

Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction

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INTRODUCTION

In our increasingly mobile world, family relationships and problems often span national borders. These transborder entanglements pose challenges both for individuals and legal regimes. In the late 1970s, as a result of growing awareness of the phenomenon of child abduction by a parent, nations sought to address this issue through the creation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention” or the “Convention”).¹ More than eighty nations are now parties to this treaty, which aims to “protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return.”² The Hague Convention deals exclusively with the unilateral, wrongful removal or retention of children by parents, guardians, or close family members.³ Specifically, the Hague Convention demands that a child abducted by a parent from one signatory nation to another be returned to her home country, where custody proceedings may take place, unless the abducting

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1. PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 3 (1999).

2. Hague Conference on Private International Law, The Child Abduction Section, http://hcch.e-vision.nl/index_en.php?act=text.display&tid=21 (last visited Jan. 18, 2010).

3. BEAUMONT & MCELEAVY, *supra* note 1, at 1.

parent can successfully invoke one of the defenses set forth in the Convention.⁴

Increasingly, however, advocates and practitioners are raising concerns that the Hague Convention prioritizes expediency and the petitioning parent's rights over the rights of the abducting parent and child, doing a disservice to the mothers and children involved.⁵ Contrary to the assumptions of the drafters of the Convention,⁶ the vast majority of respondents ("abductors") in cases brought pursuant to the Hague Convention are mothers.⁷ Many of these women maintain that they fled across borders with their children due to domestic violence and the home state's inability to protect them.⁸ Unfortunately, many courts apply the Hague Convention in a way that is unsympathetic to such respondents' claims by insisting upon narrow constructions of the exceptions allowed in the Convention text.⁹

4. Hague Convention on the Civil Aspects of International Child Abduction art. 12–13, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter Hague Convention].

5. See, e.g., Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, in 11 VIOLENCE AGAINST WOMEN 115 (2005) (discussing the prevalence of adult domestic violence in parental abductions and specific cases in which battered mothers have objected to the return of their children to abusive partners); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000) [hereinafter Weiner, *International Child Abduction*] (highlighting the problems inherent in applying the Hague Convention to primary caregivers, often women, who take their children across international borders to escape domestic violence); Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701 (2004) (advocating for strengthening the Hague Convention's Article 20 defense to achieve more just results for domestic violence victims who flee their home countries with their children).

6. Weiner, *International Child Abduction*, *supra* note 5, at 609–10.

7. A 2003 statistical report found that 68 percent of taking persons were mothers and 29 percent fathers, while 68 percent of taking persons were also primary or joint caregivers. NIGEL LOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 21–22 (2007 update), available at http://hcch.e-vision.nl/upload/wop/abd_pd03e1_2007.pdf [hereinafter 2003 STATISTICAL ANALYSIS].

8. See, e.g., Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 277 (2002) [hereinafter Weiner, *Navigating the Road*] (noting that "[s]even of the nine cases decided by the United States courts of appeals between July 2000 and January 2001 involved an abductor who alleged that she was a victim of domestic violence"); Hague Conference on Private International Law, *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*, at 309–19, Prel. Doc. No. 2, (Oct. 2006) [hereinafter *Collated Responses*], available at http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf (providing signatory states' replies to the following questions: "Is the issue of domestic violence or abuse often raised as an exception to return in child abduction cases? What is the general approach of your courts to such cases and, in particular, how far do they investigate the merits of a claim that such violence or abuse has occurred?").

9. See Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 284–85 (2008) [hereinafter Weiner, *Half-Truths*] (observing that narrowly construing the Article 13(b) exception, as U.S. courts often do, "can render irrelevant the domestic violence perpetrated

Viewing Hague Convention adjudications through the lens of the parent fleeing domestic violence exposes a number of problems with Hague Convention jurisprudence in U.S. courts. While scholars have detailed the general challenges that domestic violence victims face in Hague proceedings,¹⁰ the role of immigration status in such cases has received little attention. Given the inherent border-crossing nature of Hague cases, non-U.S. citizens often find themselves in the respondent role before U.S. courts. The courts may choose either to consider or ignore the respondents' (and their children's) immigration status in several different ways during the course of the Hague petition adjudication.

This Comment details the interaction of immigration status with two of the Hague Convention's defenses to the return of a child: the Article 13(b) *grave-risk* defense and the Article 12 *well-settled* defense. I assess this relationship through the lens of the parent escaping domestic violence, given the prevalence and severity of the problem. In particular, I focus on parents who flee to the United States, because the United States receives more petitions for the return of children than any other signatory to the Convention.¹¹ I argue that most U.S. courts take immigration status into account when they should not—in the consideration of the well-settled defense—and fail to weigh immigration status when they should—when an asylum application or grant is relevant to the assessment of the grave-risk defense. In order to comport with the object and purpose of the Hague Convention, which is to “protect children internationally from the harmful effects of their wrongful removal,”¹² and with other international law norms, U.S. courts must weigh the status of asylum applicants in grave-risk determinations, and they should not deem immigration status dispositive in the well-settled inquiry unless there is an imminent threat of removal.

I begin by providing an overview of the Hague Convention and its application in the United States in Part I. Part II details the current role immigration status plays in U.S. Hague Convention jurisprudence regarding the

against an abductor”).

10. See, e.g., Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004) [hereinafter Bruch, *Unmet Needs*]; Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL'Y & FAM. 191 (1999); Shetty & Edelson, *supra* note 5; Weiner, *International Child Abduction*, *supra* note 5.

11. 2003 STATISTICAL ANALYSIS, *supra* note 7, at 14. In 2003, the United States received 23 percent of all return petitions submitted worldwide under the Convention. *Id.* Overall, the U.S. Department of State has received inquiries for approximately sixteen thousand cases of international child abduction since the late 1970s. Shetty & Edelson, *supra* note 5, at 118 (this figure includes cases of abduction both into and out of the United States). In 2003, when the statistical analysis was prepared, there were seventy-four total signatories to the Convention, forty-five of which had received applications for return of a child that year. 2003 STATISTICAL ANALYSIS, *supra* note 7, at 7, 8.

12. Hague Convention, *supra* note 4, at pmb1.

grave-risk defense and the well-settled defense. In Part III, I rely on principles of treaty interpretation and applicable international law to conclude that the best interests of the child require courts to consider asylum claims in making grave-risk determinations. I argue that if an asylum claim is pending at the time of a Hague proceeding, the proceeding should be stayed until the asylum claim is adjudicated. If the asylum application is approved, then courts should consider the grant as compelling evidence that both the taking-parent and child would face a grave risk of harm upon return to the home country. In determining whether a child is well settled, I argue that courts should disregard immigration status unless the child faces an imminent threat of removal.

I

BACKGROUND: THE HAGUE CONVENTION AND U.S. IMPLEMENTATION

This Part lays the statistical and legal foundations upon which later analysis and argumentation build. I provide an overview of key statistics to illustrate the scope of the problem and then explore the human dimensions of the problem by sharing a respondent's story. With that foundation established, I turn to the Hague Convention and its implementation in the United States.

A. International Parental Child Abduction and Domestic Violence

Who are the parents who abduct, and what motivates them to do so? When the Hague Convention was drafted in the late 1970s, the prevailing perception was that most acts of parental child abduction were committed by fathers dissatisfied with actual or potential custody awards.¹³ But analysis of data drawn from subsequent Hague Convention cases reveals a different reality. A study commissioned by the Permanent Bureau of the Hague Conference on Private International Law found that of the 954 applications received in 1999 by signatories to the Convention, 69 percent of the taking parents were female.¹⁴ A similar study of Hague Convention applications submitted during 2003 yielded virtually identical results.¹⁵ It is also increasingly recognized that a significant portion of mothers who take their children across borders are fleeing domestic violence.¹⁶ Some of these women may seek asylum to escape

13. BEAUMONT & McELEVAY, *supra* note 1, at 3.

14. NIGEL LOWE, SARAH ARMSTRONG & ANEST MATHIAS, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 1999 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 8, 10 (Nov. 2001), *available at* <http://hcch.e-vision.nl/upload/abd2001pd3e.pdf>. The 954 applications sought the return of 1,394 children. *Id.* at 10.

15. Of the 1,259 applications made for the return of 1,784 children in 2003, fathers constituted the taking person in 29 percent of cases and mothers in 68 percent of the cases. The study further identified the primary or joint primary caretaker of the child as the taking person in 68 percent of the cases. 2003 STATISTICAL ANALYSIS, *supra* note 7, at 10–11, 21–22, 25.

16. *See* Shetty & Edleson, *supra* note 5, at 119–20; Weiner, *Half-Truths*, *supra* note 9, at 282. The University of Minnesota and the University of Washington Schools of Social Work have also launched a joint project to better understand the challenges faced by mothers fleeing domestic

the persecution that they fear they and their children will face if they are forced to return to the child's home country.¹⁷

Consider the case of Rosa Gutierrez. Rosa and her children were born in Mexico and lived there until February 2001.¹⁸ Rosa suffered from physical, sexual, and emotional abuse at the hands of her spouse, Eduardo Gonzalez, often in front of her children.¹⁹ In 1998, after six years of marriage, the couple separated, but Eduardo continued to abuse Rosa both physically and verbally.²⁰ In 2000, he assaulted her by "hitting her, throwing her to the ground, and yelling profanities at her, all in the presence of" their two-year-old son.²¹ Rosa sought assistance from an attorney and the police, but to no avail.²² The police insisted she obtain a medical report documenting her injuries before assisting her, but Rosa was unable to obtain such a report because she could not prove that her husband was responsible.²³ Rosa finally divorced Eduardo, but the abuse did not abate.²⁴ Rosa told Eduardo she was taking the children on a weeklong vacation, and then she and the children fled to the home of her sister in the United States. There, she applied for asylum, claiming she was a victim of domestic violence whom Mexico was unwilling or unable to protect.²⁵ Eduardo then filed a petition seeking the return of the children to Mexico.²⁶ While Rosa's asylum application was pending, a district court ordered the children returned to Mexico, and Rosa appealed.²⁷ After the district court issued its decision, an immigration judge granted Rosa's asylum application, but the Immigration Service appealed that decision to the Board of Immigration Appeals ("BIA").²⁸ At the time of the Ninth Circuit's opinion in Rosa's case, the BIA appeal remained pending.²⁹

violence involved in Hague Convention cases so as to improve the legal system's response in such cases. *See* The Hague Domestic Violence Project, <http://www.haguedv.org/index.html> (last visited Jan. 18, 2010).

17. *See, e.g.*, *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002) (noting that the respondent filed for and was granted asylum based on her status as a victim of domestic violence, in the larger context of denying the availability of the remedy of return to a father who only possessed access rights); *Lopez v. Alcalá*, 547 F. Supp. 2d 1255 (M.D. Fla. 2008) (ordering the return of several children, pursuant to the Hague Convention, to their allegedly abusive father in Mexico, despite the respondent mother's pending asylum application).

18. *Gonzalez*, 311 F.3d at 945–46.

19. *Id.* at 946.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 947.

25. *Id.*

26. *Id.*

27. *Id.* Because the district court did not publish its opinion in this case and the case is not available electronically, the only information available regarding the proceedings comes from the Ninth Circuit opinion.

28. *Id.* at 947 n.9.

29. *Id.*

Mothers escaping domestic violence are, of course, not the only parents who abduct, and one should keep in mind that “[a]bductions occur for a variety of reasons from the narcissistic to the heroic.”³⁰ Common explanations for parental abductions include the desire to exact revenge on the other parent, the desire to protect the child from harm, and the simple desire of one parent to return to his or her own home country with the child.³¹ The drafters of the Hague Convention did not seem to contemplate victims of domestic violence as abductors, however, so it is important to “ensure that the Convention is not another obstacle for women seeking to escape abusive situations.”³²

*B. The Hague Convention on the Civil Aspects
of International Child Abduction*

As the title indicates, the Hague Convention on the Civil Aspects of International Child Abduction only addresses abductions that reach across borders and the civil—not criminal—remedies available.³³ The primary objectives of the Convention are (a) “to secure the prompt return of children wrongfully removed to or retained in any Contracting State,” and (b) “to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States.”³⁴ Removal or retention of a child is wrongful when such an action breaches the custody rights of a person, institution, or body under the law of the home country, and when the child’s legal guardian was actually exercising those custody rights.³⁵ If a child has been wrongfully removed or retained and less than a year has passed from the time of abduction to the date when court proceedings began, then the court shall order the return of the child immediately.³⁶

The Convention also establishes that “the interests of children are of paramount importance in matters relating to their custody.”³⁷ The drafters emphasized, however, that courts adjudicating Hague Convention petitions should not decide the merits of what arrangement was in the child’s best interest, but rather whether the removal was wrongful.³⁸ Scholars have argued that a textual reading of the Convention indicates the drafters’ recognition that a

30. Geoffrey L. Greif & Rebecca L. Hegar, *International Parental Abduction and Its Implications for Social Work Practice: Great Britain to the United States*, 7 CHILD. & SOC’Y 269, 270 (1993).

31. *Id.*

32. Weiner, *International Child Abduction*, *supra* note 5, at 600.

33. See ELISA PÉREZ-VERA, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, EXPLANATORY REPORT (1981) [hereinafter PÉREZ-VERA REPORT], available at <http://hcch.evision.nl/upload/expl28.pdf>.

34. Hague Convention, *supra* note 4, art. 1.

35. *Id.* art. 3.

36. *Id.* art. 12.

37. *Id.* at pmb1.

38. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT’L & COMP. L.Q. 537, 553 (1981).

wrongful removal or retention may actually benefit the child, as the signatories declared a desire to “protect children internationally from the *harmful effects* of their wrongful removal or retention,” not from the acts themselves.³⁹

Hague Convention proceedings typically unfold as follows: after the taking parent removes a child from the home country (for this example, Mexico), the left-behind parent seeks assistance from that country’s “central authority.”⁴⁰ The Mexican central authority transmits an application for the return of the child to the central authority in the country to which the taking parent has fled with the child (for this example, the United States).⁴¹ The U.S. Central Authority, which receives the application, identifies the child’s location and finds local counsel to represent the left-behind parent in judicial proceedings.⁴² The left-behind parent then files a petition for the return of the child in U.S. court.⁴³ If the court determines that the removal was wrongful, it will order the child returned to Mexico, where the merits of the underlying custody dispute can be litigated.⁴⁴ If, however, the taking parent establishes any one of the Convention’s affirmative defenses, “the State is not bound to order the return of the child.”⁴⁵

Although the general scheme of the Convention leaves the determination of an individual child’s best interests to the courts in the home country, the exceptions to the Convention deviate from this rule.⁴⁶ The Convention sets forth five affirmative defenses to the remedy of prompt return, two of which—the Article 12 and Article 13(b) defenses—are the focus of this Comment.⁴⁷

39. Hague Convention, *supra* note 4, at pmb1. (emphasis added). See BEAUMONT & MCELEAVY, *supra* note 1, at 29.

40. See Hague Convention, *supra* note 4, art. 8. Each signatory is responsible for designating a central authority, which is responsible for: locating children; preventing harm to children through provisional measures; securing the voluntary return of children; initiating and facilitating judicial proceedings to secure children’s return; and providing or facilitating legal aid. *Id.* art. 6. Left-behind parents (or other custody holders) can file one of two types of Hague cases with their central authority: a return case, through which the return of the child to his or her country of habitual residence is sought, or an access case, through which the left-behind parent seeks to enforce visitation rights. NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, LITIGATING INT’L CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 4–5 (2007), available at http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf [hereinafter NCMEC]. This Comment focuses on return cases, which constitute the bulk of Hague Convention cases. 2003 STATISTICAL ANALYSIS, *supra* note 7, at 10–11 (estimating that in 2003, of a maximum 1,610 Hague applications made, 1,355 were return applications, while 255 were access applications).

41. See Hague Convention, *supra* note 4, art. 9.

42. See, e.g., NCMEC, *supra* note 40, at 3–4.

43. See *id.*; see, e.g., *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002).

44. See Hague Convention, *supra* note 4, art. 12; NCMEC, *supra* note 40, at 5.

45. Hague Convention, *supra* note 4, art. 13.

46. Bruch, *Unmet Needs*, *supra* note 10, at 530.

47. Articles 13(a) and 20 also establish defenses. Article 13(a) essentially restates Article 3 in clarifying that return is not required if the child’s caretaker did not, in fact, have custody of the child at the time of removal or retention, or if the caretaker agreed to the removal or retention. Hague Convention, *supra* note 4, art. 13. A child’s return may also be refused if “fundamental

The Article 12 well-settled exception provides that

[t]he judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.⁴⁸

The Article 13(b) grave-risk exception sets forth that

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 . . . [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.⁴⁹

Signatories to the Convention do not interpret either of these exceptions uniformly. In particular, states disagree as to whether the well-settled exception should impose a heavy burden of proof on taking parents.⁵⁰ Supporters of this “policy” approach emphasize that the Convention’s primary purpose is the prompt return of the child to the home country, and as such, the exception should be difficult to establish.⁵¹ Other states, however, interpret settlement “literally,” which involves taking a child-centric tact concerned with the child’s views on settlement.⁵² Interpretation of the grave-risk exception is less divisive, as the drafters of the Convention specified that this exception should be “interpreted in a restrictive fashion.”⁵³ In response to the plight of domestic violence victims, however, Switzerland recently proposed amending the Convention to promote a broader, more sympathetic interpretation of the grave-risk exception.⁵⁴ Despite the proposal’s ultimate failure, it did spark debate among signatories.⁵⁵

principles of the requested State relating to the protection of human rights and fundamental freedoms” would not permit her return. *Id.* art. 20.

48. *Id.* art. 12. Although the text of the Convention is concerned only with whether the child is “settled,” jurisprudence often refers to Article 12 as the “well-settled” defense.

49. *Id.* art. 13.

50. See Hague Conference on Private International Law, Comments on Settlement (Mar. 18, 2008) [hereinafter Comments on Settlement], available at <http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=598&lng=1>.

51. The Hague Conference identifies England, Scotland, and the United States as examples of jurisdictions where courts have taken this approach. *See id.*

52. Examples include Australia, Austria, France, and Hong Kong. *See id.*

53. PÉREZ-VERA REPORT, *supra* note 33, at 434.

54. Weiner, *Half-Truths*, *supra* note 9, at 290–91.

55. *Id.* at 292.

C. U.S. Implementation and Application of the Hague Convention

The United States signed the Hague Convention in 1981 and ratified it in 1988.⁵⁶ Congress then enacted the International Child Abduction Remedies Act (“ICARA”) to implement the Convention domestically.⁵⁷ Under ICARA, both state and federal district courts have concurrent original jurisdiction over Hague Convention cases for the return of a child; as such, thousands of judges have the potential to hear Hague cases.⁵⁸ ICARA also sets forth burdens of proof; the Hague Convention itself does not offer guidance about such burdens. Petitioners must establish a prima facie case of wrongful removal by a preponderance of the evidence.⁵⁹ Respondents then must establish the well-settled defense by a preponderance of the evidence, and the grave-risk exception by the higher clear and convincing evidence standard.⁶⁰

The U.S. Department of State’s Office of Children’s Issues serves as the U.S. Central Authority (“USCA”) for the Hague Convention.⁶¹ In its 2008 compliance report, which the USCA must submit to Congress annually, the USCA stated that 355 Hague Convention applications for the return of 518 children abducted to the United States were filed between October 1, 2006 and September 30, 2007.⁶²

Hundreds of the cases received by the USCA have made their way into U.S. state and federal courts.⁶³ Nonetheless, only a handful of decisions are

56. Hague Conference on Private International Law, Status Table for the Hague Convention on International Child Abduction, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Jan. 18, 2010).

57. International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11610 (2006). Congress later passed the International Parental Kidnapping Crime Act to make international parental child abduction a federal crime. 18 U.S.C. § 1204 (2006).

58. ICARA, 42 U.S.C. § 11603(a) (2006). While theoretically ICARA should be applied similarly in state and federal courts, some practitioners have found that federal courts are “more likely to adhere to the Hague Convention’s mandate.” NCMEC, *supra* note 40, at 5. Federal Hague proceedings are also characterized by the use of full civil litigation trial procedure, which often leads to delays. *Id.* State courts, in contrast, are more efficient as a result of their familiarity with family and child custody issues, but “may blur the lines by addressing the underlying merits of the custody action instead of returning the child to the country of habitual residence for a custody determination.” *Id.*

59. ICARA, 42 U.S.C. § 11603(e) (2006).

60. *Id.*

61. Hague Conference on Private International Law, Authorities: United States of America: Central Authority, http://hcch.e-vision.nl/index_en.php?act=authorities.details&aid=133 (last visited Sept. 22, 2009). Previously, the National Center for Missing and Exploited Children—a private, nonprofit organization—handled incoming cases (abductions to the United States), but the State Department reassumed those duties in April 2008. Nat’l Ctr. for Missing & Exploited Children, Bringing Return Proceedings in the United States, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=213 (last visited Jan. 18, 2010).

62. U.S. DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INT’L CHILD ABDUCTION 5 (April 2008), available at <http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf>.

63. The International Child Abduction Database (INCADAT), which aims to make leading

relevant to this Comment's inquiry. The Supreme Court thus far has refused to hear a Hague Convention case,⁶⁴ and only one federal court of appeals, the U.S. Court of Appeals for the Ninth Circuit, has spoken to the role that immigration status should play in adjudicating Hague petitions.⁶⁵ Thus, it is not surprising that the USCA reported in 2006 that there is no "settled law of the land" regarding Hague Convention jurisprudence in the United States.⁶⁶ The following Part details the different approaches courts have taken in considering the interaction of immigration status—including pending asylum applications—with Hague petitions for the return of a child.

II

ADJUDICATING HAGUE PETITIONS IN U.S. COURTS: DOES IMMIGRATION STATUS MATTER?

Like Rosa Gutierrez and her children, who fled from Mexico to the United States in order to escape domestic violence,⁶⁷ many respondents and children involved in Hague Convention cases in the United States are not U.S. citizens, and some of these individuals find themselves in the United States without documentation. It is important to note that state and federal trial courts, where left-behind parents file Hague petitions, typically do not hear immigration matters. Immigration claims—such as applications for asylum or withholding of removal—are adjudicated by asylum officers or immigration judges.⁶⁸ Thus, it is not uncommon for Hague petitions and asylum claims to overlap, and for taking parents to have concurrent matters before both a federal judge and an immigration judge or asylum officer.

Hague Convention decisions issued by national courts widely available, contains decisions from 120 cases in which state and federal U.S. courts heard Hague petitions for the return of a child between 1989 and 2008. See Hague Conference on Private International Law, International Child Abduction Database (INCADAT), <http://www.incadat.com/index.cfm> (last visited Jan. 18, 2010). A LexisNexis search conducted on September 22, 2009 for "Hague Convention on Civil Aspects of International Child Abduction" returned results indicating mention of the Convention (but not necessarily adjudication of Hague petitions) in 465 opinions by U.S. state and federal courts.

64. See, e.g., *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), *cert. denied*, 543 U.S. 978 (2004).

65. See *In re B. del C.S.B.*, 559 F.3d 999 (9th Cir. 2009). Circuit courts of appeal have, however, addressed a range of other questions pertaining to the Hague Convention. See, e.g., *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001) (affirming a judgment denying petitioner father's request for the return of his children to France because returning the children would subject them to post-traumatic stress disorder and thus create a grave risk of psychological harm); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (concluding that the district court's determination regarding habitual residence did not sufficiently weigh the import of shared parental intent under the Convention and remanding for reconsideration); *England v. England*, 234 F.3d 268 (5th Cir. 2000) (reversing and remanding the district court's denial of petitioner father's application requesting the return of his children to Australia, because there was no clear and convincing evidence that the children would face a grave risk of psychological harm upon return to Australia).

66. *Collated Responses*, *supra* note 8, at 215.

67. See *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002).

68. See 8 C.F.R. §§ 208.2, 208.4 (2009).

In light of this reality, as well as increasingly restrictive U.S. immigration policy in the wake of the September 11 attacks, the role of immigration status in Hague Convention cases is ripe for analysis.⁶⁹ Generally, questions of immigration status do not arise in a court's adjudication of the case-in-chief, likely because most judges find it irrelevant to the question of whether a wrongful removal has occurred. But courts have found immigration status relevant in determining if the grave-risk and well-settled defenses apply. This Part focuses on how U.S. courts treat the immigration status of respondent parents and their children in considering these defenses.

The following review of case law reveals a surprising dichotomy. While federal courts and the USCA do *not* consider status as an asylum applicant relevant to the Article 13(b) grave-risk exception, federal district courts are increasingly looking to immigration status in determining whether a child is "settled" in the United States (under the Article 12 well-settled exception).⁷⁰ A recent Ninth Circuit decision holding that immigration status is only pertinent in the face of an *imminent* threat of deportation, however, provides fodder for reversing at least this well-settled exception trend.⁷¹

A. Asylum Claims and the Article 13(b) Grave-Risk Exception

U.S. courts generally have not taken into account the immigration status—specifically, asylum applicant or asylee status—of respondents and children when determining if a child will face a grave risk of harm upon return to her country of habitual residence. In order to successfully raise the grave-risk defense in a U.S. court, the respondent must establish by clear and convincing evidence that the child's return would expose the child to a grave risk of (1) physical harm, (2) psychological harm, or (3) an otherwise intolerable situation.⁷² While many of the drafters of the Convention, as well as the U.S. Department of State's legal analysis of the Convention, have emphasized the need to narrowly interpret the grave-risk exception,⁷³ an increasing number of

69. See, e.g., Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9 (2006) (describing how legislation enacted since September 11, 2001 has eroded the rights of immigrants, as growing numbers of migrants continue to enter the United States without documentation).

70. Although it is beyond the scope of this Comment to address, U.S. courts have also found immigration status relevant to the determination of the child's place of habitual residence (which is a term from Article 3 of the Convention, not a defense to return). The leading U.S. case, *Mozes v. Mozes*, states that "[w]hile an unlawful or precarious immigration status does not preclude one from becoming a habitual resident under the Convention, it prevents one from doing so rapidly." 239 F.3d 1067, 1082 (9th Cir. 2001).

71. See *In re B. del C.S.B.*, 559 F.3d 999 (9th Cir. 2009).

72. See ICARA, 42 U.S.C. § 11603(e) (2006); BEAUMONT & MCELEAVY, *supra* note 1, at 139.

73. Department of State Public Notice 957, 51 Fed. Reg. 10,494, 10,509, § III(I)(2)(a) (Mar. 26, 1986) [hereinafter Department of State Public Notice 957] (observing that the Convention drafters "generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly

U.S. and foreign courts are recognizing the viability of this defense for domestic violence victims.⁷⁴

Questions of U.S. immigration status are most relevant to the grave-risk defense when the taking parent has filed an asylum claim. An asylum officer or immigration judge may grant asylum to an individual who has fled her country of nationality if she “is unable or unwilling to return to, and is unable or unwilling to avail . . . herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷⁵ Courts have recognized domestic violence as a possible ground for asylum, although whether victims of abuse constitute members of a “particular social group” remains an unsettled question.⁷⁶ Anyone seeking asylum may include children under the age of twenty-one on the application; if asylum is granted, those children will receive derivative asylee status.⁷⁷

In at least three of the four known U.S. Hague Convention cases involving asylum claims, respondent mothers have applied for asylum on the basis of their status as domestic violence victims.⁷⁸ Three of these four courts did not acknowledge or consider the asylum claims in the context of the grave-risk inquiry. The following paragraphs detail these cases, as well as the USCA’s endorsement of this narrow approach.

Recall the story of Rosa Gutierrez and her children, Maria and Eduardo.⁷⁹ To date, the petition for Maria’s and Eduardo’s return to Mexico is the only case mentioning a respondent’s asylum claim that has reached a federal circuit court.⁸⁰ A district court concluded that Rosa had wrongfully removed her children to the United States in violation of their father’s custody rights.⁸¹ The court found that she had not successfully established any of the affirmative defenses under the Convention and, presumably disregarding her pending asylum claim, ordered that Maria and Eduardo be returned to Mexico.⁸² Rosa appealed the decision on the grounds that the children’s father did not have rights of custody when she fled to the United States and that the district court improperly denied her grave-risk defense.⁸³

In considering these issues, the Ninth Circuit’s opinion noted that an immigration judge granted asylum to Rosa and her children several months

meritorious cases”); BEAUMONT & MCELEAVY, *supra* note 1, at 138–39.

74. Weiner, *Half-Truths*, *supra* note 9, at 283–84.

75. Immigration & Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2006).

76. See *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008).

77. 8 C.F.R. § 208.21 (2009).

78. Three of these opinions are published. The fourth opinion was not published but is described in another published source.

79. See *supra* Part I.A.

80. See *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002).

81. *Id.*

82. *Id.*

83. *Id.* at 947–48.

before the Hague Convention case was argued before the Ninth Circuit, but subsequently the Immigration Service appealed the asylum decision (and the appeal remained pending at the time the court wrote its opinion).⁸⁴ Because the Ninth Circuit reversed the district court's decision on the issue of whether the father had custodial rights under the Convention, however, the court did not enter into analysis of the adequacy of Rosa's grave-risk defense, nor did it discuss the impact of her asylum claim on the proceedings.⁸⁵ Thus, this case did not present an opportunity for the Ninth Circuit to provide guidance to lower courts faced with such overlapping claims.

Two federal district court cases also involved the intersection of a Hague petition with a respondent's asylum claim. In *Lopez v. Alcalá*,⁸⁶ Guadalupe Rios Alcalá and two of her three children moved from Mexico to Florida after Guadalupe had separated from her abusive husband.⁸⁷ Guadalupe applied for asylum in the United States on an unknown ground.⁸⁸ After more than a year, the children's father filed a petition for their return.⁸⁹ In the Hague petition proceedings, Guadalupe raised several affirmative defenses, including the children's wishes to remain in the United States with their mother, the children's settlement in their new environment, and the grave risk of harm or other intolerable situation that the children would face if they were returned to Mexico.⁹⁰ Guadalupe's asylum claim remained pending at the time of the proceedings.⁹¹

While the court mentioned Guadalupe's status as an asylum applicant in the factual background of the opinion and in a footnote pertaining to the separate well-settled defense, the court did not discuss the application in its grave-risk analysis.⁹² The court asserted that "Alcalá has applied for asylum status on behalf of herself and the children, however these applications have not been approved and do not appear meritorious."⁹³ The court did not elaborate upon its conclusion that Guadalupe's asylum application did not appear to be meritorious, nor did it assert any authority for doing so. Under U.S. immigration law, U.S. federal district courts play no role in hearing or reviewing asylum claims.⁹⁴ As such, the district court lacked the expertise to assess the merits of

84. *Id.* at 947 n.9.

85. *Id.* at 948 n.11.

86. 547 F. Supp. 2d 1255 (M.D. Fla. 2008).

87. *Id.* at 1257.

88. *Id.*

89. *Id.*

90. *Id.* at 1259–60.

91. *Id.* at 1260.

92. *Id.* at 1257, 1260 n.6.

93. *Id.*

94. *See* 8 U.S.C. § 1252(b)(2) (2006) (establishing that any petition for review from the BIA "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"); 8 C.F.R. §§ 208.2, 208.4 (2009); *see also* Press Release, U.S. Dep't of Justice, Executive Office of Immigration Review, Asylum Protection in the United States (Apr.

Guadalupe's asylum claim. Furthermore, in weighing the grave-risk defense, the court ignored the asylum claim completely and concluded that "the alleged abuse in this case is not so severe that it rises to the level of an intolerable situation."⁹⁵ With the asylum application still pending, the court ordered the return of the children to Mexico.⁹⁶

The second district court opinion that mentioned a respondent's asylum claim in the context of a Hague petition adjudication is *Arguelles v. Vasquez*.⁹⁷ Erika Gaspar Vazquez and Carlos Almaguer Arguelles married in 1999 and had a daughter, "T.A.G.," in 2001; all three are Mexican citizens.⁹⁸ Several years after T.A.G.'s birth, Erika and Carlos separated.⁹⁹ Erika alleged that Carlos "made [Erika's] living situation intolerable," and she feared for her daughter's safety.¹⁰⁰ After Carlos assaulted Erika while T.A.G. was in the house, Erika and T.A.G. moved from Mexico to Wichita, Kansas, in October 2005.¹⁰¹ In September 2007, Carlos learned of Erika's and T.A.G.'s whereabouts, and he filed a Hague petition in January 2008 for T.A.G.'s return to Mexico.¹⁰² Erika, in turn, raised the following affirmative defenses: T.A.G. would face a grave risk of harm or intolerable situation upon return to Mexico; T.A.G. was well settled in her new environment; Carlos consented to or acquiesced in T.A.G.'s removal; and T.A.G.'s return would violate public policy (Article 20).¹⁰³ Concurrently, Erika filed for asylum for both herself and T.A.G. as a derivative based on the domestic violence Erika experienced in Mexico.¹⁰⁴

The *Arguelles* court addressed Erika's asylum claim in much the same manner that the *Lopez* court approached Guadalupe's claim.¹⁰⁵ First, the *Arguelles* findings of fact mention that Erika applied for domestic-violence-based asylum.¹⁰⁶ As in *Lopez*, from that point forward, the court only consid-

28, 2005), available at <http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm> (describing how an asylum applicant may appeal an immigration judge's denial of asylum eligibility to the BIA, and if the BIA affirms the immigration judge's decision, the applicant may appeal to the federal court system).

95. *Lopez*, 547 F. Supp. 2d at 1262; see also *id.* at 1257 (describing allegations that the petitioner was an alcoholic who was verbally and physically abusive to the respondent and children, including testimony that the petitioner hit the children with his hand and belt and hit and kicked the respondent).

96. *See id.*

97. *In re Hague Child Abduction Application*, No. 08-2030-CM, 2008 U.S. Dist. LEXIS 97048 (D. Kan. Mar. 17, 2008). Although the case is officially titled "*In re Hague Child Abduction Application*," I will refer to it by the parties' names for clarity: *Arguelles v. Vasquez*.

98. *Id.* at *4-5.

99. *Id.* at *8.

100. *Id.* at *6, *8.

101. *Id.* at *11, *14.

102. *Id.* at *2, *16.

103. *See id.* at *3.

104. *See id.* at *17.

105. *See supra* text accompanying notes 92-96.

106. *Arguelles*, 2008 U.S. Dist. LEXIS 97048, at *17.

ered the asylum application as relevant to Erika's well-settled defense.¹⁰⁷ In analyzing Erika's grave-risk defense, the court did not even acknowledge the pending asylum claim and concluded that T.A.G.'s return to Mexico would expose her to *minimal* risk of harm, because "any instances of physical abuse by Petitioner were limited incidents aimed at persons *other than the child* at issue"¹⁰⁸ Without further regard to the pending asylum claim, the magistrate judge recommended that T.A.G. be returned to Mexico.¹⁰⁹

In contrast to the approach taken by the federal courts in the previous cases, a California state court denied the return of a child in a Hague Convention proceeding on grave-risk grounds because the mother had been granted asylum in the United States and her child had received derivative asylee status.¹¹⁰ As in *Gonzalez v. Gutierrez*, the respondent had not just applied for asylum but had already received a grant.¹¹¹ Unfortunately, because the court did not publish its opinion, the only information regarding the decision comes from the U.S. responses to a 2006 Hague Conference questionnaire concerning the practical operation of the Convention. There, the USCA described the California case, in which the respondent mother and her child fled Hungary and received domestic-violence-based asylum in the United States.¹¹² The father subsequently filed a petition for the child's return to Hungary, and in response, the mother raised the grave-risk defense, which the court found persuasive in light of the asylum grant.¹¹³ In reporting this decision, the USCA noted its disagreement with the outcome on the grounds that "the standard for asylum is much lower than the 13(b) standard, and . . . asylum hearings are not contested hearings."¹¹⁴

The USCA did not confine its displeasure with the California state decision to its questionnaire responses. At the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction in 2006,¹¹⁵ the USCA opposed all

107. *Id.* at *32–35.

108. *Id.* at *47.

109. *Id.* at *51.

110. *Collated Responses*, *supra* note 8, at 243.

111. In *Gonzalez v. Gutierrez*, however, the Immigration Service appealed the respondent's grant of asylum to the Board of Immigration Appeals. 311 F.3d 942, 947, n.9 (9th Cir. 2002).

112. *Collated Responses*, *supra* note 8, at 243.

113. *See id.*

114. *Id.*

115. The Hague Conference typically assigns the term "Special Commission" to preparatory meetings on a particular topic that take place between regular Diplomatic Sessions of the Conference, which are held every four years. The Secretary General of the Hague Conference may also convene a Special Commission to review a Convention's operation, to which all member states of the Hague Conference on Private International Law are invited, as well as nongovernmental and intergovernmental organizations interested in the operation of the treaty. Meetings of the Special Commission to review the child abduction convention took place in 1989, 1993, 1997, 2001, and 2006. *See* BEAUMONT & MCELEAVY, *supra* note 1, at 24; Hague Conference on Private International Law, The Child Abduction Section, Practical Operation

attempts to encourage broader interpretation of the grave-risk defense, including proposals from Switzerland and nongovernmental organizations.¹¹⁶ The United States maintained that in order to establish the grave-risk defense, the respondent must demonstrate that the court in the country of habitual residence is unwilling or unable to protect that parent and child.¹¹⁷ Article 13(b) of the Hague Convention, however, imposes no such requirement; the United States derived this rule, which echoes the asylum standard, from *Friedrich v. Friedrich*, a Sixth Circuit Hague Convention decision.¹¹⁸ The United States went on to insist that—contrary to the California state court holding—a respondent’s grant of asylum in the United States should not itself establish that there is a grave risk that the child’s return would expose that child to harm or an intolerable situation.¹¹⁹

Thus, U.S. federal courts and the USCA have not recognized the relevance of asylum applications and actual asylum grants to Hague Convention cases. Rather than considering asylum applications and their underlying facts in weighing what type of harm a child might face upon return to her country of habitual residence, federal courts have interpreted the grave-risk defense excessively narrowly, in accordance with the U.S. position at the Fifth Meeting. As I detail in Part III, international law norms and the best interests of the child require U.S. courts to change course and recognize the pertinence of domestic-violence-based asylum applications and grants to the grave-risk defense.

B. Immigration Status and the Article 12 Well-Settled Exception

In contrast to the grave-risk approach just described, U.S. courts have identified immigration status as a relevant factor in analyzing whether a child is well settled under Article 12. In order to raise a successful defense to the return of a child under Article 12 of the Hague Convention, more than one year must have passed between the wrongful removal of the child and the commencement of the Hague proceedings.¹²⁰ Moreover, the respondent must demonstrate by a

Documents, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=24 (last visited Sept. 23, 2009).

116. Weiner, *Half-Truths*, *supra* note 9, at 286, 289–90.

117. *Id.* at 286.

118. *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (concluding that a grave risk of harm exists only “when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease” or “in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection”). *But see* *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008) (holding that a parent defending his or her wrongful removal of a child from the child’s country of habitual residence by claiming that the child would be exposed to a grave risk of harm if returned does not have to show that the country’s legal and social services systems are unable to protect the child).

119. Weiner, *Half-Truths*, *supra* note 9, at 288.

120. Hague Convention, *supra* note 4, art. 12.

preponderance of the evidence that the child is now settled in her new environment.¹²¹ In its legal analysis of the Convention, the State Department specifies that this burden of proof requires “substantial evidence of the child’s significant connections to the new country.”¹²²

Although neither the Hague Convention nor ICARA detail what it means to be “settled,” U.S. jurisprudence has generated a list of factors that courts should weigh in assessing the extent of a child’s connections to the United States. The standard factors a court typically examines include: (1) the child’s age; (2) “the stability of the child’s [new] residence”; (3) “whether the child attends school or daycare consistently”; (4) “whether the child attends church regularly”; (5) “the stability of the [parent’s] employment”; and (6) “whether the child has friends and relatives in the new area.”¹²³ Beginning with *In re Koc* in 2002, six district courts have also considered uncertain or undocumented immigration status as a significant factor that suggests a child is not settled in his or her new environment.¹²⁴

To date, courts have treated lack of immigration status as pertinent to the well-settled inquiry in one of three ways: (1) one relevant factor among many;¹²⁵ (2) the sole or dispositive factor accorded more weight than others;¹²⁶ or (3) not relevant unless there is an immediate threat of deportation.¹²⁷ I discuss the merits and implications of each approach below.

1. Immigration Status as One Relevant Factor Among Many

Thus far, three federal district courts have considered the child’s and respondent’s immigration status as one factor among six to eight total factors in determining whether a child is well settled in her new environment. For courts that have taken this totality-of-the-circumstances approach, no single factor has been dispositive.

In re Koc was the first case in which a district court stated that uncertain immigration status is relevant to the well-settled inquiry.¹²⁸ The respondent mother, Krystyna, and her daughter, Paulina, traveled from Poland to the

121. *Id.*; ICARA, 42 U.S.C. § 11603(e)(2)(B) (2006).

122. Department of State Public Notice 957, *supra* note 73, at 10,509.

123. *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2002); *see also* Wojcik v. Wojcik, 959 F. Supp. 413, 421 (E.D. Mich. 1997).

124. *See In re Koc*, 181 F. Supp. 2d at 154; *In re Ahumada Cabrera*, 323 F. Supp.2d 1303, 1314 (S.D. Fla. 2004); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004); *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008); *Valverde v. Rivas*, No. CV-08-1404-PHX-FJM, 2008 U.S. Dist. LEXIS 80855, at *4 (D. Ariz. 2008); *Arguelles v. Vasquez*, No. 08-2030-CM, 2008 U.S. Dist. LEXIS 97048, at *32–35 (D. Kan. Mar. 17, 2008).

125. *See In re Koc*, 181 F. Supp. 2d 136; *Giampaolo*, 390 F. Supp. 2d 1269; *Lopez*, 547 F. Supp. 2d 1255.

126. *See In re Ahumada Cabrera*, 323 F. Supp.2d 1303; *Valverde*, 2008 U.S. Dist. LEXIS 80855; *Arguelles*, 2008 U.S. Dist. LEXIS 97048.

127. *See In re B. del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009).

128. *In re Koc*, 181 F. Supp. 2d at 154.

United States on a six-month visa in May 1998 but remained in the United States with Krystyna's mother¹²⁹ well beyond that time.¹³⁰ After more than a year had passed, Paulina's father petitioned for her return to Poland.¹³¹ The court found that her father successfully established a prima facie case of wrongful removal by a preponderance of the evidence.¹³² In response, Krystyna raised the well-settled defense.¹³³

Considering whether Paulina was settled in her new environment, the court noted that Paulina had lived in several different homes and attended several different schools, did not participate in extracurricular activities, and was missed by friends and relatives in Poland.¹³⁴ On the other hand, she spoke excellent English, performed well academically, had recently begun attending religious classes, made a best friend at school, and enjoyed contact with her mother's relatives in the United States.¹³⁵ Balancing these factors, the court found that Krystyna had not established that Paulina was well settled in New York.¹³⁶

The court went on to note that other factors—notably, Paulina's and Krystyna's uncertain immigration status in the United States—also suggested that Paulina was not settled.¹³⁷ The court highlighted that both mother and daughter had overstayed their visas and thus were in the country illegally.¹³⁸ Unpersuaded by testimony that a friend of Krystyna's was willing to hire her and sponsor her for a work permit, or by the legal immigration status of family members in the United States, the court observed that “[t]he fact that the Immigration Service may not be looking to deport them at this time does not, in any way, guarantee that that position will not change in the future or that Paulina and her mother will ultimately become legal permanent residents of this country.”¹³⁹ In this way, Paulina's and Krystyna's uncertain immigration future further convinced the court that Paulina was not settled in United States. The court decided that Krystyna did not carry the necessary burden to demonstrate that any of the other exceptions to the Convention applied, and ordered Paulina returned to Poland.¹⁴⁰

129. According to the court's opinion, Krystyna's mother had also overstayed her visa and was waiting for papers to remain in the United States, but one of Krystyna's sister-in-laws had permanent residence. *Id.* at 143.

130. *Id.* at 140.

131. *Id.* at 142, 147.

132. *See id.* at 148.

133. Krystyna also raised the Article 13(a) acquiescence defense. *Id.* at 147, 149.

134. *Id.* at 153–54.

135. *Id.*

136. *Id.* at 154.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 156.

In August 2004, another district court cited illegal immigration status as one factor among many in its analysis of the well-settled defense in the case of Macarena Sol Giampaolo.¹⁴¹ Following the separation of Macarena's parents, Evelina and Roberto, Evelina filed a report with the Argentinean police stating that Roberto had threatened to kill her and to set Macarena on fire.¹⁴² In November 2001, the police talked with Roberto but did not arrest him;¹⁴³ in February 2002, Evelina and Macarena left for the United States to stay with Evelina's brother.¹⁴⁴

Although Roberto did not file a Hague petition for more than a year, he was still able to successfully obtain an order for Macarena's return.¹⁴⁵ The National Center for Missing and Exploited Children helped Macarena's father locate an attorney to file his petition before a U.S. court, which Roberto did in May 2004.¹⁴⁶ Because Evelina concealed Macarena's location from Roberto, however, the court tolled the beginning of the one-year period until Roberto located Macarena,¹⁴⁷ and thus concluded that the father filed his petition in a timely fashion.¹⁴⁸ The court went on to hold that even if the father had failed to file within the required one-year period, Evelina had not demonstrated by a preponderance of the evidence that Macarena was well settled in Georgia.¹⁴⁹

The court analyzed Evelina's and Macarena's immigration status alongside a number of the other standard factors.¹⁵⁰ The court noted that Macarena attended school regularly and performed well, participated in extracurricular activities, was fluent in English, made friends, and enjoyed living with her mother and new stepfather.¹⁵¹ At the same time, Macarena had lived in three different homes and attended three different schools in two-and-a-half years, did not have legal status in the United States, lacked family in the United States beyond her mother, stepfather, and uncle, and had lived in Argentina for eight of the ten years of her life.¹⁵² The court also took note of the fact that Evelina had applied for citizenship,¹⁵³ but did not discuss this fact further.

As in *In re Koc*, the court viewed immigration status as just one of the many factors to consider in determining whether Macarena was well settled.¹⁵⁴

141. *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004).

142. *Id.* at 1274.

143. *Id.*

144. *Id.*

145. *Id.* at 1281, 1285.

146. *Id.* at 1275, 1281.

147. *Id.* at 1281.

148. *Id.*

149. *Id.*

150. *Id.* at 1281–82.

151. *Id.* at 1282.

152. *Id.*

153. It is not clear from the court's opinion how Evelina could have applied for citizenship if she was not a legal permanent resident. *See id.*

154. *Id.* at 1282–83; *see In re Koc*, 181 F. Supp. 2d 136, 153–54 (E.D.N.Y. 2001).

After weighing the above factors, the court found that Macarena was not settled in the United States.¹⁵⁵ Because Evelina did not carry the burden of proof in raising any of the other affirmative defenses, the court ordered that Macarena be returned to Argentina.¹⁵⁶

Similarly, in *Lopez v. Alcala*, another district court treated immigration status as one factor among many relevant to the well-settled inquiry.¹⁵⁷ As mentioned above in the context of her asylum claim,¹⁵⁸ Guadalupe Rios Alcala moved from Mexico to Florida with two of her three children to escape abuse by her children's father.¹⁵⁹ The children's father was aware of their whereabouts for at least a year before he filed a petition for their return, so Guadalupe raised the defense that Suri and Sinai had settled into life in Florida.¹⁶⁰ The court observed that the children were doing well in their new environment, because they had adjusted to their school, had made friends, spoke English, and had established close relationships with Guadalupe's mother and brother.¹⁶¹ Other factors, however, indicated that Suri and Sinai were not well settled, including multiple changes in residence; lost relationships with their father, sister, and other relatives in Mexico; and lack of legal immigration status.¹⁶² The court highlighted the import of immigration status by stating that, "their residence in this country is not stable because neither Alcala nor the children have legal alien status and, as such, are subject to deportation at anytime."¹⁶³ The court came to this conclusion even though Guadalupe had applied for asylum and was awaiting the outcome of her application.¹⁶⁴ Because the court found that Guadalupe had not established the well-settled defense—or any other exception—by the requisite burden of proof, it ordered Suri's and Sinai's return to their father in Mexico.¹⁶⁵

2. Immigration Status as the Dispositive or Sole Factor

In contrast to the totality-of-the-circumstances approach detailed above, three district courts have treated immigration status as either a dispositive factor that undermines all positive indications of being well settled or the sole factor relevant to determining if a child is settled in the United States. In these cases, undocumented status precludes a finding that a child is well settled, regardless of whether the court considers positive indications of stability or not.

155. *Giampaolo*, 390 F. Supp. 2d at 1283.

156. *Id.* at 1283, 1285.

157. *Lopez v. Alcala*, 547 F. Supp. 2d 1255, 1260 (M.D. Fla. 2008).

158. *See supra* text accompanying notes 86–96.

159. *Lopez*, 547 F. Supp. 2d at 1256–57.

160. *Id.* at 1259.

161. *Id.*

162. *Id.* at 1260.

163. *Id.*

164. *See id.* Guadalupe's asylum claim is discussed in greater detail *supra* Part III.A.

165. *Lopez*, 547 F. Supp. 2d at 1262.

For example, in its Article 12 well-settled analysis, the *In re Ahumada Cabrera* court treated lack of legal immigration status as a dispositive factor and disregarded all other aspects of the child's life.¹⁶⁶ In 2001, after receiving written permission from her child's father, Nancy Carina Lozano and her daughter Ailin flew from Argentina to the United States under the pretext of visiting Disney World and remained with Nancy's sister in Florida.¹⁶⁷ Nancy registered Ailin for school and informed the father that she planned to stay with Ailin in the United States, after which he filed a petition for Ailin's return to Argentina.¹⁶⁸ Satisfied with the petitioner's prima facie case of wrongful retention, the court focused on Nancy's central affirmative defense that more than a year had passed and Ailin was now well settled in Florida.¹⁶⁹ Because the petitioning father was unaware of Nancy's intent not to return Ailin until June 2003, the court concluded that his petition was timely.¹⁷⁰ The court alternatively held that even if the petition had not been filed within the one-year window, Ailin could not be deemed well settled in the United States because of her immigration status.¹⁷¹

Determining that "a court is permitted to consider any relevant factor surrounding the child's living arrangement," the question of immigration status dominated the court's analysis of the well-settled question.¹⁷² The court dismissed both Ailin's regular school attendance and Nancy's employment because Nancy's uncertain immigration status "significantly undermined" any stability Ailin enjoyed and made the prospects of her long-term job stability "not strong."¹⁷³ Reasoning that it would be preferable for Ailin to return to Argentina right then, as opposed to being deported in the future, the court found that Ailin was not well settled and ordered her return to Argentina.¹⁷⁴ Thus, although the court purported to consider a variety of factors in its analysis, the child's and respondent's uncertain immigration statuses singularly undermined a finding that Ailin was well settled in the United States.

Likewise, the court in *Arguelles v. Vasquez* deemed the well-settled question moot—because it extended the one-year deadline due to equitable tolling—but went on to find that the child was not well settled in the United States due to her "questionable legal status."¹⁷⁵ As discussed previously, Erika

166. See *In re Ahumada Cabrera*, 323 F. Supp.2d 1303, 1314–15 (S.D. Fla. 2004).

167. *Id.* at 1308–09.

168. *Id.*

169. *Id.* at 1312.

170. *Id.* at 1313.

171. *Id.*

172. *Id.* at 1313–14.

173. *Id.* at 1314.

174. *Id.* at 1314–15.

175. *Arguelles v. Vasquez*, No. 08-2030-CM, 2008 U.S. Dist. LEXIS 97048, *31–32, *35 (D. Kan. Mar. 17, 2008). Her immigration status was "questionable" because she had entered the United States without legal status and her derivative asylum application was pending. *Id.* at *17–18.

Gaspar Vasquez and her daughter T.A.G. moved from Mexico to Kansas to escape T.A.G.'s abusive father, Carlos.¹⁷⁶ In determining whether T.A.G. was settled in the United States after living there for several years, the court observed that “[e]ven when significant connections to the United States are proven, the child’s connections are undermined if neither the abducting parent nor the child are legal residents of the United States.”¹⁷⁷ As such, although the court took note of T.A.G.’s valuable relationships in Kansas, consistent school attendance, and occasional presence at church, it concluded that Erika’s and T.A.G.’s living situation was “inherently unstable” because of their uncertain immigration status.¹⁷⁸ To support this conclusion, the court highlighted that Erika’s employment prospects were unknown based on her immigration status, and this lack of legal status left Erika without a driver’s license or health insurance for T.A.G.¹⁷⁹ The court failed to identify any factors indicating lack of settlement independent of undocumented status.¹⁸⁰

Lastly, a district court considered lack of legal immigration status as the *only* factor relevant to the well-settled inquiry in *Valverde v. Rivas*.¹⁸¹ Silvia Rivas brought her son, Lucas, to the United States in 2005 to escape Lucas’s father, who she claimed “was violent towards her and her two children by another relationship (but not Lucas).”¹⁸² The court found Lucas’s father’s petition to be timely and Silvia’s removal of Lucas wrongful.¹⁸³

In the alternative, the court ruled that Lucas was not well settled in the United States because “[t]he child is an illegal alien and the evidence is undisputed that (1) he has no visa to be in the United States, (2) no petition for citizenship has been filed, and (3) he has no I-94 form.”¹⁸⁴ The court considered no other factors in its well-settled calculus.¹⁸⁵ Furthermore, the court determined that despite Silvia’s “substantial evidence” of Lucas’s father’s past violence, she had not met the burden of establishing the grave-risk defense by clear and convincing evidence.¹⁸⁶ Thus, with little discussion, the court ordered Lucas returned to his father in Mexico.¹⁸⁷

176. *Id.* at *11, *14. For additional factual background and information regarding Erika’s asylum claim and grave risk defense, see *supra* text accompanying notes 97–109.

177. *Id.* at *32.

178. *Id.* at *34–35.

179. *Id.*

180. *See id.* at *32–35.

181. *Valverde v. Rivas*, No. CV-08-1404-PHX-FJM, 2008 U.S. Dist. LEXIS 80855, *4 (D. Ariz. Sept. 5, 2008).

182. *See id.* at *1–2. It is unclear from the opinion whether Silvia also brought her other children to the United States, as they were not named in the Hague petition.

183. *Id.* at *2, *4.

184. *Id.* at *4.

185. *See id.*

186. *Id.* at *3–4.

187. *Id.* at *4.

3. *Immigration Status as Irrelevant Unless Immediate Threat of Deportation Exists*

In 2009, the Ninth Circuit became the first circuit court of appeals to articulate a rule regarding the role of immigration status in the well-settled inquiry. In *In re B. del C.S.B.*, it announced that immigration status of the child and respondent is pertinent to the well-settled determination “only if there is an immediate, concrete threat of deportation.”¹⁸⁸

In re B. del C.S.B. involved three Mexican citizens: petitioner-father Ivan Salmeron Mendoza, respondent-mother Geremias Brito Miranda, and eleven-year-old Brianna, their daughter.¹⁸⁹ Brianna spent the first several years of her life in Mexico with both parents.¹⁹⁰ Ivan and Geremias were not married, and both described their relationship as abusive.¹⁹¹ Shortly before Brianna’s fourth birthday, Geremias and Brianna traveled to the United States, where much of Geremias’s extended family lived.¹⁹² After several months in California, Brianna returned to her father in Mexico, with whom she lived for a year.¹⁹³ She again reunited with her mother in 2002, permanently moving to California, where she learned English and excelled in school.¹⁹⁴

Although Brianna originally maintained phone contact with her father, communication between the two eventually ceased.¹⁹⁵ When he was unable to renew contact with Brianna, Ivan began the Hague process, filing his petition in the U.S. District Court for the Central District of California in 2007.¹⁹⁶ Geremias, in turn, opposed the application for Brianna’s return to Mexico on several grounds, including the well-settled defense.¹⁹⁷ In granting Ivan’s petition for Brianna’s return, the district court treated immigration status as the dispositive factor in its analysis, holding that Brianna was not well settled in the United States because her lack of legal status precluded such a finding.¹⁹⁸ On appeal to the Ninth Circuit, Geremias argued that the district judge erred in finding that Brianna’s lack of legal status “undermine[s] each and every connection to her community that she has developed in the past five years.”¹⁹⁹

188. *In re B. del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2009).

189. *Id.* at 1003.

190. *Id.*

191. *Id.*

192. *Id.* at 1003–04.

193. *Id.* at 1004.

194. *Id.* at 1005.

195. *Id.*

196. *Id.* at 1006–07.

197. Geremias also maintained that the removal was not wrongful because the United States was Brianna’s habitual residence and Ivan had acquiesced to Brianna’s move to California. *Id.* at 1007.

198. *In re B. del C.S.B.*, 525 F. Supp. 2d 1182, 1195 (C.D. Cal. 2007).

199. *Id.*

The Ninth Circuit agreed, concluding that “Brianna’s current immigration status . . . cannot undermine all of the other considerations which uniformly support a finding that she is ‘settled.’”²⁰⁰ In doing so, the Ninth Circuit looked to the Hague Convention’s text and history, case law, and the practical reality.²⁰¹ The court was unable to find in the Convention’s text any basis for holding that a child was not settled just because she was undocumented.²⁰² Moving on to subsequent interpretations of the text, the court noted that no district court decision had found that a child was not settled based solely on immigration status.²⁰³ Lastly, the court highlighted that “on a practical level, it makes little sense to permit immigration status to serve as a determinative factor in the Article 12 ‘settled’ analysis.”²⁰⁴ To substantiate this point, the court cited the presence of 11.6 million undocumented immigrants in the United States, many of whom permanently reside here; the low likelihood of deportation for law-abiding people; and the existence of “significant protections under state and federal law” for undocumented immigrants, such as access to public education and services like emergency Medicaid, school lunch programs, and the Special Supplemental Nutrition Program for Women, Infants and Children.²⁰⁵

Because the Hague Convention “is concerned with the *present*, and not with determining the best interests of the child in the long term,” the Ninth Circuit concluded that the district court’s preoccupation with the future specter of deportation was an inappropriate basis for finding that Brianna was not well settled in the United States.²⁰⁶ As such, in a significant departure from the district court approach, the Ninth Circuit held that “[i]mmigration status cannot be determinative for purposes of the ‘settled’ inquiry if, as here, there is no imminent threat of removal.”²⁰⁷

In sum, the seven cases discussed above reflect three different views of immigration status in the well-settled calculus. Two of those approaches—and six of the seven cases—led to the conclusion that the children were not settled and resulted in their return to the countries of habitual residence. The Ninth Circuit’s approach led to the opposite outcome. Courts have either considered immigration status as (1) just one of several factors a court should weigh (*In re Koc*, *Giampaolo*, and *Lopez*); (2) the sole or dispositive factor (*In re Ahumada Cabrera*, *Arguelles*, and *Valverde*); or (3) not relevant unless there is an immediate threat of deportation (*In re B. del C.S.B.*). As I discuss in detail in Part III, the second approach violates the prohibition of the International

200. *In re B. del C.S.B.*, 559 F.3d 999, 1010 (9th Cir. 2009).

201. *Id.*; see also *id.* at 1010–14.

202. *Id.* at 1011.

203. *Id.*

204. *Id.* at 12.

205. *Id.* at 1012–13.

206. *Id.* at 1013.

207. *Id.* at 1014.

Covenant on Civil and Political Rights on discrimination. In order to comport with U.S. obligations under international law and the object and purpose of the Hague Convention, courts should follow the lead of the Ninth Circuit and only consider immigration status relevant when there is an immediate threat of removal, and only as one factor among many.

III

RETHINKING THE ROLE OF IMMIGRATION STATUS IN LIGHT OF INTERNATIONAL LAW NORMS

The preceding review of case law illustrates why the U.S. Central Authority has stated that there is no “settled law of the land” regarding application of the Hague Convention in the United States.²⁰⁸ This is particularly true with respect to questions of immigration status in Hague cases. To date, no federal circuit court has addressed what an application for or grant of asylum means for the grave-risk defense, while only one circuit court of appeals has analyzed the role that immigration status plays in well-settled determinations. Consequently, U.S. courts and the USCA are in a position to rethink their present approaches to the relevance of immigration status. Below, I detail several suggestions that would bring U.S. adjudication of Hague petitions in line with more general international law norms.

First, I argue that principles of treaty interpretation mandate that courts utilize the best interests of the child as the central criterion in making decisions regarding the grave-risk and well-settled defenses.²⁰⁹ From this “best interests” perspective, international law norms urge courts to consider any asylum claim as part of their grave-risk analysis.²¹⁰ Second, I argue that the international human rights law norm of nondiscrimination suggests that courts should only consider the immigration status of a respondent and her child as part of a totality-of-the-circumstances approach to the well-settled inquiry, and only when an imminent threat of deportation exists.²¹¹

A. Treaty Interpretation

Because the Hague Convention does not define what constitutes an intolerable situation under the grave-risk exception, nor what it means for a child to be “settled” under the well-settled exception, U.S. courts hearing cases in which respondents raise these defenses necessarily engage in treaty interpretation.²¹² The Vienna Convention on the Law of Treaties (“Vienna Convention”) obliges courts and legislators to interpret treaties in light of their object and

208. *Collated Responses*, *supra* note 8, at 215.

209. *See* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; PÉREZ-VERA REPORT, *supra* note 33, at 432.

210. *See infra* Part IV.B.

211. *See infra* Part IV.C.

212. *See* Hague Convention, *supra* note 4, at arts. 12–13.

purpose.²¹³ This requirement means that courts should consider the best interests of the child when deciding whether the Hague Convention's exceptions apply.²¹⁴

The Vienna Convention, which the U.S. Department of State has characterized as the "authoritative guide to current treaty law and practice,"²¹⁵ requires that the object and purpose of a treaty be considered in treaty interpretation.²¹⁶ Although the United States has not ratified the Vienna Convention, the Supreme Court has cited the treaty as persuasive authority.²¹⁷ Furthermore, the Restatement (Third) of Foreign Relations Law incorporates the Convention's key principles, including the rule that a treaty should be "interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."²¹⁸ When ordinary meaning is "ambiguous or obscure," or "[l]eads to a result which is manifestly absurd or unreasonable," the Vienna Convention permits consultation of supplementary materials, such as *travaux préparatoires* (preparatory works).²¹⁹

In the case of the Hague Convention, the meanings of both "intolerable situation" in Article 13(b) and "settled" in Article 12 are ambiguous. All that can be gleaned from the text of Article 13(b) is that an intolerable situation is something akin to, but distinct from, physical or psychological harm. The U.S. Department of State's legal analysis of the Convention notes that return to a home country where opportunities, money, and education are in shorter supply

213. See Vienna Convention, *supra* note 209, art. 31(1).

214. *Id.*; PÉREZ-VERA REPORT, *supra* note 33, at 432.

215. Weiner, *Navigating the Road*, *supra* note 8, at 297 (quoting S. Comm. on Foreign Relations, Vienna Convention on the Law of Treaties, S. Exec. Doc. No. 92-1, at 1 (1971)). See also U.S. Department of State, Office of the Legal Adviser, Treaty Affairs, Frequently Asked Questions—Vienna Convention on the Law of Treaties, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 18, 2010) (stating that "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties").

216. See *id.*; Vienna Convention, *supra* note 209, art. 31(1).

217. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting) (citing the Vienna Convention for the proposition that "treaty parties may not invoke domestic law as an excuse for failing to conform to their treaty obligations"); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing the Vienna Convention to assert that "a treaty must first be construed according to its 'ordinary meaning'"); *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982) (citing the Vienna Convention in support of the assertion that "the word [treaty] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force").

218. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 325(1) (1987). Although the Restatement is not primary authority, courts usually accord such restatements greater weight than other secondary materials because they are drafted by eminent scholars in a specific field of law. The Supreme Court has cited this specific provision of the RESTATEMENT OF FOREIGN RELATIONS LAW as authority. See, e.g., *Sanchez-Llamas*, 548 U.S. at 346 (quoting with approval the statement in § 325(1) that a treaty should be interpreted "in the light of its object and purpose"); see also Vienna Convention, *supra* note 209, art. 31(1).

219. Vienna Convention, *supra* note 209, art. 32.

or more limited than in the requested state does not constitute an intolerable situation, but return to a parent who sexually abuses the child does.²²⁰ Such parameters leave a great deal of gray area in between the poles of tolerable and intolerable. Likewise, the text of the Hague Convention offers no guidance about the concept of settlement under Article 12, and parties to the Convention disagree about whether the inquiry into whether a child is settled should be child-centric or undertaken in light of the Convention's purpose as a prompt return mechanism.²²¹

Accordingly, the "intolerable" and "settled" language should be informed by the preparatory work of the treaty drafters. The Explanatory Report of the Convention's rapporteur, Elisa Pérez-Vera ("Pérez-Vera Report") details the general Convention aims of restoring the preabduction status quo by returning wrongfully removed or retained children to their habitual residence and deterring abduction by depriving taking persons of any hoped-for advantages.²²² The rapporteur goes on to note that these

two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child'. [sic] However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.²²³

Thus, Pérez-Vera indicates that the exceptions should be considered "illustrations" of the drafters' concern for the best interests of the child. It follows that although the primary purpose of the Convention as a whole is to promptly return children to their home countries, the purpose of the grave-risk and well-settled exceptions is to accommodate the child's best interests. The Convention establishes that returning a child to an environment where there is a grave risk of physical or psychological harm or which is otherwise intolerable is not in the child's best interest. Likewise, returning a child to her habitual

220. Department of State Public Notice 957, *supra* note 73, at Sec. III(I)(2)(c).

221. Comments on Settlement, *supra* note 50 (explaining that in jurisdictions favoring a policy-based approach—such as Scotland, the United States, and some English courts—the abductor's burden of proof is higher and thus the settlement exception more difficult to establish, while in jurisdictions taking a literal or child-centric approach—such as Australia, Hong Kong, and other English courts—the exception is less difficult to establish).

222. PÉREZ-VERA REPORT, *supra* note 33, at 429–30.

223. *Id.* at 432.

residence is not in her best interest if more than a year has passed since her removal and she is now well settled in her new environment. According to the Pérez-Vera Report, to determine whether a child faces such a risk or whether a child is settled in her new environment, the court should apply the best interests of the child as its guiding criterion, rather than the need for prompt return.²²⁴

In the following sections, I develop two arguments that stem from this conclusion. First, I elaborate how and why the best interests of the child generally require that the court take any asylum claim into account when considering the grave-risk defense. Second, I maintain that utilizing a totality-of-the-circumstances approach to determine if a child is settled in a new environment is in the child's best interest.

B. International Law and the Import of Asylum Claims

Asylum claims may interact with the Article 13(b) defense during one of two stages: (1) when the respondent has been granted asylum and is therefore an asylee; and (2) when the respondent has applied for asylum and is awaiting the result. Below, I address how each of these situations should impact the adjudication of a Hague petition.

Weighing the grave-risk defense from the perspective of what is best for the child—rather than the perspective of prompt return—demands the consideration of a respondent parent's grant of asylum or pending asylum claim in the United States. This is especially true when the asylum claim is based on domestic violence in the child's country of habitual residence. The court should first determine whether the respondent's asylum claim has been granted or is pending. If the respondent has been granted domestic-violence-based asylum, the court adjudicating the Hague petition should deem the grant compelling evidence that the child's habitual residence is unable or unwilling to protect the respondent and her child. In light of international law norms, which are part of U.S. asylum law,²²⁵ the court should also give significant weight to the grant in determining if there is a grave risk that return would expose the child to an intolerable situation. If the respondent's asylum application is still pending, these same principles call for the court to stay the Hague proceeding until the asylum application can be adjudicated on an expedited basis.

224. PÉREZ-VERA REPORT, *supra* note 33, at 432. That said, the U.S. Department of State rightfully warns against defendants utilizing the grave-risk defense, in particular, as a vehicle to litigate or relitigate the child's best interests in a custody arrangement. *See* Department of State Public Notice 957, *supra* note 73, at 10,510, § III(I)(2)(c). The court should constrain its inquiry into what is in the child's best interests to evidence that establishes or fails to establish one of the enumerated defenses. In doing so, the court can uphold both the general scheme of the Convention, which privileges prompt return, and honor the spirit of the exceptions, which centers around the best interests of the child.

225. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987) (holding that the Immigration and Nationality Act provisions regarding asylum mirror provisions of the U.N. Protocol Relating to the Status of Refugees).

In the United States, a grant of asylum based on domestic violence establishes that (1) the asylee has suffered domestic violence that constitutes persecution; (2) the persecution was on account of one of the required statutory grounds (typically membership in a particular social group or political opinion); and (3) the State from which she fled is unwilling or unable to protect her.²²⁶ In general, obtaining asylum in the United States is a challenging process. A recent U.S. Government Accountability Office study of nineteen immigration courts between October 1994 and April 2007 found that judges granted asylum in 37 percent of affirmative cases and 26 percent of defensive cases.²²⁷ Asylum claims based on domestic violence are even more difficult to advance than traditional asylum claims stemming from racial or religious persecution because the Board of Immigration Appeals has yet to provide guidance to immigration judges and asylum officers regarding if and how victims of abuse constitute members of a “particular social group.”²²⁸

Thus, an asylee who has received asylum based on domestic violence has already met a very high standard. A domestic-violence-based asylum grant presumes that the asylee’s home country is unwilling or unable to protect her; therefore, U.S. courts should treat such grants as evidence of that country’s inability to protect the asylee’s child, as well, for purposes of the grave-risk defense. U.S. federal courts disagree over whether the respondent in a Hague case even needs to make such a showing as part of the grave-risk defense, given that the Hague Convention establishes no such requirement.²²⁹ Even if the court is bound by the Sixth Circuit’s approach in *Friedrich*, however, the

226. See, e.g., Brief of Respondent at 1, Matter of R-A-, 24 I. & N. Dec. 629 (A.G. 2008) (Interim Decision #3624), available at http://cgrrs.uchastings.edu/documents/legal/ra_brief_final.pdf (summarizing the grounds for the Immigration Judge’s grant of domestic-violence based asylum to Ms. Alvarado Peña). See generally Immigration & Nationality Act, 8 U.S.C. § 1101 (a)(42)(A) (2006) (defining refugee as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

227. U.S. GOV’T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 28 (2008), available at <http://www.gao.gov/new.items/d08940.pdf>. These nineteen courts handled almost 90 percent of asylum cases over this time period. *Id.* Filing affirmatively means the applicant applied for asylum of her own initiative with the Department of Homeland Security’s asylum office, while filing defensively means the applicant applied for asylum through the Department of Justice after being placed in removal proceedings.

228. See Matter of R-A-, 24 I. & N. Dec. 629 (A.G. 2008) (lifting the stay previously imposed on the BIA and remanding the case of Rodi Alvarado for reconsideration of the issues presented with respect to asylum claims based on domestic violence).

229. See *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (requiring the respondent to demonstrate that the court in the child’s country of habitual residence is incapable or unwilling to adequately protect the child); *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008) (holding that a respondent does not have to show that the country’s legal and social services systems are unable to protect the child in order to establish the grave risk defense).

asylee's grant should serve as sufficient evidence of the state's inability or unwillingness to protect the child, as well as the mother. After all, if the state cannot protect a parent—an adult capable of contacting the pertinent authorities—from persecution, it is certainly unable to protect a child, who is likely too young or afraid to even attempt to seek out such assistance.

The respondent's asylum grant should also indicate to the court adjudicating the Hague petition the likelihood that upon return to the country of habitual residence, the child will face a grave risk of physical or psychological harm or an otherwise intolerable situation. The fact that the mother—and not the child—has been the target of abuse in the past does not make the asylum grant any less relevant. Based on the best interests of the child and U.S. obligations under the Convention Relating to the Status of Refugees and its 1967 Protocol ("Refugee Convention and Protocol"), the court should give significant weight to the asylum grant in determining whether the respondent meets the requirements of the Article 13(b) grave-risk exception.²³⁰

Domestic violence is both physically and psychologically harmful to children, and those from homes in which domestic violence takes place are fifteen times more likely to be physically or sexually abused or seriously neglected.²³¹ Many such children also experience clinical levels of anxiety or post-traumatic stress disorder, which places them "at significant risk for delinquency, substance abuse, school drop-out, and difficulties in their own relationships."²³² In light of this, the international community has increasingly recognized domestic violence as a children's rights issue.²³³ The Convention on the Rights of the Child ("CRC") provides that signatories "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 . . . while in the care of parent(s) . . ."²³⁴ Because the United States is one of only two countries that has not ratified the CRC,²³⁵ it is not binding on

230. Although the United States has not ratified the Refugee Convention, it has ratified the Protocol, which provides that States Parties to the Protocol will "undertake to apply articles 2 to 34 inclusive of the Convention." Protocol Relating to the Status of Refugees art. 1, Oct. 4, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223.

231. Mary McKernan McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 CHILD WELFARE 29 (1994).

232. Joseph S. Volpe, *Effects of Domestic Violence on Children and Adolescents: An Overview*, AM. ACADEMY OF EXPERTS IN TRAUMATIC STRESS, 1996, <http://www.aets.org/article8.htm>.

233. See Weiner, *Strengthening Article 20*, *supra* note 5, at 734. See also Shetty & Edelson, *supra* note 5, at 115 (noting that "children exposed to domestic violence may experience subsequent negative developmental outcomes" and "that almost half of the families in which adult domestic violence occurs also show evidence of child maltreatment").

234. Convention on the Rights of the Child art. 19(1), Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 [hereinafter CRC].

235. According to the U.N. High Commissioner for Human Rights treaty body database, only the United States and Somalia have not ratified the CRC. See Office of the High Comm'r for Human Rights, Treaty Body Database, <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?>

the United States. However, the treaty's almost universal ratification signals that many, if not most, of its principles are emerging as norms of customary international law.²³⁶ U.S. courts considering the grave-risk defense should not contravene international law norms by ordering a child returned to the habitual residence where the respondent and her child have been harmed by domestic violence.

Ordering the return of a child of a domestic-violence-based asylee would also likely violate the international norm of nonrefoulement.²³⁷ U.S. obligations under the Refugee Convention and Protocol prohibit the return of a refugee to territory where her life or freedom would be threatened.²³⁸ Consequently, a respondent who has been granted asylum based on domestic violence suffered at the hands of the abuser-petitioner in the child's habitual residence cannot be forced to return to that country. If the court orders the child returned, the respondent must make the impossible choice between returning to the country that has proven it cannot protect her from persecution or living apart from her child. Ordering the return of the asylee's child amounts to a coercive act that would compel the asylee-respondent to return to the place of persecution in violation of the norm of nonrefoulement.²³⁹

Furthermore, separating a child from a primary caregiver parent is antithetical to the best interests of the child. The importance of family unity is recognized in U.S. immigration law and in the international norms enshrined in the Convention on the Rights of the Child and the Final Act of the 1951 United Nations Conference on the Status of Refugees and Stateless Persons.²⁴⁰ Ordering a child returned to a state to which a parent cannot return due to fear of persecution eliminates the possibility of the child maintaining regular personal contact with both parents and should therefore constitute an

OpenFrameSet (last visited Jan. 18, 2010).

236. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 600–01 (E.D.N.Y. 2002) (citing provisions of the Convention on the Rights of the Child as customary international law). *But see Beharry v. Ashcroft*, 329 F.3d 51, 63–64 (2d Cir. 2003) (reversing the district court's decision and remanding the case). See also *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (citing the Convention on the Rights of the Child as a key part of the “overwhelming weight of international opinion against the juvenile death penalty”).

237. See U.N. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150.

238. *Id.*

239. Weiner, *Strengthening Article 20*, *supra* note 5, at 728.

240. See CRC, *supra* note 234, art. 9(3) (providing that “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests”); Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (recommending “[g]overnments to take the necessary measures for the protection of the refugee's family”); see generally, Cynthia S. Anderfuhren-Wayne, *Family Unity in Immigration and Refugee Matters: United States and European Approaches*, 8 INT'L J. REFUGEE L. 347 (1996).

intolerable situation from the perspective of the best interests of the child.²⁴¹ Although the taking parent disrupted family unity by fleeing the child's country of habitual residence, if she is an asylee, she presumably did so out of necessity. Even where a court denies the left-behind parent's petition for the return of the child, that left-behind parent may still seek custody of or access to the child in the United States.

The USCA objects to the idea that a grant of domestic-violence-based asylum should automatically establish the grave-risk defense, out of concern for the different standards of proof required in asylum and Hague proceedings and the nonadversarial nature of affirmative asylum hearings.²⁴² Because of the circumstances under which many refugees flee, credible testimony by the applicant may be sufficient to substantiate that she is a refugee.²⁴³ In contrast, the Hague Convention requires the respondent to produce clear and convincing evidence of the grave risk of harm the child would face upon return in order to establish the grave-risk exception.²⁴⁴

Because these standards differ, I do not recommend that the United States adopt the approach taken by the California state court discussed above, which equated a grant of asylum with satisfaction of the grave-risk exception.²⁴⁵ U.S. federal courts hearing Hague petitions should, however, give considerable weight to the asylum grant in the grave-risk determination. Asylum officers receive guidelines and special training regarding the consideration of gender-based claims and claims by children.²⁴⁶ The Department of Justice also provides immigration judges with guidelines for adjudicating contested immigration cases in which the respondent is an unaccompanied minor child.²⁴⁷ On the other hand, many federal judges who hear Hague petition cases have little to no experience with asylum or domestic violence claims, or interviewing children.²⁴⁸ This disparity further suggests that courts should positively weigh,

241. The child could, of course, return to visit the asylee, but the asylee would not be able to litigate the custody dispute in the courts of the child's country of habitual residence.

242. *Collated Responses*, *supra* note 8, at 243.

243. 8 C.F.R. § 208.13 (2009).

244. ICARA, 42 U.S.C. § 11603(e) (2006).

245. *See Collated Responses*, *supra* note 8, at 243.

246. *See* Memorandum from Phyllis Coven, Immigration and Naturalization Serv., Office of Int'l Affairs to All INS Asylum Officers & HQASM Coordinators, Subject: Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995), *available at* http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf; Memorandum from Jeff Weiss, Acting Dir., INS Office of Int'l Affairs to Asylum Officers, Immigration Officers & Headquarters Coordinators (Asylum & Refugees), Subject: Guidelines for Children's Asylum Claims (December 10, 1998), *available at* http://cgrs.uchastings.edu/documents/legal/gender_guidelines/DHS_INS_children_guidelines.pdf.

247. *See* Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, Executive Office of Immigration Review, to All Immigration Judges, Court Adm'rs, Judicial Law Clerks & Immigration Court Staff, Subject: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), *available at* <http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

248. Weiner, *Strengthening Article 20*, *supra* note 5, at 730.

rather than ignore, a grant of asylum in grave-risk determinations.

If a respondent's asylum application is pending but has not yet been granted, all of the factors discussed above urge the court to stay the Hague Convention proceeding until an asylum officer or immigration judge adjudicates the application.²⁴⁹ The principle of nonrefoulement applies to asylum applicants, as well as asylees.²⁵⁰ Furthermore, allowing an asylum adjudicator to decide the asylum claim first may yield additional evidence regarding country conditions in the child's habitual residence.²⁵¹ When issuing the stay, the court adjudicating the Hague petition should request an expedited adjudication of the asylum application. Accelerated consideration should be feasible given the limited number of cases that would require such treatment and the existing procedure of expediting asylum decisions in cases involving detained applicants.²⁵² An accelerated asylum procedure should prevent undue delays in the Hague proceeding, as prompt resolution of the petition is undoubtedly in the child's best interest. However, expediency concerns should not deprive the respondent parent and child of the benefits of adjudicating the asylum application first.

C. International Law and Lack of Legal Status as a Dispositive Factor

While the international law norms discussed above urge U.S. courts to consider asylum claims when making grave-risk determinations, the internationally recognized norm of nondiscrimination should counsel courts to adopt a totality-of-the-circumstances approach to the well-settled inquiry—an approach that only considers a possibility of deportation relevant when it is an imminent threat. Given the lack of clarity regarding the concept of settlement, U.S. courts are entitled to weigh any relevant factor in determining whether a child has settled, as long as the best interests of the child guide the courts. By treating lack of legal status as a dispositive factor that undercuts all other indications of settlement or as a bar to settlement, however, U.S. courts have discriminated against children without such status and therefore have not acted in their best interests.

The International Covenant on Civil and Political Rights (“ICCPR”), which the United States has ratified,²⁵³ obligates each state party “to ensure to

249. *See id.* at 726.

250. UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, Nov. 1997, available at <http://www.unhcr.org/refworld/docid/438c6d972.html>.

251. Weiner, *Strengthening Article 20*, *supra* note 5, at 731.

252. The Code of Federal Regulations provides that “expedited consideration shall be given to [asylum] applications of detained aliens.” 8 C.F.R. § 208.5(a) (2009). I do not mean to suggest that Hague petition respondents are similarly situated to detainees. Rather, I highlight the existing framework for such a procedure to demonstrate that it is possible to expedite the adjudication of certain subsets of asylum applications when public policy goals support doing so.

253. The United States ratified the ICCPR on September 8, 1992. *See* Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal Human*

all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁵⁴ This provision establishes the general rule that “each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”²⁵⁵ The ICCPR thus requires that aliens and citizens be treated equally before courts and tribunals.²⁵⁶

U.S. courts that view a child’s lack of legal status as a dispositive factor or bar in the well-settled exception calculus contravene this norm of equal treatment before courts. For example, consider the following scenario: a left-behind parent files a petition for the return of a U.S. citizen child from the United States to Mexico. If more than a year has passed since the abduction, and the child is living in a stable residence, regularly attending school, and enjoying the company of family and friends in her new environment, the court will likely deem her well settled and not order her return. Now consider the same scenario, except that the child lacks legal status in the United States; in other words, the fact pattern of *In re B. del C.S.B.* A court that treats legal status as dispositive or as a bar would find that the child had not settled in her new environment and would order her return. While it is only logical for courts to weigh immigration status as one factor among many in their well-settled determinations, according such status dispositive weight is discriminatory and contrary to children’s best interests.

Treating lack of status as a dispositive factor also contravenes the views of the U.N. Human Rights Committee, which has found that family unity may outweigh a state’s interests in border enforcement.²⁵⁷ Furthermore, present lack of legal status does not preclude obtaining it in the future. Even without the benefit of legal status, millions of undocumented immigrants live and work in the United States and are integral to the U.S. economy, as the Ninth Circuit highlighted in *In re B. del C.S.B.*²⁵⁸ The majority of the 11.5 to 12 million undocumented immigrants in the United States are long-term residents who are

Rights Treaties as of 14 July 2006, available at www2.ohchr.org/english/bodies/docs/status.pdf.

254. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

255. Human Rights Comm., Office of the High Comm’r for Human Rights, *General Comment 15: The Position of Aliens Under the Covenant* (Apr. 11, 1986), available at <http://www.unhcr.org/refworld/pdfid/45139acfc.pdf>. Protections established in the ICCPR include the rights to: life; freedom from cruel, inhuman or degrading treatment or punishment; liberty and security of person; equality before courts and tribunals; peaceful assembly; and freedom of association. See ICCPR, *supra* note 254, at arts. 6, 7, 9, 14, 21, 22.

256. ICCPR, *supra* note 254, art. 14.

257. The Human Rights Committee is the treaty body that oversees the ICCPR. See *Winata v. Australia*, U.N. Hum. Rts. Comm., Communication No. 930/2000, ¶¶ 7.3 U.N. Doc. No. CCPR/C/72/D/930/2000 (Aug. 16, 2001), available at <http://www.unhcr.ch/tbs/doc.nsf/0/488b0273fa4febfbcb1256ab7002e5395?Opendocument>.

258. See *In re B. del C.S.B.*, 559 F.3d 999, 1012 (9th Cir. 2009).

unlikely to be deported.²⁵⁹ Despite the disadvantages of “living in the shadows,” millions of undocumented immigrants maintain regular employment and established residences and are, in fact, settled in this environment.²⁶⁰

Critics may argue that allowing a child to remain in an environment where she lacks legal status and from which she could be deported at any time is hardly in her best interests. As the Ninth Circuit noted, however, the Hague Convention “is concerned with the *present*, and not with determining the best interests of the child in the long term.”²⁶¹ Thus, I urge courts only to consider immigration status relevant if an immediate threat of deportation exists. If such a threat is present, courts should still take a totality-of-the-circumstances approach and consider all the factors that have emerged from U.S. jurisprudence as key considerations in well-settled determinations. In this calculus, courts should not treat any one factor as dispositive or as a bar that discriminates against a particular group of children.

CONCLUSION

The Hague Convention itself is largely a positive, useful tool for combating international child abduction. There are, however, systemic flaws in the Convention’s implementation—notably in its application to respondents fleeing domestic violence. This Comment has highlighted the problematic ways in which U.S. courts address—or fail to address—the overlap of immigration status with defenses to the return of a child in Hague Convention proceedings in cases involving domestic violence victims. I urge courts to consider immigration status as relevant to the grave-risk exception but not dispositive in analysis of the well-settled exception.

Additionally, administrative and legislative action can contribute to better outcomes for undocumented and asylee Hague petition respondents who have fled to the United States to escape domestic violence. First, the USCA should shift its policy to comply with international law norms. Second, Congress should amend ICARA, the U.S. legislation that implements the Hague Convention.

259. JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 1 (2006), *available at* <http://pewhispanic.org/files/execsum/61.pdf>; MICHAEL HOFER, ET. AL., OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, at 1, 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf (highlighting that 63 percent of unauthorized immigrants entered the United States before the year 2000); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 470–71 (2008) (noting that “[e]ven with occasional spikes in the enforcement of immigration laws, most unauthorized immigrants are unlikely to face removal”).

260. See Thronson, *supra* note 259, at 470.

261. *In re B. del C.S.B.*, 559 F.3d 999, 1013 (9th Cir. 2009).

Advocates and scholars have called for the amendment of ICARA to address the needs of domestic violence victims.²⁶² Any such modification of ICARA should establish that under the Article 13(b) defense, domestic violence poses a grave risk of harm or an intolerable situation. Furthermore, the amendment should require that courts weigh asylum grants in grave-risk determinations and require that courts stay Hague proceedings until pending asylum applications can be resolved on an expedited basis.

Short of congressional action, the USCA should ensure that its policies comply with international law norms. Although the USCA does not play a direct role in judicial proceedings, it provides resources to judges and attorneys and represents the United States at meetings of the Special Commission to review the operation of the Hague Convention.²⁶³ The USCA is therefore in a position to endorse a totality-of-the-circumstances approach to the well-settled inquiry. While including this nuanced matter of judicial interpretation in an amendment to ICARA is not necessary, the USCA should favorably present the totality-of-the-circumstances method in the resources it makes available to judges and attorneys and at the next Special Commission meeting.

In light of the international law norms discussed above, the USCA should also change its position that a respondent's grant of asylum does not itself establish that there is a grave risk that the child's return would expose that child to harm or an intolerable situation. At least one other signatory to the Hague Convention, the Netherlands, does equate a grant of asylum with satisfaction of the grave-risk exception.²⁶⁴ While the USCA is unlikely to shift its position entirely,²⁶⁵ it should at least acknowledge that asylum grants merit consideration in grave-risk determinations. As the proposed amendment to ICARA suggests, the USCA should also recommend that courts stay Hague proceedings until pending asylum applications can be resolved on an expedited basis. The USCA can make its reformed views known through both the materials it produces and the next Special Commission meeting.

These steps will contribute to a more just application of the Hague Convention to victims of domestic violence and their children who find themselves in the United States, both as asylees and without legal status. As the Hague Convention itself proclaims, the treaty's primary purpose is to protect children from the *harmful effects* of child abduction.²⁶⁶ Courts must therefore ensure that any decision to promptly return a child is not itself harmful. Returning a

262. See, e.g., Shetty & Edleson, *supra* note 5, at 135; Dana Beth Finkey, *The Hague Convention on the Civil Aspects of International Childhood Abduction: Where Are We, and Where Do We Go From Here?*, 30 HASTINGS INT'L & COMP. L. REV. 505, 520 (2007).

263. See Office of Children's Issues, U.S. Dep't of State, Resources: For Attorneys and Judges, http://travel.state.gov/family/abduction/resources/resources_4306.html (last visited Jan. 18, 2010); see also "Special Commission" explanation, *supra* note 115.

264. *Collated Responses*, *supra* note 8, at 242.

265. See *supra* text accompanying notes 114–19.

266. Hague Convention, *supra* note 4, at pmbl.

child to the petitioner's country is likely to be detrimental if the respondent has been granted asylum or the totality of the circumstances shows that the child is settled in the United States.

