" and ICARA "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 22 U.S.C. 9001(b)(4).

Absent a finding that an exception applies, a child determined to have been wrongfully removed or retained must be "promptly returned" to the country of habitual residence. 22 U.S.C. 9001(a)(4). The Act re-

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[1] In 2014, the codified Act was transferred from Title 42 of the United States Code to Title 22; all references herein are to the 2018 edition.

quires that a respondent who opposes return of the child under Article 13(b) establish grave risk "by clear and convincing evidence." 22 U.S.C. 9003(e)(2)(A).

2. a. Petitioner, a United States citizen, and respondent, an Italian citizen, married in August 2015. Pet. App. 28a. Their only child, B.A.S., was born in Milan in June 2016. *Ibid.* The parties' relationship was "violent and contentious almost from the beginning." *Ibid.* (citation omitted). Respondent "physically, psychologically, emotionally and verbally abused" petitioner. *Ibid.* (citation omitted). "Among other things," he "called her names, slapped her, pushed her, pulled her hair, threw a glass bottle in her direction, and * * * threatened to kill her." *Id.* at 28a-29a. Many of those incidents occurred in B.A.S.'s presence, *id.* at 29a, but respondent "does not have a history of directly abusing B.A.S.," *id.* at 10a n.3.

"Despite the significant problems in their relationship," the parties lived together in Milan until July 2018, when petitioner and B.A.S. traveled to the United States. Pet. App. 29a. Petitioner did not return to Milan, instead moving with B.A.S. to a confidential domestic-violence shelter in New York. *Ibid.* Respondent then filed this action in federal district court, seeking B.A.S.'s return to Italy. *Id.* at 41a.

b. Following a two-week trial, the district court found that due to respondent's abuse of petitioner, "returning B.A.S. to Italy would subject him to a grave risk of psychological harm, and therefore the Hague Convention did not require that the district court order B.A.S.'s return." Pet. App. 1a, 3a. The court did not end its analysis at that point, noting that it was required under Second Circuit precedent to determine if there were any ameliorative measures, or "undertakings,"

that would reduce the grave risk of harm to B.A.S. such that the court could "'allow *both*' the child's return and his protection from harm pending a custody determination" in Italy. *Id.* at 81a (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 249 (2d Cir. 1999)).[2]

The district court explained that respondent had agreed to provide petitioner with $30,000 to allow her to live independently in Italy until the Italian courts decided the relevant issues, to stay away from petitioner until the Italian courts resolved the custody dispute, to pursue dismissal of criminal charges against petitioner related to the abduction of B.A.S., to begin cognitive behavioral therapy, and to waive any right to legal fees or expenses under the Convention and ICARA. Pet. App. 4a, 82a-84a. The court found that those "proposed undertakings sufficiently ameliorate the grave risk of harm to B.A.S. upon his repatriation to Italy" and ordered his return. *Id.* at 83a.

3. a. In July 2019, the court of appeals issued a decision partially affirming and partially vacating the district court's judgment. Pet. App. 26a-40a. The court agreed with the district court that Italy was B.A.S.'s habitual residence, but held that the district court had "erred in granting [the] petition because the most important protective measures it imposed are unenforceable and not otherwise accompanied by sufficient guarantees of performance." *Id.* at 27a-28a. The unenforceable measures, the court observed, included conditions

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[2] The Second Circuit has used the terms "ameliorative measures" and "undertakings" interchangeably, see Pet. App. 3a, to refer to actions "(by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation," *Blondin*, 189 F.3d at 248.

"essential to mitigating the grave risk of harm B.A.S. faces." *Id.* at 35a.

The court of appeals explained, however, that "it is important for courts to consider 'the [full] range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm,'" and that "[d]istrict courts have 'broad equitable discretion to develop a thorough record' on potential ameliorative measures." Pet. App. 35a-36a (quoting *Blondin*, 189 F.3d at 249) (first set of brackets in original). The court determined that it was "by no means inevitable that there w[ould] be *no* conditions conducive to balancing [the] commitment to ensuring that children are not exposed to a grave risk of harm with [the court's] general obligation under the Hague Convention" to return the child. *Id.* at 36a. Accordingly, the court remanded the case to the district court to consider whether there were possible alternative ameliorative measures that were either enforceable by the district court or subject to sufficient guarantees of performance. *Ibid.*

b. On remand, the district court spent "nine months" "undert[aking] an extensive examination of the measures available to ensure B.A.S.'s safe return to Italy." Pet. App. 12a. The court noted that, with the assistance of the State Department, it had contacted one of the United States members of the International Hague Network of Judges. *Ibid.* That judge assisted the court in contacting the Italian authorities regarding the possible return of B.A.S. and the sufficiency of various ameliorative measures. *Ibid.* The district court ordered the parties to seek certain protective measures in the Italian courts, and they both complied. *Id.* at 4a. The district court then found that "the Italian courts are willing and able to resolve the parties' multiple dis-

putes" and "address the family's history and ensure B.A.S.'s safety and well being," and it therefore ordered B.A.S. returned to Italy. *Id.* at 13a.

The district court noted that the Italian court overseeing the parties' custody dispute had issued a "comprehensive order imposing various measures to facilitate B.A.S.'s Italian repatriation," including, *inter alia*, "a protective order against [respondent] and an order directing Italian social services to oversee his parenting classes and behavioral and psychoeducational therapy." Pet. App. 17a. Separately, the Italian criminal court dismissed the charges respondent had initiated against petitioner in connection with B.A.S.'s removal from Italy, and respondent signed a statement agreeing not to pursue future criminal or civil action. *Ibid.* The district court also concluded that a $150,000 payment by respondent to petitioner for "a year of expenses" would ensure her "financial independence from [respondent] and his family * * * pending the Italian custody proceeding." *Id.* at 22a-23a. The court thus again ordered B.A.S.'s return to Italy subject to the specified "ameliorative measures." *Id.* at 25a.

c. The court of appeals affirmed. Pet. App. 1a-10a. It held that "the district court correctly concluded that there existed sufficiently guaranteed ameliorative measures that would remedy the grave risk of harm to B.A.S. upon his return to Italy" and "properly granted [respondent's] petition." *Id.* at 9a.

4. Petitioner filed a petition for rehearing or rehearing en banc, which was denied on January 14, 2021. Pet. App. 86a. The Second Circuit granted a stay of the order requiring return of B.A.S. pending this Court's disposition of the petition for a writ of certiorari and any

resulting ruling by this Court. D. Ct. Doc. 134 (Apr. 21, 2021).

## DISCUSSION

In the view of the United States, the Convention allows, but does not require, a court to consider measures that could ameliorate a grave risk of harm when determining whether to refrain from ordering the return of a child under Article 13(b). A flexible, discretionary approach to such ameliorative measures is most consistent with the text of the Convention, implementing legislation, and the longstanding view of the State Department. Such an approach also best balances the Convention's goal of prompt return of children wrongfully removed from their countries of habitual residence with its grave-risk exception to the return requirement. In contrast, the Second Circuit's categorical requirement to consider—and even craft—a full range of ameliorative measures fails to adequately respect the Convention's prohibition on making custody decisions when adjudicating a return petition and its emphasis on expeditious proceedings.

This Court's review is warranted. The courts of appeals are divided on how to address ameliorative measures, and the Second Circuit's mandatory rule is likely to cause delays inconsistent with the Convention's focus on prompt resolution of return petitions, thus affecting the United States' performance of its treaty obligations. The petition for a writ of certiorari should be granted.

## I. THE COURT OF APPEALS ERRED IN HOLDING THAT COURTS ARE REQUIRED TO CONSIDER A FULL RANGE OF AMELIORATIVE MEASURES AFTER FINDING THAT RETURN POSES A GRAVE RISK OF HARM

### A. The Text Of Neither The Convention Nor ICARA Mandates Consideration Of Ameliorative Measures

1. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (citation omitted). Article 13(b) of the Convention provides that "the requested State is not bound to order the return of the child" if the relevant party "establishes that * * * [t]here is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention art. 13(b). The Convention does not specifically mention consideration of ameliorative measures if the court finds that return poses a grave risk to the child. Rather, Article 13(b)—by providing that "the requested State is not bound" to order return—affords the court discretion to deny the return upon such a finding of grave risk. Convention art. 13.

The text of the Convention does, however, provide some guidance regarding the Article 13 inquiry, explaining that "[i]n considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." Convention art. 13. Notably, that provision does not specify that courts must take possible ameliorative measures into account. Thus, while courts are obliged to consider information such as "home studies and other social background

reports" if the relevant authorities choose to provide them, 51 Fed. Reg. at 10,513, in order to facilitate "a balanced record upon which to determine whether the child is to be returned," *id.* at 10,510, nothing in the Convention suggests that courts invariably must "'develop a thorough record' on potential ameliorative measures" and take into account "'the [full] range of [such] remedies,'" as the Second Circuit has held. Pet. App. 35a-36a (quoting *Blondin* v. *Dubois*, 189 F.3d 240, 249 (2d Cir. 1999)) (first brackets in original).

To be sure, a court has discretion under Article 13(b) to order return of a child despite a grave-risk finding. In deciding whether to do so, the court may take into account existing or potential ameliorative measures that might reduce the grave risk of harm. But there is no requirement that a court do so in every instance, much less explore the full range of possible measures. "[T]he Convention does not pursue" its goal of deterring international child abduction through its return remedy "at any cost," and the Second Circuit's contrary rule effectively "rewrite[s] the treaty" as if it did. *Lozano* v. *Alvarez*, 572 U.S. 1, 16-17 (2014); see also *Monasky* v. *Taglieri*, 140 S. Ct. 719, 728 (2020) (rejecting atextual imposition of "categorical requirements for establishing a child's habitual residence").

2. Nor do the statutory provisions Congress enacted to implement the Convention mandate consideration of ameliorative measures in deciding whether to return a child following a finding of grave risk under Article 13(b). Consistent with the Convention, ICARA outlines the procedures by which a petitioner can seek the return of a child and a respondent can oppose that request. See 22 U.S.C. 9003. A petitioner seeking return must prove by a preponderance of the evidence that the

child was wrongfully removed or retained within the meaning of the Convention. 22 U.S.C. 9003(e)(1)(A). A respondent may raise one of the Convention's specified exceptions in an attempt to prevent the return, and the respondent must prove the "grave risk" exception to return by clear and convincing evidence. 22 U.S.C. 9003(e)(2)(A). The Act does not mention any requirement to inquire into or evaluate ameliorative measures or otherwise channel courts' discretion to deny or grant return after finding that the respondent has established a grave risk under Article 13(b).

### B. A Discretionary Approach To Ameliorative Measures Accords With The Longstanding View Of The State Department, Which Finds Support In International Understandings Of The Convention

1. Recognizing courts' discretion regarding ameliorative measures is also consistent with the State Department's interpretation of the Convention. See, *e.g.*, *Abbott*, 560 U.S. at 15 (Executive Branch's interpretation of the Convention is entitled to "great weight") (citation omitted). The Department has long held the view that consideration of protective measures can sometimes be appropriate under the Convention, but it has never treated that as a requirement under Article 13(b) across the board.

The State Department's authoritative legal analysis of the Convention issued soon after its adoption contemplates that denial of a return under Article 13(b) may be proper even absent consideration of possible ameliorative measures. See 51 Fed. Reg. at 10,510. The State Department explained that "a court in its discretion need not order a child returned" where the requisite grave risk exists or return would "otherwise place the child in an intolerable situation." *Ibid.* "An example of

an 'intolerable situation,'" the Department observed, "is one in which a custodial parent sexually abuses the child." *Ibid.* "If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition." *Ibid.* The Department's analysis makes no mention of a requirement to develop or consider possible ameliorative measures under such circumstances.

The State Department's view on protective measures under the Convention is also set out in a 1995 letter to an official of the United Kingdom. App., *infra*, 1a-20a (Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Dep't of State, to Michael Nicholls, Lord Chancellor's Dep't, Child Abduction Unit, United Kingdom (Aug. 10, 1995)). The letter explained that, "[w]hile undertakings are not necessary to operation of the Convention, there are good arguments that their use can be consistent with the Convention." *Id.* at 2a. In particular, undertakings can "facilitate Article 12's objective of ensuring the return of abducted children 'forthwith.'" *Ibid.* The letter also emphasized, however, that "undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence," and that "[u]ndertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance." *Id.* at 2a (noting that Articles 16 and 19 of the Convention contemplate that "substantive issues relating to custody" are to be resolved in the courts of the child's habitual residence).

In particular, the Brown Letter criticized undertakings entered by a British court that "went well beyond

what was necessary to ensure the prompt return of the child" by directing that "the left-behind father would provide the mother and their three children a motor vehicle," school expenses, weekly maintenance payments of $200, and medical and dental insurance. App., *infra*, 3a-4a. The State Department elaborated that those undertakings were, in its judgment, "too broad," failing to give "appropriate respect" to the Convention's premise that return proceedings should "not attempt to address the underlying [custody] dispute." *Id.* at 4a, 6a. "If the requested state court is presented with unequivocal evidence that return would cause the child a 'grave risk' of physical or psychological harm, * * * then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request." *Id.* at 16a.

Similarly, in a 2006 newsletter for judges published by the Hague Permanent Bureau, a State Department official opined that while consideration of ameliorative measures is "not necessary to the proper operation of the Convention," the State Department supported the "limited use" of undertakings, but only where narrowly tailored to support the prompt return of an abducted child. Kathleen Ruckman, *Undertakings As Convention Practice: The United States Perspective*, The Judges' Newsletter (Hague Conf. On Private Int'l Law, London, England) Vol. XI, at 46 (2006), https://assets.hcch.net/docs/b3f445a5-81a8-4ee8-bc42-720c6f31d031.pdf. The article indicated that courts had a choice whether to consider ordering undertakings, and cautioned against using such discretion to undermine the basic precepts of the Convention. See *ibid.*

2. The Hague Conference on Private International Law, *1980 Child Abduction Convention: Guide to Good Practice Part VI Article 13(1)(b)* (2020) (*Guide*), https://

assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf, which was developed to "promote, at the global level, the proper and consistent application of the grave risk exception," also contemplates the exercise of discretion. *Guide* ¶ 3. It states that "[t]he examination of the grave risk exception should then also include, *if considered necessary and appropriate*, consideration of the availability of adequate and effective measures of protection in the State of habitual residence." *Id.* ¶ 36 (emphasis added).[3]

Many contracting states that mandate consideration of ameliorative measures root that obligation outside the Convention. European Union member states (other than Denmark) follow Brussels IIa, a regulation that limits their discretion to refuse to return a child to another member state in light of an Article 13(b) defense where "adequate arrangements have been made to secure the protection of the child after his or her return." Council Regulation 2201/2003, art. 11(4), 2003 O.J. (L 338) 6 (EU). That regulation—which operates only between member states subject to separate instruments affecting the enforceability of any ameliorative measures under consideration—does not suggest that the Convention itself supports a requirement that courts take ameliorative measures into account under Article 13(b).[4]

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[3] The *Guide* includes evaluation of ameliorative measures as a necessary step in its section describing the grave-risk exception "in practice." *Guide* ¶¶ 41, 61. Paragraph 36 of the *Guide*, however, makes clear that the Convention permits such consideration as courts may deem "necessary and appropriate." *Guide* ¶ 36.

[4] In addition, Australia plainly does not interpret the Convention to mandate consideration of ameliorative measures, having implemented it through a regulation providing that "[i]f a court is

### C. A Flexible Ameliorative-Measure Approach Best Serves The Convention's Purposes

By requiring courts to consider a broad range of possible ameliorative measures, and even to develop them, the Second Circuit stated that it sought to "honor[] the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country." *Blondin*, 189 F.3d at 248. But the Second Circuit's standard is based on an unduly restrictive understanding of the Convention's purposes and fails to respect the treaty's provisions barring custody determinations, directing expeditious adjudication of return petitions, and permitting denial of return under Article 13(b).

1. The Convention and ICARA expressly prohibit courts from resolving any underlying custody dispute in adjudicating a return petition; the remedy is limited to returning the child to the country of habitual residence. See Convention arts. 16, 19; 22 U.S.C. 9001(b)(4) (empowering courts "to determine only rights under the Convention and not the merits of any underlying child custody claims"). "It is the Convention's core premise that 'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's country of 'habitual residence.'" *Monasky*, 140 S. Ct. at 723 (quoting Convention Pmbl.).

Directing courts to consider or develop ameliorative measures in every grave-risk case could embroil U.S. courts in issues more properly left to other countries' custody proceedings. This case is illustrative. In order

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satisfied that it is desirable to do so, the court may" include in a return order "a condition that the court considers to be appropriate to give effect to the Convention." *Arthur & Sec'y*, [2017] FamCAFC 111 ¶ 69(1)(c) (Austl.).

to enable B.A.S.'s safe return under the Second Circuit's standard, the district court on remand found it necessary to assess respondent's behavior as a spouse and parent, and to engage in an "extensive examination" of a "'full range'" of ameliorative options deemed adequately "'enforceable * * * or supported by other sufficient guarantees of performance.'" Pet. App. 12a-14a (citations omitted). That course led to the issuance of a "comprehensive order" from an Italian court not just encompassing a protective order pending a custodial determination, but also "directing Italian social services to oversee [respondent's] parenting classes and behavioral and psychoeducational therapy," based on the district court's concern about his "lack of insight into his behavior and its effect on B.A.S." *Id.* at 17a, 20a. The district also ordered respondent to provide petitioner with "[a] payment of $150,000.00" to ensure petitioner's "financial independence from the [respondent] and his family" for an entire year. *Id.* at 22a-23a.

The order of the Italian court supported the district court's determination that there were adequate protections to permit the child to return. But to the extent Second Circuit precedent *required* the district court to take extensive steps to prompt the issuance of an order containing such detailed provisions, that mandate is hard to square with the principle "that the Hague proceeding should * * * not attempt to address the underlying [custody] dispute." App., *infra*, 4a. Thus, while in some cases, imposition of protective measures limited in time and scope are appropriate—and while consideration of protective measures a court in the country of habitual residence has already imposed is ordinarily appropriate—the Convention's prompt-return goal does not justify transforming Article 13(b) into a back-door

route for adjudicating custody issues. Rather, where return presents a grave risk of harm to the child, it is "less appropriate for the court to enter extensive undertakings" that mimic a custody order of its own "than to deny the return request" in accordance with Article 13(b)'s express exception. *Id.* at 16a.

2. Requiring consideration of a range of ameliorative measures after every grave-risk finding is also at odds with the Convention's emphasis on prompt adjudication of return petitions, regardless of the ultimate decision reached. "To avoid delaying the custody proceeding" by adjudicating the Convention's merely "'provisional' remedy that fixes the forum," "the Convention instructs contracting states to 'use the most expeditious procedures available.'" *Monasky*, 140 S. Ct. at 723-724 (citations omitted); see *id.* at 724 (pointing to Article 11's provision permitting inquiry into "delay[]" after six weeks as indicating a "normal time for return-order decisions"). Article 11, moreover, expressly requires contracting states to "act expeditiously in proceedings for the return of children." Convention art. 11. The Convention takes care to simplify its proceedings to support that mandate. For example, Article 30 makes documents submitted "in accordance with the terms of th[e] Convention * * * admissible in the courts" of contracting states, thereby avoiding potentially lengthy authentication processes. *Id.* art. 30; see *id.* art. 22 (precluding a security or bond requirement); *id.* art. 23 (limiting formality requirements).

That emphasis on expedition reflects the recognition that a decision regarding a petition for return should be made quickly, whether that decision orders return or not. See *Chafin* v. *Chafin*, 568 U.S. 165, 179 (2013) (noting that "courts can and should take steps to decide

these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation"). If, however, courts are invariably required to consider a range of ameliorative measures—particularly based on a "thorough record" they are required to "develop," including by making "any appropriate or necessary inquiries of the government" of the country of habitual residence, *Blondin*, 189 F.3d at 249—then Article 13(b) cases would routinely take many months, if not more, to resolve.

Again, this case provides a useful example. After the Second Circuit found the initial protective measures inadequate, the district court spent over nine months conducting the type of inquiry the Second Circuit directed, "communicat[ing] with Italian authorities" and undertaking an "extensive examination," including "multiple conferences and * * * status reports and briefs on the status of the case in Italy." Pet. App. 4a, 12a. This case demonstrates how mandatory requirements like the Second Circuit's, with extensive oversight of foreign proceedings, can lead to additional—perhaps substantial—delay, in significant tension with the Convention's focus on expedition.

3. In contrast with the Second Circuit's mandatory regime, a more flexible, discretionary approach to ameliorative measures permits courts to consider each case in light not only of the Convention's general policy to return a child, but also of its prohibition on custody determinations by courts considering return petitions, its emphasis on prompt resolution of return petitions, and its solicitude for the child's welfare. Cf. *Lozano*, 572 U.S. at 23 (Alito, J., concurring) (explaining that case-specific "[e]quitable discretion" is "a far better tool" "to address the dangers of concealment" of a child

than an across-the-board equitable-tolling requirement). Courts' discretion in balancing those potentially competing aspects of the Convention should be substantial, leaving them free to take into account such factors as the nature of the grave risk, whether protective measures are already in place in the country of habitual residence, and whether there are or promptly could be proceedings in that country in which a court would be able to expeditiously issue protective measures. In general, however, ameliorative measures ordered by a U.S. court are most appropriate where they are limited in time and scope to ensure prompt return of the child. Cf. App., *infra*, 3a-4a (noting with disapproval undertakings going "well beyond what was necessary to ensure the prompt return of the child," addressing motor vehicles, school expenses, insurance, and weekly maintenance payments).

## II. THE SCOPE OF JUDICIAL DISCRETION UNDER ARTICLE 13(b) IS AN IMPORTANT ISSUE DIVIDING THE CIRCUITS THAT WARRANTS THIS COURT'S REVIEW

This case merits this Court's review. The Second Circuit's creation of a categorical and atextual requirement that courts consider and even craft ameliorative measures under Article 13(b) could impact the United States' performance of its obligations under the Convention, prompting intrusions into the arena of custody arrangements and hindering courts' ability to expeditiously resolve return petitions. Congress has made clear that "the United States should set a strong example for other Convention countries in the * * * prompt resolution of cases involving children abducted abroad and brought to the United States." Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, Pub. L. No. 113-150, § 2(b), 128 Stat.

1809 (expressing the sense of Congress). This Court should grant certiorari to provide guidance to the lower courts that will enable them to exercise their discretion appropriately and promptly in resolving Convention cases.

Moreover, the courts of appeals are in conflict regarding the appropriate role of ameliorative measures after a grave-risk finding. Like the Second Circuit, the Third and Ninth Circuits require courts to consider potential ameliorative measures before making a decision whether to deny return under Article 13(b). See *In re Adan*, 437 F.3d 381, 395 (3d Cir. 2006); *Gaudin* v. *Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005).[5] In contrast, the First, Eighth, and Eleventh Circuits have concluded that district courts may deny return under Article 13(b) even without examining whether they can craft sufficiently protective measures. See *Danaipour* v. *McLarey*, 386 F.3d 289, 303 (1st Cir. 2004) (rejecting argument that "a district court cannot properly find that an Article 13(b) exception exists unless it examines the remedies available in the country of habitual residence"); *Acosta* v. *Acosta*, 725 F.3d 868, 877 (8th Cir. 2013) (concluding that "[o]nce a district court concludes that returning a child to his or her country of habitual residence would expose the child to a grave risk of harm, it has the discretion to refuse to do so," and placing burden on petitioning parent to "proffer[]" any

[5] Some state courts have also adopted the Second Circuit's requirement that courts consider potential ameliorative measures. See, *e.g.*, *Maurizio R.* v. *L.C.*, 135 Cal. Rptr. 3d 93, 111 (Cal. Ct. App. 2011) (citing *Blondin* for the proposition that "the inquiry does not stop" with a finding of grave risk, and that the "court must also consider whether any alternative remedies could facilitate [the child's] repatriation and mitigate the risk of severe psychological harm").

undertaking); *Baran* v. *Beaty*, 526 F.3d 1340, 1346-1352 (11th Cir. 2008) (explaining that "[a]lthough a court is not barred from considering evidence that a home country can protect an at-risk child, neither the Convention nor ICARA require it to do so," and concluding that the district court properly denied the petitioning parent's "request to propose undertakings at a future evidentiary hearing"); see also *Simcox* v. *Simcox*, 511 F.3d 594, 608 (6th Cir. 2007) (reasoning that "[o]nce the district court determines that the grave risk threshold is met," it is "vested by the Convention with the *discretion* to refuse to order return," emphasizing that courts' use of such discretion to "craft appropriate undertakings" is "intensely fact-bound"); *Van De Sande* v. *Van De Sande*, 431 F.3d 567, 571-572 (7th Cir. 2005) (citing *Danaipour* for the proposition that it may be less appropriate to order extensive undertakings than to deny return).[6]

That disagreement among domestic courts results in inconsistent application of the Convention within the United States, permitting abducting parents to forum shop among U.S. courts to obtain the most favorable rule. Here, for instance, had petitioner brought B.A.S. to Florida or Massachusetts instead of New York, a district court could have opted to deny return without considering potential ameliorative measures after a

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[6] Courts have sometimes treated the court-ordered conditions bearing on the child's circumstances upon return as part of the initial grave-risk inquiry, rather than as a subsequent step of ameliorating an established risk. See, *e.g.*, *Nunez-Escudero* v. *Tice-Menley*, 58 F.3d 374, 377-378 (8th Cir. 1995). The scope of district courts' discretion regarding the grave-risk inquiry is not at issue here, given that the Second Circuit requires consideration of ameliorative measures *after* such a finding.

grave-risk finding. The opportunity for such inconsistencies to manifest is substantial, given that the United States is among the contracting states that receive the highest yearly number of return applications. See Hague Conf. on Private Int'l Law, *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part I* 6 (2018), https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf.

Finally, this case presents an appropriate vehicle to review this issue. Respondent's suggestion (Br. in Opp. 14) that this Court's resolution of the question presented could "have no impact on this case" is misplaced. The United States takes no view on whether any particular ameliorative measure imposed by the district court would be an abuse of discretion. But to the extent the full slate of conditions on return was effectively imposed by the district court—and when that slate is viewed in its totality and in light of the delay in securing those conditions—it exceeded what would ordinarily be appropriate under the Convention. The district court's approach nevertheless reflected the Second Circuit's erroneous legal standard. See Pet. App. 14a (noting obligation under Second Circuit precedent to consider full range of ameliorative measures after finding grave risk of harm to B.A.S.); see pp. 6-7, *supra* (discussing "extensive" inquiry undertaken and "comprehensive" measures developed). While the time spent crafting that return order cannot now be recovered, and the comprehensive order issued by the district court has been found adequate, the courts below nonetheless should have an opportunity to consider the appropriate disposition of this case absent the Second Circuit's

erroneous rule. On remand, those courts could decide in the first instance whether to deny return in light of the grave risk of harm to B.A.S., or to order return.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRIAN H. FLETCHER
*Acting Solicitor General*
EDWIN S. KNEEDLER
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OCTOBER 2021

**APPENDIX**

United States Department of State
*Washington, D.C. 20520*

August 10, 1995

Michael Nicholls
Lord Chancellor's Department
Child Abduction Unit
81 Chancery Lane
London WC2A 1DD

RE: Undertakings and the Hague Convention on the Civil Aspects of International Child Abduction

Dear ~~Mr. Nicholls~~ [Michael],

You have raised with us a number of questions about the attitude of courts in the United States and of the United States Department of State toward undertakings entered by courts of the United Kingdom in connection with ordering the return of children to the United States under the Hague Convention on Civil Aspects of International Child Abduction. We understand your concerns to be those stated in your memorandum to me of February 6, 1995, and in your letter to the Legal Adviser, Conrad Harper, of March 20, 1995, as well as those expressed to us both when you and I met in London in January and in subsequent telephone conversations with me and members of my office.

Mr. Harper advised you in his letter of March 28, 1995, that we would be reviewing the issues you had raised and that we hoped it would be possible to resolve to our mutual satisfaction any difficulties in the interpretation and enforcement of undertakings in the United States and the United Kingdom. We are now in a position to address most of the issues you raised.

As a starting point, we undertook to research the use of undertakings under the Convention. The attached paper reflects the results of that research and suggests several relevant conclusions:

1. While undertakings are not necessary to operation of the Convention, there are good arguments that their use can be consistent with the Convention. Undertakings are most clearly consistent with the Convention where they facilitate Article 12's objective of ensuring the return of abducted children "forthwith;" minimize the use of non-return orders based on Article 13; and do not undercut the provisions of Articles 16 and 19, which clearly contemplate that return proceedings under the Convention should be jurisdictional and that substantive issues relating to custody, including maintenance, should be left to the court in the child's place of habitual residence.

2. As a corollary to the above, undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that that jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.

3. We did not find any persuasive evidence that courts in the United States are hostile to the concept of undertakings. Our ability to evaluate how U.S. courts have viewed undertakings is limited because child custody proceedings are frequently conducted "under seal" or, in any event, are not reported. We identified only three specific relevant cases. Significantly, in two of these cases a U.S. court entered an order directing the return of an abducted child to the country of habitual residence and also containing provisions that were essentially "undertakings." The third case was Roberts, in which enforcement of undertakings entered by a British court was denied.

Given our findings, we believe that any concern on the part of the English judiciary about the manner in which United States courts have viewed undertakings issued by foreign courts is unwarranted. You indicated that this concern has been prompted by a "small number of cases," of which we understand the Roberts case to be the most significant. While the U.S. court in Roberts denied enforcement of the undertakings, the undertakings in any event by their terms would have been effective only until the U.S. court further adjudicated "custody, care, and control." That occurred only eight days later, when the U.S. court issued a temporary custody order that closely approximated the content of the undertakings.

Moreover, based on the information available to us, we believe that the Roberts court might well have enforced more narrowly tailored undertakings. The undertakings entered by the British court in Roberts went well beyond what was necessary to ensure the prompt return of the child. For example, they provided that

the left-behind father would provide the mother and their three children a motor vehicle; that he would cover schooling expenses; that he would provide maintenance at the rate of $200 a week; and that he would pay medical and dental insurance expenses. These undertakings seem to us not to have given appropriate respect to the fact that the Hague proceeding should be essentially jurisdictional and not attempt to address the underlying dispute. The U.S. court's order suggests that the court believed that the U.K. court's authority was jurisdictional only and that it, and not the U.K. court, should decide what temporary arrangements should be in place pending final resolution of the custody dispute.

Thus, we do not believe that the Roberts case should give rise to any particular concern about the way in which the Convention is operating between the United States and the United Kingdom. This is particularly true when at least two U.S. courts themselves have entered undertakings in connection with ordering the return of a child. Rather we would read Roberts as an example of the possibility that undertakings may not be enforced if they are overly detailed and broad.

I recall your informing me that the undertakings in Roberts were essentially volunteered by the left-behind parent in the United States. In London in January we discussed whether the treatment of undertakings should vary depending on whether they are volunteered by the litigant or required by the court. This possibility is also mentioned in your note to me of February 6, 1995. Although this distinction is somewhat appealling, upon reflection we believe that there are also strong reasons why voluntariness should not be determinative of whether undertakings will be enforced. In the context

of child abduction cases, it will be difficult to know whether the left-behind parent is ever really acting "voluntarily," or rather out of a sense of desperation. Also, it seems unnecessarily burdensome to expect a court in the country to which the child is returned to look behind undertakings to determine whether they were volunteered by the parties or imposed upon them. Focusing instead on whether the undertakings themselves are appropriate would avoid both of these problems. Moreover, we would not favor the establishment by courts of requirements for extra-Convention undertakings as a condition precedent to the issuance of a return order under the Convention.

Assuming that the use of undertakings is accepted as consistent with the Convention, we are therefore inclined to say that the key question in any particular case where the enforcement of undertakings is at issue should be whether the undertakings are appropriate in scope. In your letter to Mr. Harper of March 20, 1995, you suggested that undertakings might be "limited to those necessary to make the return of the children easier and to provide for necessities, such as a roof over their head and adequate maintenance." In an earlier fax message, you suggested that undertakings "should be realistic and not go beyond what is necessary for the immediate protection of the child pending the matter being brought before the courts of the requesting state."

It seems to us difficult, particularly at this early stage of practice under the Convention, to draw up definitive rules as to what is appropriate for an undertaking and what is not. The principles you have suggested seem reasonable, but there is considerable room for dis-

cussion about the degree to which undertakings can appropriately provide for "necessities." Providing that the children should return and reside in the family home with the abducting parent is one thing; providing for ongoing monthly maintenance payments may be quite another.

The extent to which undertakings address "necessities" may not be particularly important if the court in the state of habitual residence is able to act quickly to address the same issues, and to provide for temporary support of the child pending full resolution of the custody issues (at which point we assume the undertakings order would lapse in any event). To the extent that questions of enforcing undertakings relating to interim maintenance do require resolution, however, we believe that they should be addressed on a case-by-case basis by the courts. Over time, some general principles on what is and is not appropriate in undertakings may emerge. For now, however, we are prepared to say that we view the Roberts undertakings as too broad, and that undertakings such as those entered by the U.S. court that ordered the return of children to the United Kingdom in the Zimmerman case seem appropriate. In that case, the undertakings were essentially that the mother would accompany the children to the U.K. and report immediately to the family court there; that the father would pay for her return flight and that of their two children; and that the mother would have custody of the children until custody was resolved by the U.K. court.

Another related issue you have raised with us is how courts in the U.K. might be assured that undertakings they enter will be enforced in the United States. You

recognized, in your letter to Mr. Harper, that the Department of State cannot bind our judiciary. Ultimately the question of enforcement is a decision for the courts and we cannot control the outcome. It does appear, however, that U.S. courts might be persuaded to enforce appropriately tailored undertakings during the period before they enter a superceding order, on a number of different legal theories. Moreover, while it is not our practice to intervene even as amici in lower court proceedings, to the extent that we receive informal requests for advice we would at this time be prepared to encourage serious consideration of the enforcement of undertakings that are narrowly tailored.

We also should not lose sight of the fact that there may be other ways to accomplish the objectives of proposed undertakings. For example, it might be possible for the parties to propose a consent order to the appropriate U.S. court prior to entry of the return order in the United Kingdom. In this connection, you may be interested to know that the private bar in the United States occasionally seeks to facilitate the return of children abducted from the United States by having the left-behind parent seek entry, by the appropriate U.S. court, of an order addressing interim issues of custody and support. We understand that private lawyers sometimes recommend use of these orders, which they call "safe-harbor" orders, in cases where the foreign court may be reluctant to return a child to the United States unless such issues are addressed in some fashion. Where a "safe-harbor" order has been entered in the United States, there may be no reason for a foreign court even to consider entering undertakings as part of a basic return order.

The Uniform Child Custody Jurisdiction Act ("UCCJA") is of dubious relevance, however. That statute is similar to the Convention, in that it seeks to ensure the return to the state of habitual residence of a child abducted from one state of the United States to another. The UCCJA also provides for enforcement in any state of a custody order entered by the state of habitual residence. Foreign custody decrees may obtain similar recognition in appropriate cases. The UCCJA may not be relevant to enforcement of undertakings, however, because return orders in principle are not the kinds of orders the UCJJA enforces—that is, they are not custody orders entered by the jurisdiction of habitual residence, but rather orders facilitating the return of children to the appropriate jurisdiction to determine custody. It is not clear to us that a return order that included undertakings addressing custody on an interim basis could properly be considered a custody order under the UCCJA for enforcement purposes.

Given how early we are in implementation of the Convention in the United States, my office and the U.S. Central Authority are taking a special interest in following the development of precedents in U.S. courts. We will undoubtedly refine our views as we see more Convention issues addressed by the judiciary. In addition, we agree with the proposal by the Government of Australia that it would be useful to address the subject of undertakings at a session of the Hague Special Commission on implementation of the Convention. A broad discussion of this issue among the states party to the Convention would be invaluable.

I hope that these observations and the attached memorandum will be useful to you and respond adequately to your questions relating to the attitudes of the United States towards undertakings. Assuming that you are still planning a trip to Washington in the Fall, we can continue this discussion and arrange at that time for you to meet with members of the private bar as well as the U.S. Central Authority. We look forward to seeing you at that time.

Best wishes,

Sincerely,

/s/ CATHERINE W. BROWN
CATHERINE W. BROWN
Assistant Legal Adviser
for Consular Affairs

Attachment:
Legal memorandum.

* * * * *

**The Hague Convention on the Civil Aspects of International Child Abduction—The Role of Undertakings and Their Recognition in the United States**

Background:

Undertakings have been entered principally by courts in the United Kingdom, Australia, and New Zealand in connection with the issuance of orders for return under the Hague Convention on the Civil Aspects of International Child Abduction.[1] The concept of an undertaking is derived from the law of contracts which defines an undertaking as a promise unsupported by consideration.[2] In the context of the Hague Convention, an undertaking is a promise, generally given by the left-behind parent during the course of an Article 12 hearing to secure the prompt return of a child wrongfully removed under the Convention. The scope of undertak-

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[1] Courts in the United States, Canada, Hungary and Switzerland have also issued Hague Convention orders containing undertakings. In preparing this report, the Department examined eighteen cases containing undertakings: Wadda and Wadda v. Ireland, High Court [1994] 1 ILRM 126, P v. P, [1992] 1 FLR 155, Police Commissioner of South Australia v. Temple, [1993] FLC 92-424, In Re G, Court of Appeal [1989] 2 FLR 475, Thomson v. Thomson, [1994] S.C.R., Court of the Capital of Buda, Court of Appeal, [1988] No. 50.PF.548/1988/3, C v. C, Court of Appeal [1989] 1 FLR 403, In Re M, Court of Appeal [1994], Korowin v. Korowin, District Court of Horgen [1991], Madden v. Hofmann, [1994] FP 009/478/94, McOwan v. McOwan, Family Court of Australia [1993], Zimmermann v. Zimmermann, District Court of Dallas County [1991], P v. B, Supreme Court [1994] 1 ILRM 201, Hemard v. Hemard, U.S. District Court for the Northern District of Texas [1995] 7-94CV-110-X, Boy v. Boy, [1994] FP No. 734/93.

[2] *See, e.g., CORWIN,* Section 13.

ings entered by Hague Convention courts varies significantly. Limited undertakings have been entered requiring the left-behind parent to provide a return airplane ticket for the taking parent or requiring the child to be returned to his/her country of habitual residence in the custody of the taking parent. Other courts have entered extensive undertakings regulating virtually all matters bearing on custody and maintenance.

The Department has identified only three cases where United States courts have addressed the role of undertakings under the Convention. In two of these cases, limited undertakings were entered in connection with the issuance of a Hague Convention return order.[3] In the third case, a Massachusetts state family court denied enforcement of broad undertakings issued by an English court relying on Article 19 of the Convention which specifies that Convention orders are not to be determinative of underlying custody issues.[4]

Given the limited body of judicial precedent available to the State Department on the subject of undertakings, this paper can only provisionally consider the role of undertakings under the Convention. Nevertheless, this paper examines whether the Hague Convention authorizes the judicial and administrative authorities responsible for entering return orders under Article 12 to issue

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[3] See, Zimmermann v. Zimmermann, District Court of Dallas County [1991], and Hemard v. Hemard, U.S. District Court for the Northern District of Texas [1995] 7-94CV-110-X.

[4] The Massachusetts state family court decision denying the enforcement of undertakings issued by a U.K. court, the Roberts case, has not been reported as this case has been impounded. Because state family court cases typically remain unreported, this listing of U.S. case law on undertakings is likely incomplete.

undertakings and the permissible scope of such undertakings.

Summary:

No article in the Hague Convention on the Civil Aspects of International Child Abduction[5] provides express legal authority for the issuance of undertakings. The negotiating history of the Convention, however, reveals that the drafters contemplated that the judicial and administrative authorities responsible for ensuring the return of a child to his/her country of habitual residence might seek to enter provisional orders comparable to undertakings pursuant to their domestic legal authorities. Furthermore, Article 12 of the Hague Convention appears to permit the issuance of undertakings that are narrowly tailored to ensure the prompt return of a child to his/her country of habitual residence. Although limitations on the legal authority of the executive branch do not permit the Department of State to require state and federal courts to recognize undertakings, the Department could, consistent with the Convention, encourage enforcement in the United States of limited undertakings when issued by foreign courts and administrative bodies.

Legal Basis and Scope of Undertakings:

Foreign courts[6] have relied on internal law and the Hague Convention itself to issue orders containing undertakings under the Convention. Specifically, some

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[5] Hereinafter the Convention or the Hague Convention.

[6] As noted previously, the Department is aware of only two cases in which a state court in the United States has entered a return order containing undertakings. *See supra, note 3 and accompanying text.* This paper, therefore, focuses on the practice of foreign courts in

courts have relied on internal legislation,[7] constitutional provisions[8] and general equitable jurisdiction[9] to justify the issuance of return orders containing undertakings. Other courts have invoked Articles 12[10] and 13[11] of the Hague Convention to justify the issuance of orders including undertakings.

Although no Article of the Convention explicitly refers to undertakings, the negotiating history of the Convention provides support for judicial reliance on internal law to issue return orders containing undertakings. Further, undertakings appear to be consistent with Article 12.

The negotiating history examines the role of the Convention viz. the internal laws of Contracting states bearing on child custody and international conventions governing the protection of minors and the enforcement of

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analyzing the legal bases under the Convention for the issuance of undertakings.

[7] *See, e.g.,* P v. B, [1995} 1ILRM 201 (Where the Irish Supreme court upheld a trial court order containing undertakings under the Child Abduction and Enforcement of Custody Orders Act 1991 and the Irish Constitution); Police Commissioner of South Australia v. Temple, [1993] FL 92-424 (Finding limited undertakings to be permitted under Australian legislation implementing the Convention, Regulation 15(3).

[8] *See, e.g.*, Wadda and Wadda v. Ireland, High Court [1994] 1 ILRM 126.

[9] *See, e.g.*, Madden v. Hofmann, [1994] FP 009/478/94.

[10] See e.g., Thomson v. Thomson, [1994] S.C.R. (Canada), In Re M, [1994] Court of Appeal (UK), and Korowin v. Korowin, [1991], District Court of Horgen (Switzerland).

[11] See, e.g., C v. C, [1989] 1 FLR 403 Court of Appeal (UK), Zimmermann v. Zimmermann, [1991] District Court of Dallas County (U.S.).

custody decisions. The negotiating history emphasizes that:

> "The Convention must necessarily coexist with the rules of each Contracting State on applicable law and on the recognition and enforcement of foreign decrees, quite apart from the fact that such rules are derived from internal law or from treaty provisions. On the other hand, even within its own sphere of application, the Convention does not purport to be applied in an exclusive way. *It seeks, above all, to carry into effect the aims of the Convention and so explicitly recognizes the possibility of a party invoking, along with the provisions of the Convention, any other legal rule which may allow him to obtain the return of a child wrongfully removed or retained or to organize access rights*." (Emphasis added)

This statement suggests that the drafters intended the judicial and administrative authorities to enter temporary or provisional remedies based on other "legal rules," such as internal law, to better effectuate the Convention's purpose of "secur[ing] the prompt return of children wrongfully removed to or retained in any Contracting State."[12]

Article 12 also appears to provide a legal basis for the issuance of undertakings if their purpose is to secure the prompt return of a child to his/her country of habitual residence. Specifically, Article 12 requires the judicial and administrative authorities in the requested state to "order the return of the child forthwith." This obligation to ensure the expeditious return of a child has been interpreted by a number of courts as providing a legal

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[12] Article 1.

basis for the issuance of undertakings. Underlying judicial reliance on Article 12 is the idea that undertakings further the aims of the Convention by encouraging taking parents promptly to return a child to the requesting state. Undertakings also tend to diminish the likelihood that a taking parent will engage in protracted litigation to avoid a return order.

A number of courts have invoked Article 13(b) to justify the issuance of return orders containing undertakings.[13] Article 13(b) prohibits the judicial and administrative authorities in requested states from ordering the return of a child where "there is 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." Courts have relied on Article 13(b) to enter undertakings on the ground that undertakings are necessary to prevent a "grave risk" of harm to the child which would result from an unconditional order of return. Undertakings of this nature might, for example, order the return of the child in the custody of the taking parent and permit the taking parent to retain custody until custody was determined by the court of the place of the child's habitual residence. (Such an order was issued by a U.S. court in the Zimmermann case.)

The negotiating history of the Convention plainly indicates that Article 13(b)'s "grave risk" exception to return is "to be interpreted in a restrictive fashion if the Convention is not to become a dead letter."[14] Limited undertakings of the kind just described would be con-

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[13] *See, e.g.*, In Re G, [1989] 2 FLR 475; C v. V, [1989] 1 FLR 403.

[14] Perez-Vera Report, at 434.

sistent with this approach, as it would temporarily obviate any concern about placing the child in the immediate custody of the left-behind parent while still effectuating a prompt return of the child to his/her country of habitual residence. If the requested state court is presented with unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm, however, then it would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context could embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception.)

Thus, the negotiating history and Article 12 of the Convention support the issuance of undertakings. Limited undertakings may also help ensure that Article 13 is used only restrictively, as intended. The appropriate scope of undertakings remains a serious issue, however. In a number of cases, courts have entered return orders containing undertakings which appear to have gone beyond what was necessary to secure the prompt return of a child under Article 12.[15] Undertakings that

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[15] For example, in C v. C., involving an abduction from Australia to the U.K., the U.K. Court of Appeal issued extensive undertakings requiring the father, the left-behind parent, to pay A$650 a week maintenance to the mother, obtain housing for the mother, to secure a place for the child at a preparatory school, to pay all fees relating to the child's education, to provide air tickets for the child and the mother to return to Sydney, and to provide a car for the mother for her use for two months or until resolution of the custody case, whichever proved to be longer. The Court of Appeal also prohibited the father from enforcing a 1988 custody order which had been issued ex parte, from removing the child from the mother pending full resolution of custody by an Australian court, from instituting contempt

delve deeply into custody and maintenance issues would seem inconsistent with the intended sense of Article 12 and to contravene both the spirit and the letter of the Convention.

Broad undertakings run counter to the jurisdictional nature of the Convention, which is repeatedly emphasized in the negotiating history:

> "[T]he Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.*, of custody rights, should take place before the competent authorities in State where the child had its habitual residence prior to its removal; . . . "

Undertakings bearing on custody issues in any but the most temporary and minimalist way necessary to effectuate prompt return also contravene Articles 16 and 19 of the Convention. Specifically, Article 16 prohibits requested state courts from "decid[ing] on the merits or rights of custody until it has been determined that the child is not to be returned." Article 19 further emphasizes the jurisdictional nature of the Convention, stating that: "A decision under this Convention . . . shall not be taken to be a determination on the merits of any custody issue."[16] Extensive undertakings, even if voluntary, do not appear, therefore, to be appropriate under the Convention.

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proceedings against the mother, and from impounding the mother's passport.

[16] This was the position taken by Judge Sabaitis in the Roberts case, where an English court had entered undertakings regulating virtually all matters bearing on custody.

Undertakings would appear most consistent with the Convention when designed primarily to restore the *status quo ante*, or when they impose reciprocal obligations on both the left-behind and the taking parent. For example, in Madden v. Hofmann,[17] a New Zealand court ordered the child's return to Australia on condition that the child remain in the mother's (the taking parent's) custody until a full custody order issued by the Australian court. The New Zealand court also ordered the mother to appear in Australian family court within one week of her return, however. Similarly, in Zimmermann v. Zimmermann,[18] the District Court of Dallas specifically ordered the mother, the abducting parent, to report immediately to the U.K. family court upon her return. The court further specified that the undertakings would cease to have effect upon the issuance of U.K. court orders. The approach taken by the Madden and the Zimmermann courts, whereby undertakings are reasonably tailored to expedite the return of the child, impose reciprocal obligations on both parents, and explicitly terminate upon action by the court of appropriate jurisdiction, seems entirely appropriate.

Recognition of Undertakings in the United States:

The Convention has been used successfully to return abducted children to and from the United States in many cases without reliance upon undertakings, particularly when civil countries are involved. Thus, it is clear that the Convention can function effectively without the use of undertakings. While not necessary to the operation of the Convention, undertakings and their

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[17] [1994] FP 009/478/94

[18] [1991] District Court of Dallas County

enforcement may facilitate the return of children and do not appear inconsistent with the Convention when limited in scope. The Department, as Central Authority for the United States, could support or at least not object to the recognition of undertakings issued by foreign courts which are reasonably limited in scope and duration. Neither the Hague Convention nor federal implementing legislation, however, specifically provides a mechanism for the domestic enforcement of foreign undertakings issued in connection with Convention orders for return.[19] The Department cannot directly compel enforcement of undertakings in United States state and federal courts, nor act as an attorney or in any fiduciary capacity in legal proceedings arising under the Convention.[20] Enforcement will, therefore, depend primarily on comity.

The Department could support or at least accept the use of "safeharbor orders"[21] which typically impose

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[19] Parents could conceivably attempt to invoke the Uniform Child Custody Jurisdiction Act to seek enforcement of undertakings. ("UCCJA") Section 23 of the UCCJA generally requires state courts to grant full faith and credit to foreign custody orders provided minimum standards of due process have been accorded both parties. By its terms, however, Section 23 would not normally encompass Hague orders for return, as Section 23 applies only to foreign "custody decrees." The question would be whether a U.S. court would regard a return order that included undertakings relating to temporary custody as a "custody decree" within the meaning of Article 23. If so, it would presumably be subject to modification by the U.S. court, which would have jurisdiction to decide custody issues, both under the Convention and the UCCJA.

[20] See, 22 C.F.R. 94.4.

[21] A "safeharbor order," is a temporary order obtained from a court in the child's country of habitual residence. It is generally

conditions on return similar to those imposed by undertakings, but can be enforced domestically as they are issued by U.S. state and federal courts. Such orders appear to facilitate the return of children to the United States and to obviate the concerns that occasionally prompt foreign courts to issue return orders containing undertakings. However, the Department does not support conditioning the issuance of a return order on the acquisition of a safeharbor order from a court in the requesting state.

In light of the limited number of United States court cases analyzing undertakings, the Department will want to keep this issue under review and continue to monitor the use of undertakings in connection with Hague Convention return orders. The Department's view of use of undertakings under the Convention may evolve as a fuller judicial record is developed. In this connection, the Department may well support the Australian recommendation that the agenda of the next session of the Hague Special Commission on implementation of this Convention include a discussion of undertakings.

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obtained by the left-behind parent prior to initiating Hague Convention proceedings in the country to which the child has been wrongfully removed or retained. The safeharbor order will typically recite that the left-behind parent agrees to submit tothe jurisdiction of the home-state court upon return of the child, will provide financial arrangements for the return of the child, and any other additional conditions which may expedite return of the child.