Consideration of Ameliorative Measures in International Child Abduction Cases Post-*Golan*

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In cases brought under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) and its implementing statute, the International Child Abduction Remedies Act (ICARA), the foremost concern is whether a wrongfully removed child may be safely repatriated into their country of habitual residence. When courts determine there is a "grave risk of harm" facing the child upon their return, the key inquiry becomes whether courts are required to identify and analyze any potential "ameliorative measures" that could be imposed to ensure the safety of the child.

The Supreme Court of the United States granted certiorari in Golan v. Saada *to resolve the circuit split concerning the proper consideration of ameliorative measures in these cases. The Court's 2022 opinion held state and federal courts have discretion to analyze ameliorative measures in cases where there is a "grave risk of harm" to the child. To guide future courts in exercising this discretion, the Court opined that courts ordinarily should address ameliorative measures raised by parents or as evidenced by the circumstances of the case. Specifically, courts should consider whether ameliorative measures are (1) intended to prioritize the child's physical and psychological safety, (2) without usurping the role of foreign countries in resolving the underlying custody issues, and (3) while moving as "expeditiously as possible."*

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In the year since the Golan *opinion was released, courts are already grappling with how to interpret the Supreme Court's guidance. The Hague Convention and ICARA are notably silent on procedural matters, leaving courts with wide discretion on how to adjudicate child abduction cases. The gap in the plain language of the Hague Convention, ICARA, and existing case law is particularly amplified when analyzing cases where the taking parent is a victim of domestic violence.*

This Article surveys cases decided prior to and following Golan *and advances a proposed two-stage judicial framework for court proceedings to promote consistent and expedient adjudication of international child abduction cases. Initially, a court should expedite the case, enter a case management order after consideration of written proofs of the parties, make a finding of whether the abducted child has been exposed to domestic violence, and appoint an attorney for the child. This Article argues that further consideration of ameliorative measures is not necessary in cases where the court initially finds that a child has been exposed to or is a victim of domestic violence. At the final trial, the court should contemporaneously determine the separate issues of (1) whether the petitioner establishes a prima facie case, (2) if so, whether the respondent can establish the child faces a "grave risk of harm" if returned, and (3) in cases without a preliminary finding of domestic violence, whether there are enforceable protective measures that can ameliorate that risk.*

I. INTRODUCTION

Consider an Italian citizen who, up until recently, resided in Italy with his wife and two-year-old son. He tells you his wife traveled to the United States with their child to attend her brother's wedding, but instead of returning to Italy afterwards, she decided to stay. He is distraught, asking you if he can file an international child abduction claim. If he files such a claim, should a court order the child to be returned to Italy? What if this man physically, psychologically, and verbally abused his wife in front of the child and threatened to kill her?

On June 15, 2022, the United States Supreme Court issued its unanimous decision in *Golan v. Saada* under these facts, providing future courts with guidance as to how the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") may be applied in future international child abduction disputes.[1] While family law issues rarely reach the Supreme Court, *Golan* is the second Hague Convention case the Court has decided in the past three years.[2] This reflects not only the increased prioritization of Hague Convention cases but also the increased rates of international travel[3] and international marriages; as of 2021, 12.4 percent of married households are comprised of at least one spouse born outside of the United States.[4] With air travel reopening after the COVID-19 pandemic, the US Department of State reported that in 2021, ninety-four countries filed 247 new international abduction cases (representing 345 children).[5]

International child abduction cases adjudicated in the United States all start the same way: both parents reside in a foreign country.[6] One parent absconds with the child to the United States.[7] In response, the left-behind parent files a petition for return of the child under the

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[1] *See* Golan v. Saada, 142 S. Ct. 1880, 1887 (2022).

[2] *See generally id.*; Monasky v. Taglieri, 140 S. Ct. 719, 719 (2020).

[3] *See* Lauren Cleary, Note, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 FORDHAM L. REV. 2619, 2624 (2020).

[4] *See* Andrew Van Dam, *The States Where You're Most (and Least) Likely to Marry a Local*, THE WASH. POST (Jan. 27, 2023, 5:30 AM), https://www.washingtonpost.com/business/2023/01/27/states-marriage-neighbors.

[5] *See* U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 2022, at 1 (2022).

[6] *See Golan*, 142 S. Ct. at 1889; Danaipour v. McLarey, 386 F.3d 289, 292 (1st Cir. 2004).

[7] *See Danaipour*, 386 F.3d at 292.

Hague Convention and its implementing legislation, the International Child Abduction Remedies Act (ICARA).[8] The court must then return the child to their country of "habitual residence" unless the abducting parent asserts an exception applies.[9] One commonly litigated exception is that the child would be at a "grave risk of physical or psychological harm" or otherwise placed in an intolerable situation if returned to their country of habitual residence.[10] Even if a court finds a "grave risk" exists, it still has discretion to decide if the child should return.[11] As part of this analysis, the *Golan* Court clarified that a court may, but is not required to, consider potential ameliorative measures[12] to ensure a child's safe repatriation upon return.[13]

The primary issues with potential ameliorative measures are that they take significant time for courts to evaluate and have largely proven ineffective in protecting children if returned.[14] In *Golan*, the district court took over nine months to consider the asserted ameliorative measures.[15] This lengthy delay in proceedings is common across all jurisdictions that have mandated consideration of ameliorative measures.[16] Even after the courts take time to consider ameliorative measures, individuals rarely follow them, particularly in cases with a history of prior domestic violence.[17] A 2003 analysis of cases from the United Kingdom found ameliorative measures were broken in 66.6 percent of the cases studied, and individuals failed to follow measures

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[8] *See id.*

[9] *See* Hague Convention on the Civil Aspects of International Child Abduction art. 13, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

[10] *See id.*

[11] *See id.*

[12] Ameliorative measures are also referred to as "undertakings" or "protective measures."

[13] *See* Golan v. Saada, 142 S. Ct. 1880, 1892 (2022).

[14] *See* Brief of Child Just., Inc. et al. as Amici Curiae Supporting Petitioner at 12, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034) [hereinafter Brief of Child Just.].

[15] *Golan*, 142 S. Ct. at 1895.

[16] *See* Blondin v. Dubois, 189 F.3d 240, 249–50 (2d Cir. 1999) (resulting in a five month delay due to consideration of ameliorative measures).

[17] MARILYN FREEMAN, REUNITE INT'L CHILD ABDUCTION CTR., THE OUTCOMES FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION 31 (2003), https://takeroot.org/ee/pdf_files/library/freeman_2003.pdf; JEFFREY L. EDLESON ET AL., MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES 169 (2010) [hereinafter EDLESON ET AL., MULTIPLE PERSPECTIVES], https://www.ojp.gov/pdffiles1/nij/grants/232624.pdf.

to refrain from further violence.[18] A similar 2010 study of cases in the United States discovered women or children faced renewed violence upon return in 58.3 percent of all cases, despite adopted measures.[19] Worse still, the study identified multiple cases where the children were not domestic violence targets prior to removal from the country but became the direct victims upon return.[20]

In *Golan*, the Supreme Court declined to explicitly distinguish between instances where there is evidence of prior incidents of domestic violence, and did not discuss whether consideration of ameliorative measures would (or would not) be appropriate in those cases.[21] Rather, the *Golan* decision left future courts with wide discretion to decide what extent they should consider ameliorative measures, even if it is at the expense of judicial efficiency or following a finding of domestic violence.[22]

This Article argues that balancing the court's interests in expeditious proceedings, protecting children from wrongful removal, and safeguarding children upon return mirrors the policy concerns underlying state court domestic violence proceedings.[23] Accordingly, state and federal courts should adopt best practices mirroring the procedural safeguards established in those cases. Part II of this Article provides an overview of the Hague Convention and exceptions to returning the child. It then applies the framework espoused in *Abbott v. Abbott* in analyzing the appropriate approach for consideration of ameliorative measures in Hague proceedings where the abducting parent advances an Article 13(b) exception of the Hague Convention ("Article 13(b)"). Part III examines courts' different approaches in considering ameliorative measures both prior to and since *Golan* and highlights the gaps *Golan* leaves open. Part IV recommends a framework that courts should adopt moving forward to promote consistency between future state and federal courts adjudicating "grave risk" cases. First, contemporaneous with its determination of whether a child faces a "grave risk of harm" if returned to their country of habitual residence, courts should make a finding as to whether family

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[18] FREEMAN, *supra* note 17, at 31.

[19] EDLESON ET AL., MULTIPLE PERSPECTIVES, *supra* note 17, at 196.

[20] *Id.*; Mariachiara Feresin et al., *The Involvement of Children in Postseparation Intimate Partner Violence in Italy: A Strategy to Maintain Coercive Control?*, 34 J. WOMEN & SOC. WORK 481, 482, 494 (2019), https://doi.org/10.1177/0886109919857672.

[21] *See* Golan v. Saada, 142 S. Ct. 1880, 1890–91 (2022).

[22] *See id.* at 1895.

[23] See discussion *infra* Part IV.A.

violence has occurred. If they make this affirmative finding, courts should automatically find it is not appropriate to consider ameliorative measures in these cases. If no such finding of family violence is made, the courts should place the case on an expedited track that sets timelines for submitting ameliorative measures and adjudicating proceedings to expeditiously ensure finality of cases in an expedient manner that affords the appropriate due process to litigants.

II. AMELIORATIVE MEASURES AND THE *ABBOTT* FRAMEWORK

Prior to analyzing the American courts' judicial approaches, it is helpful to first have a background of the Hague Convention and possible avenues for its interpretation. Part II.A begins with an overview of cases brought pursuant to the Hague Convention and ICARA, followed by a discussion of the "grave risk of harm/intolerable situation" exception generally as it pertains to ameliorative measures in Part II.B. Part II.C then applies the analytical framework advanced in *Abbott* to interpret the appropriate approach for evaluating ameliorative measures in Hague Convention proceedings. Specifically, the framework outlines four considerations that are discussed in this Part: (1) plain text and drafters' intent of the Hague Convention, (2) objectives of the Hague Convention, (3) US Department of State guidance, and (4) decisions of other signatory states. Part II.D concludes this Part by discussing general criticisms and difficulties surrounding ameliorative measures.

A. *The Hague Convention and ICARA*

The Hague Convention is the legal treaty that governs the wrongful removal of children from one foreign state to another.[24] Signatory states ("contracting states") to the Hague Convention are required to designate a central authority to perform the duties enumerated by the Hague Convention and pass implementing binding legislation, like ICARA in the United States, as necessary.[25] When a child is wrongfully removed[26] from one Hague contracting state to

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[24] *See* Molshree A. Sharma, Golan v. Saada*: Protecting Domestic Abuse Survivors in International Child Custody Disputes*, 56 FAM. L.Q. 251, 253 (2023).

[25] *See* Katherine Jenkins, Note, *The Hague Convention on International Parental Kidnapping: Still the Best Hope for Children?*, 6 CARDOZO INT'L & COMPAR. L. REV. 623, 629 (2023).

[26] The Hague Convention defines a removal as "wrongful" where it breaches existing custody rights under the relevant law of the state of the child's "habitual

another, the Hague Convention generally requires the child's "prompt return" to the child's country of "habitual residence."[27] But the Hague Convention is often characterized as "jurisdictional," meaning it does not govern adjudication of substantive legal issues.[28] Rather, the courts of the country of habitual residence adjudicate any underlying custody or support matters following a child's return pursuant to local laws.[29]

To date, there are 103 contracting states to the Hague Convention, including the United States.[30] In the United States, ICARA confers concurrent original jurisdiction on both United States state and federal district courts to adjudicate cases brought under the Hague Convention for the return of a child.[31] This means a party petitioning for return of the child[32] can properly file a petition in either state or federal court.[33] The petitioning party has the burden of proof to establish a prima facie case by a preponderance of the evidence that (1) a parent wrongfully removed or retained their child from their country of habitual residence; (2) the left-behind parent has a right of custody; and (3) the left-behind parent was actually exercising their right of custody prior to the wrongful removal or retention or would have exercised their right but for the removal or retention.[34] If the petitioner meets their burden of proof, the burden

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residence" immediately before removal if the rights "were actually exercised or would have been so exercised but for the removal or retention." *Golan*, 142 S. Ct. at 1888 n.1.

[27] *Id.* at 1888 (citing Hague Convention, *supra* note 9, art. 1(a)). In 2020, the Supreme Court held a child's "habitual residence" should be determined based on a "totality of the circumstances" rather than the agreement between the parties on where to raise the child. Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020). The relevant circumstances a court may consider include where the child was taken from, the child's birth country, or coercion by one parent on the other into the exchange. The Federalist Soc'y for L. & Pub. Pol'y Stud., Golan v. Saada—*Post-Decision SCOTUScast*, SPREAKER FROM IHEART, at 02:26 (July 8, 2022), https://www.spreaker.com/user/fedsoc/golan-v-saada-post-decision-scotuscast.

[28] *See* The Federalist Soc'y for L. & Pub. Pol'y Stud., *supra* note 27, at 01:57.

[29] *See id.* at 02:05.

[30] *See 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (Nov. 14, 2022).

[31] 42 U.S.C. § 11603.

[32] The Hague Convention applies to children who are under sixteen years old and "'habitually resident' in a contracting state to the [Hague] Convention immediately prior to the breach of custody or access rights." Cleary, *supra* note 3, at 2627 (citing Hague Convention, *supra* note 9, art. 4).

[33] 42 U.S.C. § 11603.

[34] 22 U.S.C. § 9003(e).

then shifts to the respondent to prove one of the delineated exceptions to return applies under the Hague Convention and ICARA.[35]

B. *The Article 13(b) Exception and Ameliorative Measures*

Once the petitioner establishes the three elements required to form their prima facie case, the court must issue an order that the child shall return to the country of habitual residence unless the respondent raises one of the five narrowly construed exceptions available under the Hague Convention:

> (1) Article 12: By a preponderance of the evidence, the child is well-settled in the new environment.[36]
> (2) Article 13(a): By a preponderance of the evidence, the left-behind parent consented or acquiesced to the removal or retention.[37]
> (3) Article 13(b): By clear and convincing evidence, there is a "grave risk" that their return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[38]
> (4) Article 13: By a preponderance of the evidence, the child of sufficient age and maturity objects to being returned.[39]

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[35] *See* Mejia Rodriguez v. Molina, 628 F. Supp. 3d 905, 913 (S.D. Iowa 2022).

[36] 22 U.S.C. § 9003(e)(2)(B); Hague Convention, *supra* note 9, art. 12; *see, e.g.*, Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (finding that children removed from Argentina were not well settled in Florida because they had lived in seven locations during their eighteen months in the United States and had been treated for stress); *In re* B. Del C.S.B., 559 F.3d 999, 1009 (9th Cir. 2008) (delineating a list of factors courts may consider when engaging in the "settled environment" analysis).

[37] 22 U.S.C. § 9003(e)(2)(B); Hague Convention, *supra* note 9, art. 13(a); *see also* Friedrich v. Friedrich, 78 F.3d 1060, 1070 (6th Cir. 1996) ("[A]cquiescence under the [Hague] Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." (footnotes omitted)).

[38] Hereinafter the "grave-risk exception." 22 U.S.C. § 9003(e)(2)(A); Hague Convention, *supra* note 9, art. 13(b); *see, e.g.*, Acosta v. Acosta, 725 F.3d 868, 876 (8th Cir. 2013) (affirming the district court's finding that a suicidal and abusive father, his sustained uncontrolled rage, and inability to cope with the prospect of losing custody would expose the children to a "grave risk of harm" if they returned to Peru). *But see* Buenaver v. Vasquez, 29 F. Supp. 3d 243, 258 (E.D.N.Y. 2014) (finding that the mother failed to establish "grave risk of harm" if the child were to return to Colombia by allegations of domestic violence between the mother and father prior to their divorce and the eight-year-old child's opinion that she liked America "much much better").

[39] 22 U.S.C. § 9003(e)(2)(B); Hague Convention, *supra* note 9, art. 13; *see, e.g.*, Roque-Gomez v. Tellez-Martinez, No. 2:14-cv-398-FtM-29DNF, 2014 WL 7014547, at

> (5) Article 20: By clear and convincing evidence, that fundamental principles relating to the protection of human rights and fundamental freedoms do not permit return of the child.[40]

The drafters intended to restrictively apply these exceptions where it will be considered to be in the child's best interests to return to their country of habitual residence unless an exception applies.[41] Even if the respondent asserts and proves one of these exceptions, judges still retain discretion to return a child to their country of habitual residence.[42] Retaining judicial discretion aligns with the Hague Convention's overarching goal of safely and promptly returning a child to their country of habitual residence.[43]

This Article focuses on the Article 13(b) exception, where a court may decline to return a wrongfully taken child to their country of habitual residence if there is a "grave risk" that their return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. In 2011, the Permanent Bureau released its analysis of ninety-two cases to prepare for the Sixth Meeting of the Special Commission.[44] The Permanent Bureau found over one-

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*10–11 (M.D. Fla. Dec. 11, 2014) (finding that the eleven-year-old child's tendency to be untruthful and evidence showed he had not attained sufficient maturity to warrant consideration of his opinion that he wanted to stay in the United States); Escobar v. Flores, 107 Cal. Rptr. 3d 596, 607 (Ct. App. 2010) (affirming the trial court's refusal to return a nine-year-old child to Chile, finding he was communicative, under no undue influence, and demonstrated sufficient age and maturity).

[40] 22 U.S.C. § 9003(e)(2)(A); Hague Convention, *supra* note 9, art. 20.

[41] *See* Elisa Pérez Vera, *Explanatory Report*, *in* 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426, 434 (Permanent Bureau trans., 1981) ("The . . . exceptions . . . [should] be applied only so far as they go and no further."); HAGUE CONF. ON PRIV. INT'L L., 1980 CHILD ABDUCTION CONVENTION GUIDE TO GOOD PRACTICE: PART VI, ARTICLE 13(1)(B) 25 (2020) [hereinafter GUIDE TO GOOD PRACTICE], https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf.

[42] *See* Melissa Kucinski, *Exception to the Exception: Judicial Discretion in Crafting Remedies to Return Children and the Expanding Complexity of Litigating a Hague Abduction Convention Case in the U.S.*, AM. BAR ASS'N. (Nov. 4, 2021), https://www.americanbar.org/groups/international_law/publications/articles/judicial-discretion-in-crafting-remedies-to-return-children-exceptions.

[43] *See* Maurizio R. v. L.C., 135 Cal. Rptr. 3d 93, 111–12 (Ct. App. 2011); Cleary, *supra* note 3, at 2632.

[44] *See* Jeffrey Edleson et al., *Fleeing for Safety: Helping Battered Mothers and Their Children Using Article 13(1)(b)*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION: THE 1980 HAGUE CONVENTION 96, 109 (Marilyn Freeman & Nicola Taylor eds., 2023) [hereinafter Edleson et al., *Fleeing for Safety*].

third of the ninety-two cases they studied involved an abducting parent asserting an Article 13(b) exception.[45]

When analyzing American courts' approaches to adjudicating the Article 13(b) exception, legal scholars commonly criticize that American courts fail to separate the second "intolerable situation" prong of the exception from "grave risk."[46] These scholars emphasize that the exception provides two independent bases, not just one, to refuse to return an abducted child, but courts often conflate them.[47] Scholars criticize this approach, noting that a child could be returned to an intolerable situation despite there being no "grave risk of harm."[48] Disaggregating the two prongs increases the likelihood that the wording of the exception will be effective by forcing courts to independently consider whether a child will be placed in an intolerable situation despite not being at a "grave risk of harm."[49] This Article specifically focuses on the "grave risk of harm" prong of the Article 13(b) exception.

Prior courts have primarily ruled that a "grave risk" constitutes an exception to return of a child under three circumstances:[50] first, where a return would send the child to a "zone of war, famine[,] or disease";[51] second, in cases concerning serious abuse or neglect or extraordinary emotional dependence where the country of habitual residence would not protect the child;[52] and third, where "the abuse is substantially

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[45] *See id.*

[46] *See* Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 345 (2008) [hereinafter Weiner, *Intolerable Situations and Counsel for Children*]; Cleary, *supra* note 3, at 2645.

[47] *See* Merle H. Weiner, *You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence*, 28 UCLA WOMEN'S L.J. 223, 272 (2021) [hereinafter Weiner, *You Can and You Should*], https://doi.org/10.5070/L328155744; Cleary, *supra* note 3, at 2645.

[48] *See* Weiner, *You Can and You Should*, *supra* note 47, at 272; Cleary, *supra* note 3, at 2645.

[49] *See* Weiner, *You Can and You Should*, *supra* note 47, at 272; Cleary, *supra* note 3, at 2645.

[50] *See* Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996); Vasquez v. Colores, 648 F.3d 648, 650 (8th Cir. 2011).

[51] Silverman v. Silverman, 338 F.3d 886, 900 (8th Cir. 2003) (quoting *Friedrich*, 78 F.3d at 1069).

[52] *See Vasquez*, 648 F.3d at 650; Walsh v. Walsh, 221 F.3d 204, 220 (1st Cir. 2000); Khan v. Fatima, 680 F.3d 781, 787 (7th Cir. 2012); Valentina Shaknes & Justine Stringer, *Ameliorative Measures Gut the Grave Risk Exception Under the Hague Convention*, N.Y. L.J. (July 23, 2021, 1:30 PM),

more than minor but is less obviously intolerable."[53] In these cases, the key is examining the "gravity of risk" facing the child if returned, which depends on both the "probability of harm" and "magnitude of the harm if the probability materializes."[54]

Legal scholars further disagree as to whether mere exposure of a child to domestic violence should by itself constitute a "grave risk of harm."[55] The Permanent Bureau supported this argument in its Guide to Good Practice.[56] The Guide advances that potential physical or psychological harm to a parent may place the child at a "grave risk of harm."[57] Legal scholars advancing this argument—and courts that have followed it—contend that returning a child to their country of habitual residence where there is evidence of domestic violence poses a "grave risk" to the child's psychological and physical health.[58] Specifically, studies have found exposure to domestic violence is linked to "lower social and emotional competence and fewer empathetic skills[,]" poorer academic performance, and increased anxiety in girls and physical aggression in boys.[59] Further, studies have identified exposure to violence increases the likelihood of children becoming physically abusive themselves.[60] Moreover, recent studies found 56.8 percent of children exposed to adult domestic violence were being abused themselves, and 23 percent of children physically intervened to stop violence against their mothers.[61] Even where children were not the direct victims of abuse, 37.8 percent of children were accidentally hurt during violence against their mother, and 26.1 percent of children were intentionally hurt during violence against their mother.[62]

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https://www.law.com/newyorklawjournal/2021/07/23/ameliorative-measures-gut-the-grave-risk-exception-under-the-hague-convention.

[53] Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007).

[54] Van De Sande v. Van De Sande, 431 F.3d 567, 570 (7th Cir. 2005).

[55] *See* Weiner, *You Can and You Should*, *supra* note 47, at 282.

[56] *See* GUIDE TO GOOD PRACTICE, *supra* note 41, at 37.

[57] *See id.*

[58] *See* Edleson et al., *Fleeing for Safety*, *supra* note 44, at 99; Miltiadous v. Tetervak, 686 F. Supp. 2d 544, 553 (E.D. Pa. 2010); Noergaard v. Noergaard, 197 Cal. Rptr. 3d 546, 555 (Ct. App. 2015).

[59] *See* Edleson et al., *Fleeing for Safety*, *supra* note 44, at 99.

[60] *See id.* at 100.

[61] *See id.* at 100–01.

[62] *See id.*

As with the other exceptions, regardless of the circumstances under which a court finds there is a "grave risk of harm" to a child, the court retains discretion to return the child to their country of habitual residence.[63] When deciding, courts may consider whether there are any available "ameliorative measures" to protect the child if returned.[64] Ameliorative measures are specific undertakings, agreements, or concessions agreed to by the left-behind parent or central authority to mitigate the risk to the child, ensuring their safe repatriation.[65] Ameliorative measures primarily arise in the form of assurances by a parent or by the central authority in the child's habitual residence.[66] Undertakings of a parent may include financial and housing assistance, an agreement to not pursue criminal action against the abducting parent, health services, and court orders in the country of habitual residence.[67] Alternatively, a contracting state's potential ameliorative measures through their central authority may range from mere access to courts and existing assistance programs for financial, legal, or housing assistance, to entry of binding local court decisions or actions of local authorities.[68] The kind and scope of the ameliorative measures depends on the type and extent of the risk posed to the child upon their return.[69]

The unresolved question prior to the *Golan* decision was whether a court is required to consider any and all possible ameliorative measures available that would protect the child from the risk if returned.[70] These measures are intended to be temporary to provide protection until the courts in the child's country of habitual residence

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[63] *See* Hague Convention, *supra* note 9, art. 18.

[64] *See* Deborah Reece, *Exposure to Family Violence in Hague Child Abduction Cases*, 36 EMORY INT'L L. REV. 81, 93–94 (2022).

[65] *See id.*

[66] *See* Weiner, *Intolerable Situations and Counsel for Children*, *supra* note 46, at 349.

[67] *See* Kucinski, *supra* note 42.

[68] *See* KATARINA TRIMMINGS ET AL., PROTECTION OF ABDUCTING MOTHERS IN RETURN PROCEEDINGS: INTERSECTION BETWEEN DOMESTIC VIOLENCE AND PARENTAL CHILD ABDUCTION § 3.3 (2019) [hereinafter POAM REPORT], https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_UK.pdf.

[69] Brief for Child Abduction Laws. Ass'n (CALA) as Amicus Curiae Supporting Respondent at 27, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034) [hereinafter Brief for CALA].

[70] *See generally* Petition for Writ of Certiorari at 10, *Golan*, 142 S. Ct. 1880 (No. 20-1034) [hereinafter Petition for Writ of Certiorari]

enter final orders adjudicating custody and financial support of a child.[71]

C. *Applying the* Abbott *Framework to Ameliorative Measures*

In *Abbott*, the Supreme Court advanced four sources that courts should look to when deciding how to approach a Hague Convention proceeding: (1) the plain language of the Hague Convention, (2) the objectives of the Hague Convention, (3) any guidance from the US Department of State, and (4) decisions of other contracting states to the Hague Convention.[72] Analyzing ameliorative measures under these four categories helps set the stage for the split in judicial approaches that have followed.

1. Plain Language of the Convention and Drafters' Intent

Courts interpret the Hague Convention in the same way as a statute, by first looking at its text and attributing a plain and ordinary meaning.[73] The plain language of the Hague Convention and ICARA does not impose any additional requirements on the parties, ameliorative measures or otherwise, once a court finds a child is subject to a "grave risk of harm."[74] Therefore, any requirement courts have subsequently imposed on parties to introduce evidence of ameliorative measures is beyond the plain language of the Hague Convention.[75] Following the judicially created requirement of considering ameliorative measures thus implicates a question of separation of judicial and legislative powers.[76]

Notably, when drafters initially wrote the Hague Convention, it defined "typical abductor" as a nonprimary caregiver who kidnapped the child to gain an advantage in a jurisdiction with more favorable

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[71] *See* HAGUE CONF. ON PRIV. INT'L L., PRACTICAL HANDBOOK ON THE OPERATION OF THE 1996 HAGUE CHILD PROTECTION CONVENTION 79 (2014), https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf.

[72] *See* Abbott v. Abbott, 560 U.S. 1, 9–10 (2010).

[73] *See id.* at 10 (citing Medellín v. Texas, 552 U.S. 491, 506–07 (2008)).

[74] *See* Danaipour v. McLarey, 286 F.3d 1, 21 (1st Cir. 2002) ("The concept of 'undertakings' is based neither in the [Hague] Convention nor in the implementing legislation of any nation.").

[75] *See Golan*, 142 S. Ct. at 1892 ("Nothing in the [Hague] Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion.").

[76] *See* Ziglar v. Abbasi, 582 U.S. 120, 132 (2017) (emphasizing that courts must exercise great caution when considering remedies "not explicit in the statutory text itself").

custody laws.[77] The drafters of the Hague Convention gave little consideration to the child's potential exposure to harm upon return, opting instead to focus on discouraging abductors from forum shopping.[78] Over the past few decades, however, the profile of the abducting parent has shifted substantially.[79] Nearly three-quarters of all abducting parents are mothers, the vast majority of whom are the primary caretaker or joint caretaker of the children.[80] Additionally, an increasing percentage of Hague Convention cases concern an abducting parent who is fleeing with their child to escape domestic violence and abuse of the left-behind parent.[81]

Beyond its plain language, courts regularly look to negotiation and drafting history when interpreting an international agreement.[82] For the Hague Convention specifically, the Supreme Court has consulted the Hague Convention's Explanatory Report by Elisa Pérez-Vera, often regarded as the official history and commentary on the Hague Convention, to interpret its terms.[83] The language of the Hague Convention developed over multiple years and negotiation sessions, capped off by a three-week meeting of delegations from twenty-three member countries for the Fourteenth Session of the Hague Convention.[84] Despite these meetings, the drafters never discussed including any language regarding ameliorative measures in grave-risk cases.[85] Rather, when there was a proposal that would mandate courts to consider specific evidence in grave-risk cases, the drafters rejected the proposal, reasoning that it would unnecessarily constrain judicial discretion.[86]

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77 *See* Brief of Child Just., *supra* note 14, at 5.

78 *See id.*

79 *See id.*

80 *See* Edleson et al., *Fleeing for Safety*, *supra* note 44, at 97.

81 *See* Brief of Child Just., *supra* note 14, at 5–6.

82 *See, e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 534 (1987) (rejecting interpretation of the court as "inconsistent with the language and negotiating history of the Hague Convention").

83 *See, e.g.*, Monasky v. Taglieri, 140 S. Ct. 719, 727 (2020) (using the explanatory report when interpreting "habitual residence" in Article 12 of the Hague Convention); *see generally* Vera, *supra* note 41.

84 *See* Brief of Hague Convention Delegates Jamison Selby Borek & James Hergen as Amici Curiae Supporting Petitioner at 7, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034) [hereinafter Brief of Hague Convention Delegates].

85 *See id.* at 10.

86 *See id.* at 10–11.

2. Objectives of the Hague Convention

The Hague Convention's stated objectives are to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."[87] These two objectives are occasionally at odds with each other as it relates to ameliorative measures.[88] The first stated goal is protecting the interests and safety of the children.[89] When analyzing the child's interests and safety under Article 13(b), it appears courts should consider ameliorative measures to ensure the child is protected upon return to their country of habitual residence.[90] The second stated goal is to promote the timely return of children to their country of habitual residence.[91] The drafters sought to promote efficient judicial processes to avoid a child developing strong ties and stability in a "new country that would be severed if" the petition were successful.[92] The Hague Convention achieves this goal by preserving discretion for courts to order return of a child even if one of the limited delineated exceptions exist.[93] But, requiring courts to consider ameliorative measures arguably would extend the time required in court to review each measure and its feasibility and efficacy.[94] These conflicting goals underlie courts' confusion as to what extent ameliorative measures should be considered.[95]

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87 Hague Convention, *supra* note 9, pmbl.

88 *See* Cleary, *supra* note 3, at 2627.

89 *See* Kyle Simpson, Comment, *What Constitutes A "Grave Risk of Harm?": Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 842 (2017) ("[T]he drafters made clear at the beginning of the document that the [Hague] Convention's ultimate purpose is to protect the interests and safety of the child.").

90 *See* Cleary, *supra* note 3, at 2627.

91 *See id.* at 2626.

92 Brief of Hague Convention Delegates, *supra* note 84, at 15.

93 *See id.* at 15–16; *see also* discussion *supra* Part II.C.1.

94 *See* Brief of Hague Convention Delegates, *supra* note 84, at 16–17.

95 *See id.*

3. US Department of State Guidance

Although the US Department of State's guidance is not binding, courts have still found it is entitled to deference as an entity "charged with [the Hague Convention's] negotiation and enforcement."[96] The US Department of State's guidance warns against judicial consideration of ameliorative measures when there is a finding of "grave risk of harm."[97] The guidance explains, "when there is 'unequivocal evidence that return would cause the child a "grave risk" of physical or psychological harm,' it would be 'less appropriate for the court to enter extensive undertakings than to deny the return request.'"[98] Courts have interpreted this guidance to suggest courts are under no obligation to assess whether a country of habitual residence is able or willing to provide children at a "grave risk of harm" with protection or other services.[99] Rather, the court in those circumstances may, within its discretion, deny return of the child.[100]

4. The Decisions of Other Signatory States

Finally, *Abbott* recommended reviewing decisions of other Hague Convention contracting states to guide American courts' interpretation of the Hague Convention.[101] This Part focuses on three international sources guiding other contracting states' consideration of ameliorative measures: (1) the Hague Conference's Special Commission's 2020 Guide to Good Practice, (2) the United Kingdom, and (3) the Brussels II-ter Regulation.

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96 *See* Baran v. Beaty, 526 F.3d 1340, 1348 (11th Cir. 2008) (quoting Baxter v. Baxter, 423 F.3d 363, 373 n.7 (3d Cir. 2005)).

97 *See* Petition for Writ of Certiorari, *supra* note 70, at 18.

98 *See id.* at 4 (quoting Letter from Catherine W. Brown, Assistant Legal Adviser for Consular Affs., U.S. Dep't of State, to Michael Nicholls, Lord C.'s Dep't, U.K. Child Abduction Unit (Aug. 10, 1995)).

99 *See, e.g.*, *Baran*, 526 F.3d at 1352.

100 *See, e.g.*, *id.*

101 *See* Abbott v. Abbott, 560 U.S. 1, 9–10 (2010).

i. Hague Conference's Special Commission's 2020 Guide to Good Practice

In October 2017, 292 participants representing sixty-two contracting states of the Hague Convention negotiated and released the first draft of the Guide to Good Practice on Article 13(1)(b).[102] The final draft of the guide was finalized as the 2020 Guide to Good Practice on Article 13(1)(b).[103] Provisions of the Hague Conference's Special Commission's 2020 Guide to Good Practice on Article 13(1)(b) suggests evaluation of potential ameliorative measures may be a required component of determining whether a "grave risk of harm" exists.[104] Specifically, the guide directs courts to both "examin[e] and evaluat[e] the evidence presented by the person opposing the child's return/information gathered and [take] into account the evidence/information pertaining to protective measures available in the [s]tate of habitual residence."[105] Further, for cases involving domestic violence constituting a "grave risk of harm," the guide advises that courts "should consider the availability, adequacy and effectiveness of measures protecting the child."[106] Both provisions seemingly indicate a court's determination of "grave risk of harm" necessarily relies on an analysis of whether adequate ameliorative measures exist.[107]

ii. United Kingdom

In 2019, three professors from the University of Aberdeen published the United Kingdom National Report on *Protection of Abducting Mothers in Return Proceedings* ("POAM report"), funded by the European Union's Rights, Equality and Citizenship Programme.[108] The POAM report provided a comprehensive analysis of all reported decisions following the seminal Supreme Court of the United

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[102] SPECIAL COMM'N ON THE PRAC. OPERATION OF THE 1980 & 1996 HAGUE CONVENTIONS, HAGUE CONF. ON PRIV. INT'L L., CONCLUSIONS AND RECOMMENDATIONS 1 (2017), https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf; *see also* Constanza Honorati, *Protecting Mothers Against Domestic Violence in the Context of International Child Abduction: Between* Golan v. Saada *and Brussels II-ter EU Regulation*, 12 LAWS 1, 5–7 (2023), https://doi.org/10.3390/laws12050079.

[103] *See generally* GUIDE TO GOOD PRACTICE, *supra* note 41.

[104] *See id.* at 31.

[105] *Id.*

[106] *Id.* at 38.

[107] *See id.*; Honorati, *supra* note 102, at 7.

[108] *See generally* POAM REPORT, *supra* note 68.

Kingdom judgments in *In re Matter of E (Children)* ("*Re E")* and *In the Matter of S (a Child)* ("*Re S*") and, to date, is the most comprehensive report analyzing a Hague Convention contracting state's approaches to ameliorative measures.[109] The report found that through the date of its publication, United Kingdom courts primarily applied two distinct approaches as to consideration of ameliorative measures in cases asserting a "grave risk of harm" exception.[110]

Re E set forth the first approach, termed as the "protective measures approach."[111] Under this approach, courts do not start by analyzing the truth of any domestic violence allegations asserted by the abducting parent establishing "grave risk of harm" or an "intolerable situation."[112] Rather, the court will take all allegations in the light most favorable to the abducting parent.[113] The court will then consider whether protective measures proposed by the left-behind parent would obviate the "grave risk of harm" or "intolerable situation."[114] If the protective measures are unable to ameliorate the risk, the court will consider whether the abducting parent's domestic violence allegations were true.[115] Subsequent courts have criticized the protective measures approach, finding it reverses the initial burden of proving the exception by presuming the domestic violence allegations as true.[116]

The alternative approach is termed the "evaluative assessment approach."[117] Under this approach, courts first analyze the veracity of the domestic violence allegations asserted in support of the Article 13(b) exception, limited to a summary proceeding.[118] After the court assesses the merits of the allegations, it then moves on to determine whether these allegations constitute a "grave risk of harm" to the child.[119] If the court determines there is a "grave risk of harm," it will then consider availability of any protective measures.[120] The POAM report endorses the evaluative assessment approach as the superior of

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109 *See id.* §§ 2–3.

110 *Id.* § 3.2.

111 *See id.*

112 *See id.*

113 *See id.*

114 *See* POAM REPORT, *supra* note 68, § 3.2.

115 *See id.*

116 *See id.*

117 *Id.*

118 *See id.*

119 *Id.*

120 *See* POAM REPORT, *supra* note 68, § 3.2.

the two, finding that the protective measures approach incorrectly "involves the consideration of protective measures to mitigate risk before that risk has been established and assessed."[121]

Under either approach, if a judge concludes certain measures are effective, then the court must support that conclusion with reasoning.[122] To increase enforcement, United Kingdom courts order ameliorative measures under Article 11 of the 1996 Hague Convention and Regulation 606/2013 ("Protection Measures Regulation").[123] The biggest practical difference between these two avenues is that enforcement under the 1996 Hague Convention requires the abducting parent to first seek a declaration of enforceability or registration before initiating enforcement proceedings when a protective measure is not followed.[124] Conversely, the Protection Measures Regulation permits direct recognition of orders from other European Union member states without requiring a declaration of enforceability.[125] This means that if one state enters a protective order, another member state can directly enforce it without the declaration of enforceability by merely providing a copy of the order, translation, and certificate under Article 5 of the Protection Measures Regulation.[126]

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[121] Katarina Trimmings & Onyója Momoh, *Intersection Between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, 35 INT'L J.L. POL'Y & FAM. 1, 9 (2021)
(quoting Adrienne Barnett, *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on International Child Abduction—A Perspective from England and Wales*, *in* EIGHT LETTERS SUBMITTED TO THE UNITED STATES DEPARTMENT OF STATE AND THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ABOUT A DRAFT GUIDE FOR ARTICLE 13(1)(B) AND RELATED DRAFT DOCUMENTS THAT WERE CIRCULATED FOR COMMENT PRIOR TO THE OCTOBER 2017 MEETING OF THE SEVENTH SPECIAL COMMISSION ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION AT THE HAGUE 1, 18 (2017), https://law.ucdavis.edu/sites/g/files/dgvnsk10866/files/media/documents/Letters-re-Hague-Convention.pdf), https://doi.org/10.1093/lawfam/ebab001).

[122] *See* Re S (A Child) (Hague Convention 1980: Return to Third State) [2019] EWCA (Civ) 352 [60] (appeal taken from Eng.).

[123] *See* Trimmings & Momoh, *supra* note 121, at 14 (citing Re S (A Child) (Hague Convention 1980: Return to Third State) [2019] EWCA (Civ) 352 [46] (appeal taken from Eng.)).

[124] *See id.* at 15.

[125] *See id.* at 16.

[126] *See id.*; *Certificate Issued in Accordance with Article 5*, EUROPEAN E-JUST., https://e-justice.europa.eu/dynForms.do?1689488257748 (last visited Nov. 23, 2023).

The United Kingdom's evaluative assessment approach is mirrored by other Hague Convention signatories.[127] Marilyn Freeman and Nicola Taylor's 2023 *Research Handbook on International Child Abduction* surveys cases from Ireland, Canada, and Switzerland wherein the courts stressed that returning a child to a household of domestic violence could by itself constitute a "grave risk of harm."[128]

iii. European Union: Brussels II-ter Regulation

Although all members of the European Union (EU) are also contracting states to the 1980 Hague Convention, EU members apply the Hague Convention differently as it relates to Article 13(b).[129] This is because EU members are also member states to the Brussels II-ter Regulation, which supplements Hague Convention provisions.[130] The regulation sets forth several key portions related to litigation of Article 13(b) claims.[131] First, a court must provide an opportunity for the person seeking return of the child and the child themselves the opportunity to be heard before refusing return of the child to their country of habitual residence.[132]

Second, the regulation maintains an "override mechanism" even where a country of refuge refuses the return.[133] In these instances, a court in the country of the child's habitual residence may decide custody on the merits and that decision will override the decision of nonreturn of the country of refuge.[134] If the court of the requesting state required the child's return, that order would be automatically enforceable.[135]

Finally, the regulation affirmatively requires the court of the country of refuge take steps protect a child by ensuring "adequate

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127 *See* Edleson et al., *Fleeing for Safety*, *supra* note 44, at 107.

128 *See id.* at 98–104.

129 *See* Honorati, *supra* note 102, at 11.

130 *See id.*

131 *See id.*

132 *See id.* at 12.

133 *See* Nigel Lowe KC, *Whither the 1980 Hague Abduction Convention?*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CHILD ABDUCTION: THE 1980 HAGUE CONVENTION, *supra* note 44, at 387, 397.

134 Honorati, *supra* note 102, at 12.

135 *See* Lowe KC, *supra* note 133, at 397.

arrangements"[136] and "provisional and protective measures"[137] are followed in the country of habitual residence.[138] The contemplation of arrangements and measures is closest to American courts' consideration of ameliorative measures.[139] Even if the court finds there is a "grave risk of harm" to the child, it "shall not refuse to return the child" if it is satisfied these arrangements and measures have been made.[140] Conversely, if no such arrangements or measures are available, the court is seemingly required to refuse return of the child as it cannot ensure their safe return.[141] As written, the regulation does not explicitly allow for adoption of protective measures specifically for an abused parent separate from the child.[142] Accordingly, an abused parent may be forced to choose between staying safe but abandoning their child or returning to an abusive situation where there are no measures to protect them.[143]

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[136] Examples of "adequate arrangements" under the Brussels II-ter Regulation include the following:

> A court order from the [s]tate of the child's habitual residence prohibiting the applicant from coming close to the child; a provisional and/or protective measure allowing the child to stay with the abducting parent who is the primary carer until a decision has been made on the merits in relation to custody; [and] the indication of available medical facilities for a child in need of medical treatment.

Honorati, *supra* note 102, at 14.

[137] Examples of "provisional measures" include the following provisions once a child is returned:

> The child will continue to reside with the primary caregivers, or specify how contact with the parent left behind should take place after the child's return. . . . [A]nti-molestation/anti-harassment orders (for example, not to use violence or threats toward the mother, nor to instruct anybody else to do so, or not to communicate with mother directly), orders related to the occupancy of the family home . . . orders related to financial support . . . and orders related to residence or access to the child.

Id. at 16 (alteration in original).

[138] *See id.* at 14.

[139] *See id.*

[140] *Id.* at 12.

[141] *See id.* at 16.

[142] *See* Honorati, *supra* note 102, at 16.

[143] *See id.*

D. *Criticisms of Ameliorative Measures*

When considering ameliorative measures, it is important to analyze the prior efficacy of such measures in cases where courts have ordered the return of a child to be conditioned upon them.[144] Critics of ameliorative measures assert that even where possible protective undertakings are offered, they are often insufficient to protect the returning child and accompanying parent.[145] The primary reasons for this are three-fold. First, the court loses jurisdiction to enforce orders after the child is returned to their country of habitual residence.[146] Second, even in cases where the country of habitual residence has an effective law enforcement section, it is typically not informed of any future family violence until after it occurs, even if in violation of an order.[147] Finally, although a court may be able to impose measures that are seemingly sufficient to protect children from future physical harm, these measures may still be insufficient to mitigate the psychological harm confronting children.[148]

Two opinions from 2014 highlight some worst-case scenarios where ameliorative measures proved insufficient.[149] In the first case, a mother was forced to return to the United Kingdom after she fled with her children to Australia in order to escape the children's abusive

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144 *See* EDLESON ET AL., MULTIPLE PERSPECTIVES, *supra* note 17, at 229.

145 HAGUE CONF. ON PRIV. INT'L L., DOMESTIC AND FAMILY VIOLENCE AND THE ARTICLE 13 "GRAVE RISK" EXCEPTION IN THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A REFLECTION PAPER 25 (2011), https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf.

146 *See* Brief of Child Just., *supra* note 14, at 20.

147 *See* Van De Sande v. Van De Sande, 431 F.3d 567, 571 (7th Cir. 2005) ("To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of [that] country, would be to act on an unrealistic premise.").

148 *See* Blondin v. Dubois, 78 F. Supp. 2d 283, 298 (S.D.N.Y. 2000) (finding on remand, despite being required to consider all ameliorative measures, that the children "would suffer severe psychological harm from" being returned to France, where they were seriously abused, "no matter how carefully they were managed by the French courts"), *aff'd*, 238 F.3d 153 (2d Cir. 2001).

149 Sandra Laville, *Woman's Murder Could Have Been Prevented, Says Jury*, THE GUARDIAN (Feb. 26, 2014, 6:31 PM), https://www.theguardian.com/society/2014/feb/26/cassandra-hasanovic-murder-domestic-violence; Rosie Scammell, *Italian Dad Goes on the Run with American Son*, THE LOCAL (Jan. 16, 2014, 10:55 AM), https://www.thelocal.it/20140116/italian-dad-goes-on-the-run-with-ameri-can-son.

father.[150] Despite court-ordered ameliorative measures, the father dragged the mother behind a car and stabbed her to death in front of their children while she was trying to bring them to a domestic violence shelter.[151] In the second case, even after a court ordered the child to be returned to Italy after the father signed consent orders restricting his access to the child as an ameliorative measure, the father kidnapped the child upon return and disappeared for two weeks.[152] Similar to the Brussels II-ter Regulation, these ameliorative measures are designed to protect the child, not the fleeing parent.[153] This means that in some cases, the parent has not returned to the country of habitual residence with the child due to extreme fear of future abuse by the left-behind parent.[154]

III. PRE- AND POST-*GOLAN* JUDICIAL APPROACHES TO AMELIORATIVE MEASURES

The Supreme Court's ruling in *Golan* made it clear that a court has discretion to consider ameliorative measures in assessing whether there is a "grave risk of harm" to a child. Yet, the opinion opened the door for wide interpretation of how courts should balance interests of judicial expediency with the optional evaluation of ameliorative measures. Parts III.A and III.B review the judicial splits of federal and state courts prior to the *Golan* decision. Part III.C provides an overview of the entire *Golan* proceeding, including remand and subsequent appeal following the Supreme Court's decision. Part III.D then discusses case law that has been decided since *Golan*, highlighting renewed discrepancies in how courts adjudicate ameliorative measures following *Golan*.

A. *Federal Judicial Split Pre-*Golan v. Saada

Prior to the *Golan* decision, courts were split as to the extent they analyzed whether the parents or judicial system in the child's country of habitual residence could appropriately enforce ameliorative measures that reduced or eliminated harm to the child upon their return.[155] When assessing potential ameliorative measures, some

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150 *See* Laville, *supra* note 149.

151 *See id.*

152 *See* Scammell, *supra* note 149.

153 *See* Rubio v. Castro, 813 F. App'x 619, 622 (2d Cir. 2020).

154 *See id.*

155 *See, e.g.*, Blondin v. Dubois, 189 F.3d 240, 248 (2d Cir. 1999) ("For this reason, it is important that a court considering an exception under Article 13(b) take into

circuits imposed "undertakings" on a parent seeking return of a child, designed to be in place until the judicial system of the country of habitual residence could finalize custody and financial support proceedings.[156] This analysis aimed to determine whether a child could be safely repatriated to their country of habitual residence notwithstanding a "grave risk of harm."[157]

The Second, Third, and Ninth Circuits recommended or required analysis of ameliorative measures once a court found a grave-risk exception applied.[158] These cases assumed and acknowledged that courts in the countries where children are abducted from "are as ready and able as [the United States] to protect their children" and "respond accordingly."[159] Conversely, the First, Eighth, and Eleventh Circuits rejected this analysis, finding courts are under no obligation to consider ameliorative measures.[160] These cases focused on the significant burden that producing evidence of ameliorative measures from a country the parent fled would place on the abducting parent.[161] Finally, the Sixth and Seventh Circuits carved out cases involving domestic violence, finding that consideration of ameliorative measures is inappropriate under such circumstances.[162]

1. Requisite Consideration of Ameliorative Measures

Courts requiring consideration of ameliorative measures reasoned that undertakings of the left-behind parent and judicial system of the country of habitual residence could "accommodate [both] the interest in the child's welfare [and] the interests of the

account any ameliorative measures (by the parents and by the authorities of the [country of habitual residence]) that can reduce whatever risk might otherwise be associated with a child's repatriation."); Simcox v. Simcox, 511 F.3d 594, 605 (6th Cir. 2007) (citing Walsh v. Walsh, 221 F.3d 204, 221 (1st Cir. 2000) ("[E]ven when confronted with a grave risk of harm, some courts have exercised the discretion given by the [Hague] Convention to nevertheless 'return [the] child to the country of habitual residence, provided sufficient protection was afforded.'").

156 *See* Shaknes & Stringer, *supra* note 52, at 2.

157 *See* Reece, *supra* note 64, at 93.

158 *See In re* Application of Adan, 437 F.3d 381, 397 (3d Cir. 2006); Gaudin v. Remis, 415 F.3d 1028, 1036 (9th Cir. 2005); *Blondin*, 189 F.3d at 249.

159 Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996).

160 *See* Acosta v. Acosta, 725 F.3d 868, 877 (8th Cir. 2013); Baran v. Beaty, 526 F.3d 1340, 1351–52 (11th Cir. 2008); Danaipour v. McLarey, 386 F.3d 289, 303 (1st Cir. 2004).

161 *See Baran*, 526 F.3d at 1348.

162 *See* Simcox v. Simcox, 511 F.3d 594, 606 (6th Cir. 2007); Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005).

country of the child's habitual residence."[163] The seminal case, and the one controlling the district court's decision in *Golan v. Saada*, is *Blondin v. Dubois*.[164] In *Blondin,* the Second Circuit set the precedent that courts were required to consider any and all ameliorative measures if they found a child would face a "grave risk of harm" if returned to their country of habitual residence.[165] The case was rife with graphic allegations against the father, including allegations that he beat the mother and their daughter, wrapped an electrical cord around their daughter's neck, and threatened to kill the mother and father.[166] Interestingly, after remanding the case, the District Court for the Southern District of New York found there were no possible ameliorative measures to take to ensure the safe repatriation of the children.[167] In total, the case took three years, including a five-month delay during which the court contemplated the efficacy of ameliorative measures after making the grave-risk finding analysis.[168]

Cases from the Third and Ninth Circuits followed a similar extensive timeline, remanding cases back to the lower courts for consideration of ameliorative measures as required following a grave-risk finding.[169] The Third Circuit elaborated that the responsibility of the lower court is to "carefully tailor" orders based on the particular circumstances presented, seemingly disapproving the application of broad relief in all cases.[170]

2. Rejection of Consideration of Ameliorative Measures

On the other hand, courts rejecting consideration of ameliorative measures found that realistically, even if a court in the United States could craft sufficient undertakings, the practical enforcement of those undertakings in the country of habitual residence may be nearly impossible.[171] Accordingly, the First, Eighth, and Eleventh Circuits

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163 *Van De Sande*, 431 F.3d at 571–72.

164 Blondin v. Dubois, 189 F.3d 240, 249 (2d Cir. 1999).

165 *See id.* at 250.

166 *Id.* at 243.

167 Blondin v. Dubois, 78 F. Supp. 2d 283, 294 (S.D.N.Y. 2000).

168 *See id.* at 289.

169 *See In re* Application of Adan, 437 F.3d 381, 397 (3d Cir. 2006); Gaudin v. Remis, 415 F.3d 1028, 1036 (9th Cir. 2005) (taking over five years from the time the father filed a petition for return until remand).

170 *See In re Application of Adan*, 437 F.3d at 398.

171 *See, e.g.*, Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005) ("There is a difference between the law on the books and the law as it is actually

found that lower courts need not consider ameliorative measures after a grave-risk finding.[172]

The 2004 First Circuit case of *Danaipour v. McLarey* introduced this line of cases.[173] In *Danaipour*, a mother abducted her two daughters from Sweden (their country of habitual residence) alleging they had been sexually abused by their father.[174] The district court found by clear and convincing evidence that the younger child was sexually abused by her father and that this constituted a "grave risk of harm"; thus, the court denied the children's return to Sweden.[175] The father appealed, arguing that the court was required to consider ameliorative measures to safeguard the children's return.[176] The First Circuit rejected this argument, finding consideration of ameliorative measures would improperly cross the court over into analyzing the merits of the underlying custody dispute between the parties.[177]

The Eleventh Circuit followed *Danaipour*'s reasoning when declining to consider the father's proposed undertakings after denying his petition for return of his children to Australia.[178] The court found evidence of the father's heavy drinking leading to violent behaviors towards the mother in the presence of the minor children proved that the children would be subject to a "grave risk of harm" if returned.[179] The court relied heavily on the US Department of State's guidance, which provides when there is "unequivocal evidence" of a "grave risk of harm," it would be "less appropriate for the court to enter extensive undertakings than to deny the return request."[180] The court also highlighted the issue of the US court losing jurisdiction to enforce any

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applied, and nowhere is the difference as great as in domestic relations. . . . To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise.").

172 *See* Danaipour v. McLarey, 386 F.3d 289, 303 (1st Cir. 2004); Acosta v. Acosta, 725 F.3d 868, 877 (8th Cir. 2013); Baran v. Beaty, 526 F.3d 1340, 1351 (11th Cir. 2008).

173 *See Danaipour*, 386 F.3d at 292.

174 *See id.* at 292.

175 *See id.* at 303–04.

176 *See id.* at 292–93.

177 *See id.* at 293, 303.

178 *See Baran*, 526 F.3d at 1342.

179 *See id.* at 1345–46.

180 *See* Brief for the U.S. as Amicus Curiae app. at 16(a), Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034).

undertakings upon returning the child, rendering any undertakings ineffective if not enforced by the court of habitual residence.[181]

The Eighth Circuit in *Acosta v. Acosta* furthered this reasoning, declining to engage in an undertakings analysis after a grave-risk finding, where the father had verbally, physically, and emotionally abused the mother, including making threats of suicide and homicide in the presence of the children.[182] The *Acosta* court added additional caveats to whether courts should consider ameliorative measures.[183] First, the court pointed out that the father had not made a specific proposal for appropriate undertakings.[184] Second, the court found the mere existence of services that may be appropriate in the country of habitual residence does not establish, without more, that the children would receive sufficient protection from harm.[185]

3. Inappropriate to Consider Ameliorative Measures in Domestic Violence Cases

The Sixth Circuit in *Simcox v. Simcox* drew an express distinction between abduction cases where the goal of returning the child is preserving the status quo prior to wrongful removal versus cases where return of the child would expose them to a "grave risk" of further abuse.[186] The court categorized abduction cases into three categories: (1) cases where the abuse is "relatively minor" and does not arise to the level of "grave risk," rendering the ameliorative measures analysis unnecessary; (2) cases where abuse is substantially more than minor but less obviously intolerable; and (3) cases where abuse is so grave that undertakings must be dismissed.[187] The court opined that even where cases fall in the middle category, courts should only consider ameliorative measures when the court "satisfies itself that the parties are likely to obey them. . . . [and] would be particularly inappropriate, for example, in cases where the petitioner has a history of ignoring

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181 *See Baran*, 526 F.3d at 1350 ("Because the court granting or denying a petition for return lacks jurisdiction to enforce any undertakings it may order, even the most carefully crafted conditions of return may prove ineffective in protecting a child from risk of harm.").

182 *See* Acosta v. Acosta, 725 F.3d 868, 871–77 (8th Cir. 2013).

183 *See id.* at 877.

184 *Id.*

185 *Id.*

186 *See* Simcox v. Simcox, 511 F.3d 594, 607 (6th Cir. 2007).

187 *See id.* at 607–08.

court orders."[188] The Seventh Circuit agreed, again quoting the US Department of State's guidance, finding it is more appropriate for courts to just deny the return request rather than enter extensive undertakings.[189] The Seventh Circuit went one step further and found that consideration of ameliorative measures effectively asks courts to consider whether the country of habitual residence "has good laws" and if so, whether it enforces them.[190] This is an obligation noticeably absent from the plain language of the Hague Convention.[191]

B. *State Judicial Split Pre-*Golan v. Saada

State courts adjudicating return petitions under the Hague Convention experienced a similar jurisdictional split as to whether they considered ameliorative measures following a finding of "grave risk of harm."[192] The following case studies are by no means exhaustive but provide examples of states that extended the federal court approaches set forth above.

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[188] *Id.* at 608; *see also* Walsh v. Walsh, 221 F.3d 204, 221 (1st Cir. 2000) ("[The petitioning parent] has violated the orders of the courts of Massachusetts and . . . the courts of Ireland. There [was] every reason to believe that he [would] violate the undertakings he made to the district court in this case and any barring orders from the Irish courts.").

[189] Van De Sande v. Van De Sande, 431 F.3d 567, 569–70**,** 572 (7th Cir. 2005) (finding the children faced a "grave risk of harm" if returned to their father who abused their mother in their presence, called their mother derogatory names, spanked and hit the children, and threatened to kill everyone in the family).

[190] *See id.* at 571.

[191] *See* Danaipour v. McLarey, 286 F.3d 1, 21 (1st Cir. 2002) ("The concept of 'undertakings' is based neither in the [Hague] Convention nor in the implementing legislation of any nation.").

[192] *See, e.g.*, Wigley v. Hares, 82 So. 3d 932, 944 (Fla. Dist. Ct. App. 2011); *In re* M.V.U., 178 N.E.3d 754, 763, 765–66 (Ill. App. Ct. 2020); Oliver A. v. Diana Pina B., 151 A.D.3d 485, 487 (N.Y. App. Div. 2017); *In re* Custody of A.T., 451 P.3d 1132, 1141–42 (Wash. Ct. App. 2019). *But see* Maurizio R. v. L.C., 135 Cal. Rptr. 3d 93, 105, 109, 112 (Ct. App. 2011); *In re* Marriage of Forrest & Eaddy, 51 Cal. Rptr. 3d 172, 179 (Ct. App. 2006); Turner v. Frowein, 752 A.2d 955, 972 (Conn. 2000). ICARA also grants jurisdiction to state courts over Hague Convention petitions for return of a child. 22 U.S.C. § 9003(a).

1. Consideration of Ameliorative Measures with Burden Shifting and Limitations

California and Connecticut courts extended the *Blondin* court's holding and underlying reasoning, finding courts were required to consider ameliorative measures that could mitigate the "grave risk" before a court mandates return.[193] California courts subsequently expanded the nuances of this analysis, placing the burden on the left-behind parent to prove ameliorative measures and remanding cases where courts improperly conditioned ameliorative measures on acts of the parties or acts beyond the parties' control.[194]

Following Sixth Circuit precedent, California courts have placed the burden on the left-behind parent to introduce evidence of ameliorative measures.[195] This means at trial, the left-behind parent has the burden of proving ameliorative measures exist and would be effective in protecting the minor children.[196] This requires the left-behind parent to recognize and acknowledge threats to the children's safety.[197] Therefore, unlike jurisdictions that place the burden on the abducting parent to prove both "grave risk" and lack of ameliorative measures, courts may deny a petition to return the child solely based on the left-behind parent's failure to acknowledge and propose measures to protect against threats to the children.[198] For example, in *In re Marriage of Emilie D.L.M. and Carlos C.*, the court found the father's failure to concede to his excessive drinking and past acts of domestic violence proven by the mother automatically meant there were no ameliorative measures to mitigate the "grave risk of harm" to his children.[199] Accordingly, the court affirmed denial of the father's petition for return. The court inferred that the left-behind parent would continue his abusive behaviors, and therefore it should not be

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193 *See Maurizio R.*, 135 Cal. Rptr. 3d at 109; *In re Marriage of Forrest*, 51 Cal. Rptr. 3d at 179; *Turner*, 752 A.2d at 972.

194 *See In re* Marriage of Emilie D.L.M. & Carlos C., 279 Cal. Rptr. 3d 330, 332 (Ct. App. 2021); *Maurizio R.*, 135 Cal. Rptr. 3d at 111; *In re Marriage of Forrest*, 51 Cal. Rptr. 3d at 178–79.

195 *See* Simcox v. Simcox, 511 F.3d 594, 606 (6th Cir. 2007). *Compare In re* Application of Adan, 437 F.3d 381, 397 (3d Cir. 2006), *with In re Marriage of Emilie D.L.M.*, 279 Cal. Rptr. 3d at 332.

196 *See In re Marriage of Emilie D.L.M.*, 279 Cal. Rptr. 3d at 334.

197 *See id.*

198 *See id.*

199 *Id.* at 335.

the abducting parent's responsibility to find measures that will protect the children against such behaviors.[200]

Further, in contemplating possible ameliorative measures, California courts have reversed impermissible conditions imposed by said measures.[201] First, California courts have found ameliorative measures could not be dependent on the abducting parent's cooperation.[202] Such a condition meant the abducting parent could refuse to engage and thwart the success of the underlying ameliorative measure.[203] For example, in *Maurizio R.*, the court required the abducting mother to accompany her son to Italy once the father had satisfied court-ordered conditions making it safe for her return.[204] The court opined that such an order allowed the mother to argue the child could not return to Italy without her and refuse to return, thereby giving her an unfair advantage and veto power.[205] Instead, the court instructed the trial court on remand to determine undertakings that would not require the mother's cooperation.[206] As an alternative, the court suggested that if the mother chose not to return with the child to Italy, the court should "appoint a guardian or 'child welfare escort' . . . to escort [the child] back to Italy for further custody proceedings."[207] At that point, the court explained, the appropriate Italian agencies could address any psychological needs of the child to provide necessary services like counseling or support to address any anxiety felt from being separated from his mother.[208]

Second, California courts have found ameliorative measures could not be beyond the power and control of the left-behind parent.[209] Extending the example of *Maurizio R.*, the trial court ordered the father to prove the "criminal charges against [the mother] in Italy have been withdrawn or dismissed and [she] will not be under threat of being arrested or prosecuted if she returns to Italy."[210] The appellate court criticized this condition, pointing out that the decision

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200 *Id.*

201 *See, e.g.*, Maurizio R. v. L.C., 135 Cal. Rptr. 3d 93, 112 (Ct. App. 2011).

202 *Id.*

203 *Id.* at 112–13.

204 *Id.* at 112.

205 *Id.* at 112–13.

206 *Id.* at 113.

207 *Maurizio R.*, 135 Cal. Rptr. 3d at 114.

208 *Id.*

209 *See, e.g.*, *id.* at 114–15.

210 *Id.*

of whether to prosecute the mother was in the Italian courts' discretion, not in the father's.[211] Accordingly, the appellate court found the trial court erred in conditioning the child's return on an assurance from the Italian government.[212] The court further opined it would be improper generally for a court to condition the return of a child on issuance of a foreign court order, effectively coercing the foreign court's actions.[213] These two articulated "impermissible considerations" leave open the question of under what circumstances a court would determine "permissible" ameliorative measures were not available in a child's country of habitual residence.[214]

2. Discretionary Consideration of Ameliorative Measures

Florida, Illinois, New York, and Washington all found that a court need not consider ameliorative measures following a grave-risk finding.[215] In *Wigley v. Hares*, the Florida Fourth District Court of Appeal found the mother did not have a burden to prove that the child's country of habitual residence—St. Kitts and Nevis—was unwilling or unable to ameliorate the "grave risk of harm" accompanying the child's return.[216] Similarly, in *Oliver A. v. Diana Pina B.*, the New York Supreme Court, Appellate Division noted that the wife presented evidence regarding the limited access to domestic violence resources she would have as a noncitizen if ordered to return with the child to Norway, but the court did not appear to require this evidence as part of its grave-risk analysis.[217] This reasoning mirrors the federal precedent discussed above, leaving it to the court's discretion as to whether to consider ameliorative measures.[218]

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[211] *Id.* at 115.

[212] *Id.*

[213] *See Maurizio R.*, 135 Cal. Rptr. 3d at 115.

[214] *See id.* at 108.

[215] Wigley v. Hares, 82 So. 3d 932, 944 (Fla. Dist. Ct. App. 2011); *In re* M.V.U., 178 N.E.3d 754, 756 (Ill. App. Ct. 2020); Oliver A. v. Diana Pina B., 151 A.D.3d 485, 486–87 (N.Y. App. Div. 2017); *In re* Custody of A.T., 451 P.3d 1132, 1141 (Wash. Ct. App. 2019).

[216] *See Wigley*, 82 So. 3d at 944. This holding followed a finding of "grave risk of harm" after the mother testified that the father had threatened to kill the mother's child, beat mother while she was pregnant, locked mother and child outside of the home, and threatened both the mother and the child with a gun. *See id.* at 945–46.

[217] *See Oliver A.*, 151 A.D.3d at 487.

[218] *See id.*; *see also* discussion *supra* Part III.A.2.

C. Golan v. Saada

The Supreme Court of the United States granted certiorari in *Golan v. Saada* to provide clarity as to what extent, if any, state and federal courts adjudicating grave-risk cases must also consider ameliorative measures.[219] This Part reviews this case in its procedural stages.

1. Initial Ruling of the District Court (*Saada I*)

As previewed above, *Golan v. Saada* centered around Narkis Aliza Golan ("Mother"; a United States citizen), who was married to Isacco Jacky Saada ("Father"; an Italian citizen), and lived with their child, B.A.S., in Italy.[220] The couple were in a violent relationship in which they fought frequently, Father physically and verbally abused Mother, and Father at one point, told Mother's family he was going to kill her.[221] While the evidence did not support a history of direct abuse of the child by Father, his abusive behavior was in the presence of the child, constituting indirect abuse.[222] As a result of this abuse, Mother initially sought protection from the Italian police, who referred the matter to Italian social services.[223] Italian social services issued a report affirming Mother's concerns, concluding the family situation posed a "developmental danger" to the child, and recommending Mother and the child be placed in a safe house while the matter was referred to the Italian courts.[224] At that point, Mother retracted her statements, asserted she could handle the situation with Father herself, and stated did not want to leave her home.[225] But, in 2018, Mother took the child to her brother's wedding in the United States and never returned to Italy.[226] Consequently, Father filed for both a return of the child and for sole custody in Italy, and separately initiated a Hague proceeding in the United States requesting the return of the child to Italy.[227]

The District Court for the Eastern District of New York found Father established his prima facie case for return of the child and that

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219 Golan v. Saada, 142 S. Ct. 1880, 1891 (2022).

220 *See id.* at 1889.

221 *See id.* at 1889–90.

222 *See* Honorati, *supra* note 102, at 2.

223 *See id.*

224 *See id.*; *Golan*, 142 S. Ct. at 1891.

225 *See* Honorati, *supra* note 102, at 2.

226 *See Golan*, 142 S. Ct. at 1889.

227 *See id.*

Italy was the child's country of habitual residence.[228] Mother asserted that the grave-risk exception applied, arguing that returning the child to Italy would expose him to a "grave risk of harm."[229] The district court reviewed the report from Italian social services and heard expert testimony that exposure to Father's domestic violence disrupted the child's cognitive and social-emotional development.[230] Further, Father's own expert witness testified he could not control his own anger or take responsibility for his behavior.[231] Based on the evidence presented, the court found there was a "grave risk of psychological harm" to the child.

Rather than end the inquiry there and allow the child to remain in the United States, the district court found it was required under Second Circuit case law to determine whether there were any ameliorative measures available that would minimize the "grave risk of harm" and allow a safe return of the child.[232] Accordingly, the court considered a laundry list of ameliorative measures proposed by Father and found these measures ameliorated the "grave risk" to the child.[233] Accordingly, the district court ordered the child's return to Italy.[234]

2. Appeals to the Second Circuit and First Remand to the District Court

i. *Saada II*

The Second Circuit vacated the district court's order, holding that the district court's factual findings cast wide doubt on Father's intent to comply with the ordered ameliorative measures, and the proposed ameliorative measures were insufficient to eliminate the "grave risk of

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228 *See id.*

229 *See id.* at 1889–90.

230 *See id.* at 1890.

231 *See id.*

232 Saada v. Golan, No. 18-CV-5292, 2019 WL 1317868, at *18 (E.D.N.Y. Mar. 22, 2019).

233 *See id.* at *19 (finding the father's proposed ameliorative measures included the following: (1) providing financial support for expenses pending a decision in the Italian court as to financial support, (2) having no contact with the mother or child until the Italian courts had determined the child custody issue, (3) pursuing dismissal of the criminal charges he had filed against the mother, (4) starting cognitive behavioral therapy, (5) waiving any right to legal fees or expenses under the Hague Convention, and (6) living separately from the mother).

234 *See Golan*, 142 S. Ct. at 1891.

harm" as they were not directly enforceable in Italy.[235] The Second Circuit held that its precedent required lower courts to always consider any and all measures that could reduce the risk of harm to a child before returning a child.[236] The Second Circuit therefore remanded the case to the district court to determine whether an Italian court itself could issue an order (or otherwise enforce provisions) prohibiting Father from approaching Mother or visiting their child without her consent.[237]

ii. *Saada III*

On remand, the district court spent nine months following the directives of the Second Circuit, examining all measures available to ensure the child's safe return to Italy.[238] The court directed the parties to seek assistance through the Italian courts.[239] Following an application by Father in the Court of Milan, the court issued a protective order requiring that Father stay away from Mother for one year, ordered an Italian social services agency to monitor Father's parenting classes and therapy, and required supervision during all visits between Father and child.[240] With these ameliorative measures in place, the district court again ordered the child's return to Italy.[241] It also ordered Father to pay Mother $150,000 to facilitate the child's return to Italy, cover their living costs to resettle, and resolve Mother's concerns about vulnerability as a noncitizen with limited Italian language skills.[242]

iii. *Saada IV*

Mother again appealed to the Second Circuit.[243] This time on appeal, the Second Circuit affirmed the district court, finding it did not clearly err in finding that Father would likely comply with the Italian protective order and social services agency.[244] After attempting

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235 *See* Saada v. Golan, 930 F.3d 533, 540 (2d Cir. 2019).

236 *See id.* at 541.

237 *See id.* at 542.

238 *See* Saada v. Golan, No. 1:18-CV-5292, 2020 WL 2128867, at *1 (E.D.N.Y. May 5, 2020).

239 *See id.*

240 *See id.* at *3–4.

241 *See id.* at *4.

242 *See id.* at *5.

243 *See* Saada v. Golan, 833 F. App'x 829, 834 (2d Cir. 2020).

244 *See id.*

to file a petition for rehearing in the Second Circuit, which was denied, and a motion to vacate the district court judgment, which was dismissed, Mother resorted to filing a petition for writ of certiorari to the Supreme Court, which was granted.[245]

3. Supreme Court of the United States

The Supreme Court granted certiorari on a limited and specific issue:

> [W]hether the Second Circuit properly required the [d]istrict [c]ourt, after making a grave-risk finding, to examine a full range of possible ameliorative measures before reaching a decision as to whether to deny return, and to resolve a division in the lower courts regarding whether ameliorative measures must be considered after a grave-risk finding.[246]

Therefore, the Supreme Court did not address specific issues surrounding Mother and Father. The Court did not consider whether return of the child would expose the child to a "grave risk of harm," whether there was domestic violence, or whether or not the ameliorative measures proposed by Father were sufficient.[247] Rather, the opinion provided two key takeaways as it related to consideration of ameliorative measures.[248] First, it clarified that determining a "grave risk of harm" is a separate issue from considering potential ameliorative measures.[249] Second, it held courts have discretion to consider ameliorative measures and outlined guiding factors courts should follow in exercising this discretion.[250]

First, in apparent divergence from the 2020 Guide of Good Practice, the Supreme Court clarified, "the question whether there is a grave risk . . . is *separate* from the question whether there are ameliorative measures that could mitigate the risk."[251] At first glance, this may seem like an inconsequential distinction. But, if the Supreme

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245 *See* Honorati, *supra* note 102, at 3.

246 Golan v. Saada, 142 S. Ct. 1880, 1891 (2022).

247 *See id.* at 1890–91.

248 *See id.* at 1892–93.

249 *Id.* at 1892 ("The question whether ameliorative measures would be appropriate or effective will often overlap considerably with the inquiry into whether a grave risk exists. In many instances, a court may find it appropriate to consider both questions at once." (citations omitted)).

250 *Id.* at 1893.

251 *Id.* at 1892 (emphasis added).

Court had combined the two issues, it would have effectively required courts to consider ameliorative measures concurrently with making a grave-risk finding.[252] This interpretation would arguably decrease the discretion in cases where courts would determine no risk existed in the first place due to the existence of potential ameliorative measures.[253] In contrast, separating the two issues allows courts their full discretion to first consider whether a "grave risk of harm" exists, and then evaluate potential ameliorative measures.[254]

Second, relying on the plain language of Article 13(b), the Court held that following a district court's grave-risk finding, nothing in the text of the Hague Convention requires courts to consider every ameliorative measure before denying a petition to return the child.[255] Rather, it is in the court's "discretion whether [it] consider[s] ameliorative measures."[256] The Court provided that a district court may "reasonably decline" to consider ameliorative measures if (1) neither party raises them; (2) they are unworkable; (3) they draw the courts into determinations that should be adjudicated in custody proceedings; or (4) "the grave risk [is] so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate."[257]

To provide further guidance to future courts, the Court articulated three factors courts should apply when determining whether and to what extent, to consider ameliorative measures.[258] First, a court considering ameliorative measures "must prioritize the child's physical and psychological safety."[259] Where ameliorative measures will not be sufficient due to the gravity of the risk, a court may decline to consider them.[260] The Court gave examples of prior sexual abuse, "physical or psychological abuse, serious neglect, and domestic violence."[261] Likewise, a court may opt to protect the child's physical and psychological safety by declining to consider ameliorative measures if it "reasonably expects they will not be followed."[262]

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252 *See* Honorati, *supra* note 102, at 6.

253 *See id.*

254 *See id.*

255 *Golan*, 142 S. Ct. at 1892.

256 *Id.* at 1893.

257 *Id.* at 1895.

258 *Id.* at 1893–95.

259 *Id.* at 1893.

260 *Id.* at 1893–94.

261 *Golan*, 142 S. Ct. at 1894.

262 *Id.*

Second, the court should keep in mind that when addressing return petitions, it does not usurp or otherwise replace the future custody determination of a court in the country of habitual residence.[263] The scope of the hearing on the petition for return should be limited to determining jurisdiction of the custody dispute, not resolving the dispute itself.[264] Accordingly, the court's consideration of ameliorative measures should be limited to measures necessary to ensure the child's safety before the entry of a final order in the child's country of habitual residence.[265]

Finally, if courts are to consider ameliorative measures, they must do without impeding the Hague Convention's goal of expeditious child return proceedings.[266] Bearing in mind that following a ruling on a petition for return, the parties still must adjudicate child custody in the country of habitual residence, a nine-month examination as in *Golan* was well beyond the time a child should be in limbo between countries.[267]

The Supreme Court remanded the case back to the district court for a second time, finding that the Second Circuit "improperly weighted the scales in favor of return" by requiring the district court to consider every possible ameliorative measure for the child's return.[268] On remand, the Supreme Court directed the district court to engage in the appropriate discretionary inquiry regarding ameliorative measures.[269] Importantly, the Court's opinion did not in any way limit a court's discretion to refuse return of a child even if it does not consider ameliorative measures.[270]

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263 *Id.*

264 *Id.*

265 *See id.*

266 *Id.*

267 *See Golan*, 142 S. Ct. at 1894–95.

268 *Id.* at 1895.

269 *Id.* at 1895–96.

270 Brief of Amici Curiae, Professors of Law Linda J. Silberman et al., In Support of Respondent at 18, *Golan*, 142 S. Ct. 1880 (No. 20-1034) [hereinafter Brief of Amici Curiae Professors].

4. Second Remand to the District Court and Aftermath

The district court upheld its prior decision to return the child to Italy.[271] The court found, irrespective of the Second Circuit precedent, it would have exercised its discretion to consider ameliorative measures, and these ameliorative measures would be sufficient to mitigate the "grave risk of harm" to the child if ordered to return to Italy.[272] The Supreme Court urged the district court to "move as expeditiously as possible to reach a final decision without unnecessary delay" given the already significant delay in the case.[273] Nevertheless, as of November 2023, the case is still pending after five years of extensive litigation.[274] The parties' child, two years old at the commencement of the proceeding, is now seven and has not returned to Italy since 2018.[275]

Mother appealed the district court's ruling again, but sadly, she was found dead in her New York City apartment in October 2022, having died of natural causes.[276] The Second Circuit subsequently dismissed her appeal and remanded the case back to the district court.[277] As of November 2023, the case appears to be far from over.[278] Custody and visitation proceedings between Mother's sister (now a party to the case and primary custodian for the child) and Father have been bounced between the Kings County Family Court (New York state court) to the District Court for the Eastern District of New York.[279]

In analyzing custody and visitation, the Kings County Family Court issued an ex parte temporary order for protection directing Father to "stay away" from B.A.S.[280] On February 16, 2023, the District Court for the Eastern District of New York vacated the Kings County Family Court's temporary order for protection under the Hague

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271 Saada v. Golan, No. 18-CV-5292, 2023 WL 2184601, at *2 (E.D.N.Y. Jan. 23, 2023).

272 *See id.* at *2.

273 *See Golan*, 142 S. Ct. at 1896.

274 *See Saada*, 2023 WL 2184601, at *1.

275 *See* Honorati, *supra* note 102, at 2.

276 Molshree A. Sharma, Golan v. Saada*: Protecting Domestic Abuse Survivors in International Child Custody Disputes*, 56 FAM. L.Q. 251, 268 (2023).

277 *Id.*; *Civil Docket for Saada et al. v. Golan*, E.D.N.Y. (last visited Nov. 12, 2023) (on file with author).

278 *See Civil Docket for Saada et al. v. Golan*, E.D.N.Y. (last visited Nov. 12, 2023) (on file with author).

279 *See id.*

280 *See id.*

Convention and ordered visitation for Father.[281] Further, in or around June 2023, Father filed a custody proceeding pertaining to the child in the Juvenile Court of Milan.[282]

Regarding return of the child to Italy, Mother's sister filed in the District Court for the Eastern District of New York, arguing Mother's death was a substantial change in circumstances warranting reconsideration of the court's return order as the ameliorative measures were to take effect upon the child's return to Italy *with his* mother, who was now deceased.[283] As of November 2023, the custody cases in the United States and Italy are still pending, as is the Hague return proceeding.[284] The civil docket for the case paints a picture of significant acrimony between the parties and inability to reach resolutions despite referral to mediation and multiple communications and conferences between judges domestically and internationally regarding the case.[285]

In terms of the visits themselves, the child has exercised several visits with his father in New York.[286] During the first unsupervised visit, the child returned with bruises on his leg and arm "in the shape of three fingers."[287] Due to the child's trauma disorders and autism, the filings indicate he could not communicate the source of the bruising.[288]

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281 *See id.* (citing Holder v. Holder, 305 F.3d 854, 865 (9th Cir. 2002)).

282 *See id.*

283 *See* Honorati, *supra* note 102, at 11.

284 *See Civil Docket for Saada et al. v. Golan*, E.D.N.Y. (last visited Nov. 12, 2023) (on file with author).

285 *See id.* (outlining communications between Judge Daniela Bacchetta, the Italian representative to the International Hague Network of Judges, and the Honorable Mary W. Sheffield of the Missouri Court of Appeals, the US representative to the International Hague Network of Judges; conference between Judge Waksberg of the Kings County Family Court and the Honorable Ann M. Donnelly of the Eastern District of New York; and mediation of the parties with mediator Michael K. Stone).

286 *See id.*

287 *See id.* (quoting a recent court filing).

288 *See id.*

D. *Emerging Case Law Post*-Golan

In the year since the Supreme Court decided *Golan*, the cases emerging from the federal district courts already highlight the confusion courts are experiencing when considering "ameliorative measures."[289] Although the Court held courts have discretion to decide whether to consider ameliorative measures following a finding of "grave risk,"[290] the limited ruling leaves open the question of what circumstances justify not considering ameliorative measures at all, and which of the three guiding factors advanced by the Court should be prioritized, if any.[291]

This Part explores the cases decided over the past year that expose the need for a consistent judicial framework for courts considering possible ameliorative measures.

1. Consideration of Selective Factors

The first question seemingly left up to interpretation by state and federal courts is whether the three guiding factors articulated by the Supreme Court should be weighed equally when considering ameliorative measures, and whether the court must consider all three factors at all.[292]

In *Braude v. Zierler*, decided shortly after *Golan*, the father filed a petition under the Hague Convention and ICARA seeking immediate return of the minor children to Canada.[293] In response, the mother asserted a grave-risk exception applied, based on a clinical psychologist's testimony that the father's suicidal behavior would create a risk of psychological harm to the children, the father's history of angry and manipulative behavior including physical abuse of the mother, and the father's access to and possession of child pornography

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289 *See* Mejia Rodriguez v. Molina, 628 F. Supp. 3d 905, 914 (S.D. Iowa 2022); Braude v. Zierler, No. 22-CV-03586, 2022 WL 3018175, at *10 (S.D.N.Y. July 29, 2022); Garner v. Harris, 641 F. Supp. 3d 343, 355, 361 (E.D. Tex. 2022); Radu v. Shon, 62 F.4th 1165, 1171, 1175 (9th Cir. 2023).

290 *See* Golan v. Saada, 142 S. Ct. 1880, 1893 (2022).

291 *See* discussion *supra* Part III.C.3.

292 *See Braude*, 2022 WL 3018175, at *10 ("In considering ameliorative measures, the Court must (1) 'prioritize the child's physical and psychological safety'; (2) 'abide by the [Hague] Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute'; and (3) 'accord with the [Hague] Convention's requirement that courts act expeditiously in proceedings for the return of children.'").

293 *Id.* at *5.

and attendant increased risk of sexual abuse.[294] The District Court for the Southern District of New York agreed, finding these factors together constituted a "grave risk of harm" to the child.[295]

Following its grave-risk finding, the court noted the father consented to eight ameliorative measures, including no contact with the mother upon her return, continual therapy and medication for his mental health diagnoses, continuing to reside with his parents, and continuing to comply with Jewish Family and Child Services (JFCS).[296] Although the court's decision referred to the three factors outlined in *Golan*, its analysis of the ameliorative measures seemingly only focused on whether the measures would "prioritize the children's physical and psychological safety."[297] Specifically, the court found none of the measures would satisfactorily address the father's host of mental health issues, in particular, his borderline personality disorder.[298] On top of that, none of the measures would mitigate against the father's aggressive behavior and continued viewing of and access to child pornography despite his bail conditions that he could not possess a device capable of accessing the internet.[299] Nevertheless, the court did not directly address in its ruling whether the ameliorative disputes would usurp the role of the Canadian court in making a final child custody determination or whether considering the measures would unduly delay the proceedings from finalizing.[300] This suggests courts view the *Golan* factors as guidance but are not making specific findings of fact as to each.

In *Garner v. Harris*, the father had severe depression and anxiety but refused to take the antidepressant prescribed by his doctor.[301] The father engaged in erratic and violent behavior, exacerbated by his

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294 *See id.* at *8–9. The court ultimately distinguished the father's access to and possession of child pornography in this case from *Kufner v. Kufner*, where the respondent alleged the petitioner "engaged the children in a photo session disguised to create child pornography," because the father in *Braude* "admitted to watching child pornography and having sexual fantasies involving children." *See id.* at *9 (quoting Kufner v. Kufner, 480 F. Supp. 2d 491, 509 (D.R.I. 2007).

295 *See id.* at *8.

296 *See id.* at *10.

297 *Id.*

298 *See Braude*, 2022 WL 3018175, at *10.

299 *Id.*

300 *See id.*

301 Garner v. Harris, 641 F. Supp. 3d 343, 349 (E.D. Tex. 2022).

regular alcohol and marijuana use.[302] The parties' adult child testified that in addition to his suicidal diary entries, the father told her he would "slice his neck open with [a] machete that he had in his room."[303] The father would verbally and physically abuse the mother and the children, threatening to "drive him[self] . . . and the boys off [a] cliff" and to burn the house down with the children and their mother inside.[304] Unlike the court in *Braude*, the District Court for the Eastern District of Texas did not even reference the Supreme Court's three guiding factors.[305] The court addressed the only ameliorative measure advanced by the father at hearing: proposing that the two minor children could live with one of the parties' adult children.[306] Nevertheless, the court did not advance or consider any other ameliorative measure, merely concluding under these circumstances, no ameliorative measures existed to mitigate the "grave risk of harm."[307]

2. Consideration of Ameliorative Measures in Cases of Extreme Prior Violence

Following *Golan*, courts are also divided as to whether they should still consider ameliorative measures when evidence supports findings of extreme, prior domestic violence. In *Morales v. Sarmiento*, the District Court for the Southern District of Texas rejected the efficacy of ameliorative measures based on the extreme nature of the prior domestic violence and lack of any remorse of the father for his past abuse.[308] The court found as a result of the father's prior abuse, the child suffered from a host of mental health issues, including hyperactivity, anxiety, and depression, which his therapist testified was consistent with a post-traumatic stress disorder diagnosis.[309] The court noted that under these circumstances, even though the father did not address adequacy of proposed ameliorative measures, any measures would not be adequate.[310] This case builds upon prior case law where,

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302 *Id.*

303 *Id.* at 350.

304 *Id.* at 352 (alteration in original).

305 *See id.* at 361.

306 *See id.* at 355.

307 *See Garner*, 641 F. Supp. 3d at 361.

308 *See* Morales v. Sarmiento, No. 4:23-CV-00281, 2023 WL 3886075, at *13–14 (S.D. Tex June 8, 2023); *Garner*, 641 F. Supp. 3d at 361.

309 *See Morales*, 2023 WL 3886075, at *13.

310 *See id.* at *14.

in extreme cases of prior abuse, courts should not require separate consideration of ameliorative measures.[311]

Conversely, in *Nisbet v. Bridger*, the District Court for the District of Oregon still considered ameliorative measures despite similarly extreme facts underlying the father's prior violent actions.[312] In *Nisbet*, the left-behind father was sentenced to indefinite confinement in a psychiatric facility in England after he killed his mother by stabbing her in the neck with a pocketknife.[313] Additionally, the court found even after the father was confined, he threatened the mother, harassed her, and "routinely smashed his head against walls in front of others."[314] Although there were no allegations of domestic violence by the father directly against his children, the court relied on prior case precedent supporting the proposition that "courts may consider evidence of a parent's history of abuse, or threats of abuse, to determine the probability and magnitude of risk to the child."[315] Despite these findings, the court still took the extra step to analyze the father's proposed ameliorative measures of having the children live under the supervision of a live-in nanny or his friend.[316] Although the court ultimately found these measures unworkable, it still devoted the time and judicial resources to analyze them.[317]

3. Ameliorative Measures Not Requested by Parties

Another question left open in the wake of *Golan* is the extent to which a court should sua sponte consider ameliorative measures even if not requested by the parties. In *Mejia Rodriguez v. Molina*, the court held the child did not face a "grave risk of harm" upon return but nevertheless opined that it would have entertained entry of ameliorative measures if proposed by the parties.[318] Neither party in the case proposed any ameliorative measures for the court's consideration.[319] But the court found under *Golan*, it still could impose

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311 *See id.*; Díaz-Alarcón v. Flández-Marcel, 944 F.3d 303, 314 (1st Cir. 2019).

312 *See* Nisbet v. Bridger, No. 3:23-cv-00850-IM, 2023 WL 6998081, at *7–8 (D. Or. Oct. 24, 2023) (analyzing whether the children faced a "grave risk of harm" despite ultimately holding Scotland was not their country of habitual residence).

313 *See id.* at *4–5.

314 *See id.* at *8.

315 *See id.*; Gomez v. Fuenmayor, 812 F.3d 1005, 1014 (11th Cir. 2016).

316 *See Nisbet*, 2023 WL 6998081, at *12.

317 *See id.*

318 *See* Mejia Rodriguez v. Molina, 628 F. Supp. 3d 905, 918–19 (S.D. Iowa 2022).

319 *See id.* at 919.

measures "obviously suggested by the circumstances of the case."[320] The court noted that even though it did not find the respondent, the father, met the burden of proving the grave-risk exception, it still would have preferred to establish ameliorative measures prior to ordering the return of the child to Honduras.[321] Weighing the desire for ameliorative measures against the delay requesting additional materials would cause, the court declined to impose any measures or request briefing on any.[322] This decision suggests that even where there is no grave-risk finding, some courts read *Golan* as suggesting they may still entertain proffer of ameliorative measures in conjunction with a return order.

4. Requiring Additional Burden of Proof

A final point lacking clarity is whether a court should assign a burden of proof on the party proposing an ameliorative measure to prove the reasonableness of said measure.[323] In decisions issued prior to *Golan*, the First, Second, Sixth, and Eighth Circuits adopted the view that when a petitioner asserts a measure to ameliorate the "grave risk of harm," courts should find the petitioner has the burden of establishing "the measure is reasonably appropriate and effective."[324] In *Radu v. Shon*, the Ninth Circuit declined to require petitioners to meet this additional burden of proof.[325] But, in her concurrence nine months after *Golan*, Chief Judge Murguia opined that the court should assign an additional burden of proof on petitioners moving forward to "assist[] the district courts' decision-making and guide[] their discretion as to the measures raised by a petitioner seeking to mitigate a grave risk of harm."[326] Chief Judge Murguia indicated this would "not preclude the district courts from [still] considering . . . ameliorative measures not raised by the parties that are 'obviously suggested by the circumstances of the case.'"[327]

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320 Golan v. Saada, 142 S. Ct. 1880, 1893 (2022).

321 *Mejia Rodriguez*, 628 F. Supp. 3d at 919.

322 *Id.*

323 *See* Radu v. Shon, 11 F.4th 1080, 1089 (9th Cir. 2021).

324 Radu v. Shon, 62 F.4th 1165, 1176 (9th Cir. 2023) (Murguia, J., concurring) (first citing Simcox v. Simcox, 511 F.3d 594, 611 (6th Cir. 2007); then citing Acosta v. Acosta, 725 F.3d 868, 877 (8th Cir. 2013); and then citing Danaipour v. McLarey, 286 F.3d 1, 21 (1st Cir. 2002)); Blondin v. Dubois, 189 F.3d 240, 245 (2d Cir. 1999).

325 *See Radu*, 11 F.4th at 1089.

326 *Radu*, 62 F.4th at 1177 (Murguia, J., concurring) (alteration in original).

327 *Id.* (quoting Golan v. Saada, 142 S. Ct. 1880, 1893 (2022)).

On remand, the court emphasized the need for increased judicial expediency in Hague Convention cases and denied the mother's request for another evidentiary hearing.[328] Instead, the court found the record was clear, and no new evidence existed regarding the father's interaction with the children that would warrant a subsequent hearing.[329]

IV. RECOMMENDATION

The Supreme Court held in *Golan* that the Hague Convention and ICARA do not require an analysis of ameliorative measures after a finding of "grave risk of harm" under Article 13(b).[330] This was a necessary first step in protecting the plain language of the Article 13(b) exception, as mandating an analysis of ameliorative measures would have otherwise substantially limited a litigant's ability to successfully assert the "grave risk of harm" exception.[331] But the Supreme Court did not go so far as to say that courts should *never* consider ameliorative measures after finding a "grave risk of harm" exists, and the Court failed to articulate under what circumstances, if any, a court would abuse its discretion if it did not consider ameliorative measures.[332]

As set forth in Part III, the emerging case law in the year following the *Golan* decision is already setting courts up for another split in approaches on how to consider ameliorative measures. This Part advances a proposed procedural framework guided by the *Abbott* framework and the judicial approaches set forth above.

A. *Parallel Objectives and Policy Concerns of Non-Hague Domestic Violence Proceedings*

Given their similar objectives and underlying policy concerns, state and federal courts adjudicating petitions for return under the Hague Convention should adopt a framework parallel to how state courts adjudicate family violence cases in domestic child custody proceedings. Like the Hague Convention, in domestic cases brought under the Uniform Child Custody Jurisdiction and Enforcement Act, the profile of the "fleeing parent" has shifted substantially over the past

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328 *See id.* at 1172, 1176.

329 *See id.* at 1172.

330 *See Golan*, 142 S. Ct. at 1891–92.

331 *See generally* Shaknes & Stringer, *supra* note 52.

332 *See Golan*, 142 S. Ct. at 1893.

few decades. Early iterations of the act were drafted presuming the parent fleeing from one state to another was the wrongdoer. But in recent decades, courts have found the fleeing party was often a victim of domestic abuse.[333] Also similar to Hague Convention cases, the domestic violence is sometimes only between spouses, but studies have found there is a high correlation between perpetrators of violence against their spouse and the risk of committing abuse against their child in a post-separation household.[334]

In domestic violence cases involving minor children, abusers often leverage the court system to pull survivors back into unbalanced power dynamics where children are used as "pawns," or worse, abused themselves.[335] Similarly, abusers file proceedings under the Hague Convention as a means to exercise coercive control over the fleeing parent and child to instill fear across country boundaries.[336] This coercive control and the accompanying fear are further worsened when courts spend months extensively contemplating ameliorative measures that may or may not be enforced by the court of habitual residence upon the child's return.[337] Following the Hague Convention's general directive and the *Golan* Court's guidance favoring expedient proceedings, courts should adopt a judicial framework that prioritizes expediency in resolution.

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[333] *See* Hector G. v. Josefina P., 771 N.Y.S.2d 316, 323 (Sup. Ct. 2003).

[334] *See* Emily J. Salisbury et al., *Fathering by Partner-Abusive Men: Attitudes on Children's Exposure to Interparental Conflict and Risk Factors for Child Abuse*, 14 CHILD MALTREATMENT 232, 240 (2009), https://doi.org/10.1177/1077559509338407 (finding almost 50 percent of men who had previously engaged in domestic violence had a heightened risk of committing child abuse post-separation).

[335] *See* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 20 (1999) ("Since batterers know that nothing will devastate the victim more than seeing her children endangered, they frequently use the threat of obtaining custody to exact agreements to their liking."); Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1081 (2011); Brief of Child Just., *supra* note 14, at 16.

[336] *See* Brief of Child Just., *supra* note 14, at 16; AUSTRALASIAN INST. OF JUD. ADMIN., NATIONAL DOMESTIC AND FAMILY VIOLENCE BENCH BOOK, § 4.2 (2023) (ebook), https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/factors-affecting-risk ("[I]t is common for perpetrators to continue or escalate the violence after separation in an attempt to gain or reassert control over the victim or to punish the victim for leaving the relationship." (alteration in original)).

[337] *See* Brief of Child Just., *supra* note 14, at 16–17.

B. *Proposed Judicial Framework*

Based on the parallel policy rationales set forth above, the following proposed judicial framework advances a procedure similar to the one that currently exists for protective orders and temporary restraining orders and injunctions. Restricting court appearances in this way promotes judicial and economic efficiency while affording sufficient protection for minor children. State and federal circuit court practitioners should consider publishing local guidance for practitioners and adopting a framework and best practices to promote consistent adjudication of Article 13(b) cases.[338]

1. Initial Appearance

At the initial court appearance, the court should have four primary responsibilities. First, to docket the case on an expedited docket if the county clerk has not already done so. Second, to review the petition for return and ensure it alleges the necessary components of wrongful abduction. If so, the court should set a briefing schedule on the petition and enter a case management order setting forth deadlines for discovery, deposition, and trial. Third, the court should make a specific finding as to whether the child has been exposed to or subjected to domestic violence in their country of habitual residence. Finally, the court should appoint an attorney for the child with the responsibility of articulating the child's preferences, if applicable, to the court at final trial.

i. Expedited Docket

The preamble and Article 11 of the Hague Convention emphasize the Hague Convention's objective to decide international child abduction cases expeditiously.[339] A 2015 survey of Hague Convention cases worldwide found the United States' average of 208 days to reach

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[338] *See, e.g.*, 2A MAUREEN MCBRIEN & PATRICIA A. KINDREGAN, MASSACHUSETTS PRACTICE SERIES: FAMILY LAW AND PRACTICE § 65:2 (4th ed. 2023); WILLIAM P. HOGOBOOM ET AL., CALIFORNIA PRACTICE GUIDE: FAMILY LAW 7:661.7 (2023) ("[T]he [Hague] Convention explicitly recognizes any consideration of ameliorative measures must *prioritize* the child's physical and psychological safety. . . . not usurp the role of the court that will adjudicate the underlying custody dispute . . . . [and] accord with the [Hague] Convention's requirements that courts act 'expeditiously in proceedings for the return of the children.'").

[339] *See* Hague Convention, *supra* note 9, pmbl., art. 11 ("Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their *prompt return* to the [s]tate of their habitual residence, as well as to secure protection for rights of access . . ." (emphasis added)).

a final resolution of a case lagged significantly behind the global average of 164 days.[340] Both averages are substantially longer than the six weeks from petition to resolution suggested in the Hague Convention.[341] Member states like Israel follow regulations that mandate a six-week period for conclusion of legal proceedings,[342] while others follow a six-week period as a nonbinding point of reference.[343]

As outlined above, the consideration of ameliorative measures delays these proceedings even further, causing children subject to these proceedings to experience heightened stress and trauma while in limbo.[344] Often, petitioning parents seek the immediate issuance of a temporary restraining order contemporaneously with the filing of their petition for return.[345] The purpose of the temporary restraining order is to order the children not be removed from the jurisdiction of the court and to permit the court to take possession of the children's passports.[346] Concurrently with the issuance of a temporary restraining order, the court should set a date, ideally within six weeks of the filing of the petition, on which the court will conduct a final trial on the merits of the petition. At that time, the court would receive documentary evidence and sworn testimony in addition to the written proofs outlined above. The court should set deadlines for evidentiary disclosures at the initial court appearance so the case is kept on a tight leash.[347] The number of cases filed on an annual basis is still comparatively small,[348] particularly if spread out across state and federal courts in the United States, so it should not overly burden the docket to expedite these hearings.

This proposed procedure is not only in line with requests for temporary restraining orders and permanent injunctions but also follows the guidance of state court adjudications of domestic violence proceedings. In these cases, litigants appear in court seeking

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340 *See* Reece, *supra* note 64, at 98.

341 *See* Hague Convention, *supra* note 9, at art. 11.

342 *See* § 110(a), Family Court Regulations (Procedures), 5781–2020 (Isr.).

343 *See* Brief of the Int'l Acad. of Fam. Laws. as Amicus Curiae in Support of Respondent at 3–4, Golan v. Saada, 142 S. Ct. 1880 (2022) (No. 20-1034) [hereinafter Brief of the Int'l Acad. of Fam. Laws.].

344 *See* Reece, *supra* note 64, at 121.

345 *See, e.g.*, Simcox v. Simcox, 511 F.3d 594, 594 (6th Cir. 2007); Garner v. Harris, 641 F. Supp. 3d 343, 348 (E.D. Tex. 2022).

346 *See Garner*, 641 F. Supp. 3d at 347–48.

347 *See id.*

348 *See* U.S. DEP'T OF STATE, *supra* note 5, at 1.

emergency protective orders based primarily on written proofs and limited discovery.[349] The court sets a return date for a hearing on the merits to determine whether the court should enter a protective order for an extended period of time or indefinitely.[350]

In cases where the left-behind parent has previously perpetrated abuse against the fleeing parent, courts should avoid granting continuances and extensions whenever possible. Granting additional continuances and extensions of court proceedings seemingly gives abusers the power to drag the abused back into the country from which they fled and forces them to litigate custody in a foreign court where they may not know the native language.[351]

ii. Required Written Proofs

Courts should consider adopting standing orders, judicial training guides, bench books, or local court rules mandating certain allegations be contained in initial petitions for return to promote the consistent and efficient use of the petition. Regarding the scope of the petition, the standing order should limit proofs and evidence to those which establish an exception to return of the child, and those which are relevant to the mitigation of any identified risk.[352] This would serve as a basis to bar any evidence regarding the merits of a future underlying custody dispute as irrelevant, generally excluding evidence on educational benefits, parenting styles, or "best interests" of a child.[353]

Regarding requirements of the initial petition for return, the petitioning parent should be required to plead alternate relief whereby the petitioner pleads that the child should be returned because there is no "grave risk of harm," but in the alternative, the

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[349] *See, e.g.*, 750 ILL. COMP. STAT. 60/214 (2021); TEX. FAM. CODE ANN. § 83.001 (West 2001).

[350] *See, e.g.*, 750 ILL. COMP. STAT. 60/220 (2021); TEX. FAM. CODE ANN. § 85.025 (West 2023).

[351] *See* Brief of Child Just., *supra* note 14, at 16–17; *see also* Golan v. Saada, 142 S. Ct. 1880, 1889 (2022) (noting that fleeing Mother had limited Italian language skills and return to Italy would require her to litigate custody in Italy).

[352] *See* NAT'L CTR. FOR MISSING & EXPLOITED CHILD., LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 49–50, 56 (2012), https://www.missingkids.org/content/dam/missingkids/pdfs/publications/pdf3a.pdf.

[353] *See Golan*, 142 S. Ct. at 1894 (advising courts of the [Hague] Convention's requirement that when addressing petitions for return, the court should not usurp the role of the court that will adjudicate the underlying custody dispute).

parent advances ameliorative measures that would obviate any perceived risk. This requirement follows the Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings ("Practice Guidance"),[354] which requires left-behind parents to include details of "any protective measures [they seek] (including . . . where appropriate, undertakings) [that] the applicant is prepared, without prejudice to his or her case, to offer for the purpose of securing the child's return."[355] Particularly where a petitioning parent knows there are issues of domestic violence, they should include any measures they are willing to agree to for the purpose of protecting the child from future harm upon return.[356] Part of this description should be an analysis of how to ensure the efficacy and enforceability of those measures. Likewise, in any responsive pleading, the abducting parent should include details of any protective measures they are seeking in the event the court finds there is no "grave risk of harm" or orders the child's return.[357] Requiring attorneys to raise potential protective measures earlier in the proceeding will allow each party to gather relevant evidence regarding availability, efficacy, and enforcement of these measures in a more expedient manner without sacrificing the evaluation of the underlying allegations of any "grave risk of harm" or expecting a court to consider ameliorative measures on its own accord as made evident by the circumstances of a particular case.[358]

From the initial court appearance, the court should enter a discovery control plan setting tight deadlines on the investigation and disclosure of any proposed ameliorative measures. This may include investigating existing therapists and their respective availability, identifying sources of potential financial support, and researching judicial procedures in the court of habitual residence. The court should not require expert testimony or the production of medical records to make a finding of "grave risk of harm," particularly where

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354 *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* (2023) [hereinafter *Practice Guidance*], https://www.judiciary.uk/wp-content/uploads/2023/03/Presidents-Practice-Guidance-on-Case-Management-and-Mediation-of-International-Child-Abduction-Proceedings.pdf.

355 Trimmings & Momoh, *supra* note 121, at 10–11 (citing *Practice Guidance*, *supra* note 354).

356 *See Practice Guidance*, *supra* note 354.

357 *See* Trimmings & Momoh, *supra* note 121, at 11 (citing *Practice Guidance*, *supra* note 354).

358 *See* GUIDE TO GOOD PRACTICE, *supra* note 41, at 34; Trimmings & Momoh, *supra* note 121, at 11.

there is substantial other evidence from the parties but should consider it if available.[359]

Although this may limit the amount of time allocated to a final trial and likely increases the written proofs submitted, this procedure would not be inconsistent with other countries' approaches to the "grave risk of harm."[360] For example, United Kingdom courts rarely hear oral evidence on the underlying factual allegations constituting a "grave risk" claim.[361] Rather, courts decide the case primarily on written briefs and the Supreme Court of the United Kingdom has affirmed decisions made solely on the lower court's assessment of written evidence conducted on a summary non-evidentiary basis.[362]

iii. Finding of Domestic Violence

At the initial hearing, the court should also make a finding as to whether the child has been exposed to domestic violence between their parents or has been the victim of domestic violence themselves. This Article adopts Professor Merle Weiner's proposition that mere exposure is sufficient in these cases to stop the court's inquiry into ameliorative measures.[363] Courts should adopt a broad definition of domestic violence to include serious threats and psychological abuse in addition to physical abuse.[364] If the court finds at this initial appearance that the child was exposed to domestic violence in their country of habitual residence which precipitated the abduction, the court should not entertain additional evidence as to ameliorative measures. This recommendation strays from the Brussels II-ter Regulation affirmative requirement imposed on courts to always consider ameliorative measures.[365] While EU member states are

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359 *See generally* Sadoun v. Guigui, No. 1:16-cv-22349-KMM, 2016 WL 4444890, at *8 (S.D. Fla. Aug. 22, 2016) (finding a lack of police reports or hospital records should not count against the testimony of a domestic violence victim and her children and recognizing victims of spousal abuse often do not come forward to contemporaneously document or report instances of domestic violence).

360 *See* Brief for CALA, *supra* note 69, at 12.

361 *See id.*

362 *See, e.g.*, Re K (A Child) (1989 Hague Convention) [2015] EWCA (Civ) 720 [45] (Lith.); Re S (A Child) [2012] UKSC 10 [7]; Brief of the Int'l Acad. of Fam. Laws., *supra* note 343, at 3.

363 *See* Weiner, *You Can and You Should*, *supra* note 47, at 270.

364 *See generally* Gomez v. Fuenmayor, 812 F.3d 1005, 1014 (11th Cir. 2016) ("[The court held] that sufficiently serious threats and violence directed against a parent can . . . pose a grave risk of harm to a child . . . .").

365 *See* Honorati, *supra* note 102, at 17.

ensured these measures will be legally binding and enforceable in another EU member state, they have no such assurance when the other country is not a member of the EU.[366] Similarly, US courts have few means of assurance as to enforcement of measures in other countries. Reliance on mirror orders[367] or safe harbor orders[368] is optimistic at best and, as evidenced from prior studies, largely ineffective.[369]

iv. Appointment of Counsel/Scheduling In Camera Interviews

Despite approaches in other countries,[370] American courts often overlook children's direct preferences when adjudicating child abduction cases despite the direct impact of the court's ruling on their lives.[371] Although both state and federal courts are statutorily permitted to appoint an attorney or guardian ad litem for children in these cases, most parents do not request their appointment, and even when the requests are made, courts may still reject them.[372] Other legal scholars speculate that courts decline appointing counsel for children because they assume "parents can adequately represent the children's interests."[373] Professor Weiner criticizes this underlying assumption, arguing that unlike child custody proceedings, "Hague proceeding[s] do[] not adjudicate [a] child's best interests," so it is likely neither the parents nor courts will focus on the children's best interests.[374] Rather, Professor Weiner argues there are six primary policy justifications

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366 *See id.*

367 Mirror orders are defined as "orders with the same content that are issued in both the [s]tate of refuge and the [s]tate of habitual residence." *Id.*

368 Safe harbor orders are defined as "orders issued by the [s]tate of refuge or by the [s]tate of habitual residence stipulating certain conditions for a safer and less disruptive return of the child." *Id.*

369 *See* FREEMAN, *supra* note 17, at 31; EDLESON ET AL., MULTIPLE PERSPECTIVES, *supra* note 17, at 169.

370 Brussels II 45 provides that whenever an Article 12 or 13 defense is raised, "it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity." Weiner, *Intolerable Situations and Counsel for Children*, *supra* note 46, at 344 (quoting Council Regulation 2201/2003, art. 11, 2003 O.J. (L 338) 1, 6 (EC)).

371 Notably, the United States has not signed Brussels II, which requires its signatories to ensure a child is heard. *See id.* at 344, 378.

372 *Id.* at 377–78.

373 *Id.* at 379.

374 *Id.*

supporting appointment of counsel for children in Hague proceedings: (1) to ensure all evidence relevant to a "grave risk of harm" defense is presented to the court; (2) to promote the child's compliance with the final court order; (3) that children should have counsel in Hague proceedings because proving an affirmative defense to a return petition relates to the child's views; (4) to safeguard the child's wellbeing during the pendency of the proceedings; (5) to facilitate settlement between parents; and (6) to help alleviate stress attending a Hague proceeding and to advocate for an in camera interview when appropriate or desired by the child.[375] Appointment of counsel can also help judges determine if the Article 13(b) exception applies.

In addition to appointing counsel for a child, several courts have engaged in in camera interviews with a child to hear from them directly concerning any harm they fear facing if returned to their country of habitual residence.[376] Courts conducting in camera interviews should consider the maturity of the child and conduct separate interviews when there are multiple children subject to the proceedings. These interviews should be careful to focus their inquiry on the "grave risk of harm," not the underlying facts relevant to a custody determination.

The parameters of in camera interviews are demonstrated through prior case precedent. In *Garner v. Harris*, the court conducted separate in camera interviews with the minor children, who were fifteen and eleven years old, outside the presence of their parents.[377] Both children testified they feared their father would abuse them if the court ordered them to return to the United Kingdom and that they wanted to remain in Texas.[378] The court found both children were of sufficient age and maturity to voice their objection and that their decisions were "not the product of undue influence."[379]

The extent to which a judge considers the testimony should not necessarily be based on age of the child, but rather, their maturity. In *Blondin v. Dubois*, the district court judge interviewed the parties' six-year-old daughter outside the presence of her parents and their

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375 *Id.* at 383–90 (articulating additional policy reasons).

376 *See, e.g.*, Blondin v. Dubois, 189 F.3d 240, 243 (2d Cir. 1999); Simcox v. Simcox, 511 F.3d 594, 604 (6th Cir. 2007); Garner v. Harris, 641 F. Supp. 3d 343, 355–56 (E.D. Tex. 2022).

377 *Garner*, 641 F. Supp. 3d at 355–56.

378 *Id.* at 356.

379 *Id.*

attorneys.[380] The child told the judge her father had hit her and her mother and told him "she did not want to return to France because she did not 'want daddy to hit [her].'"[381] Conversely, in *Simcox v. Simcox*, the court interviewed the parties' eight-year-old son, and despite the child's visible discomfort in discussing his memories of his country of habitual residence, the court found he was "not of sufficient age and maturity to permit this [c]ourt to appropriately consider his views."[382] In reaching this conclusion, the court found the child was "preoccupied, disinterested[,] and detached; in short, a typical eight-year-old boy who strongly desired to be anywhere but in the [j]udge's chambers answering questions."[383]

In light of the foregoing considerations and case law, courts should ideally adopt a hybrid approach where they appoint independent legal representation for a child and give them an opportunity to speak to the judge either in court or in chambers. If both options are exercised, the child's counsel can help ensure the child understands the consequences and nuances of the legal action and prepare the child to testify or meet with the judge.

2. Final Evidentiary Hearing/Trial

The court should conduct one evidentiary hearing, analyzing all steps of the relevant inquiry: (1) whether petitioner establishes a prima facie case; (2) if so, whether respondent can establish an exception to return, (here, "grave risk of harm" or intolerable situation); and (3) in cases without prior findings of domestic violence, whether there are any protective measures that can ameliorate that risk. Requiring the court to assess all three of these issues at once will help promote judicial and economic efficiency.

Drawing from the benefits of both the "protective measures approach" and "evaluative assessment approach" applied by United Kingdom courts, American courts should adopt a hybrid of both approaches and consider the availability and enforceability of protective measures contemporaneously with the inquiry of whether a "grave risk of harm" exists.[384] One sample case from those surveyed in

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[380] *Blondin*, 189 F.3d at 243.

[381] *Id.*

[382] Simcox v. Simcox, 511 F.3d 594, 604 (6th Cir. 2007) (quoting Simcox v. Simcox, 499 F. Supp. 2d 946, 952 (N.D. Ohio 2007)).

[383] *Id.* (alteration in original).

[384] *See* POAM REPORT, *supra* note 68, § 3.2.

the POAM report adopted this hybrid approach.[385] In *R v. P*, the court held a two-day evidentiary hearing allowing the mother, father, and child's guardian to present oral evidence.[386] The court then ordered the parties to submit written submissions based on the oral evidence presented.[387] Here, the court considered the availability of protective measures at the same time it assessed whether there was a "grave risk of harm," rather than in a subsequent proceeding after the "grave risk of harm" finding was made.[388] Courts should exercise caution in this analysis, wherein it still considers the question of whether a "grave risk of harm" separate from whether ameliorative measures exist to ameliorate that risk and make separate findings as to each issue. This approach, though it may not in practice yield a different outcome than the straight evaluative assessment approach, promotes judicial efficiency and places the burden on the left-behind parent to conduct its discovery as to protective measures in tandem with defending against the Article 13(b) exception.[389]

3. Additional Considerations

Where the court does consider protective measures in cases where there is no initial finding of domestic violence, it should take additional steps to determine whether a conference with a judge from the country of habitual residence, entry of a mirror order, or other further assurances are appropriate.

i. Hague Conferences

Just as often occurs when there is a jurisdictional conflict in UCCJEA proceedings, judges should confer with each other (with a translator if necessary) to discuss the jurisdictional dispute as well as any proposed ameliorative measures. In the United Kingdom case of *Re E*, discussed above, the judge recommended such conferences to confer on potential ameliorative measures that would be automatically enforceable if the child is returned to their country of habitual residence.[390] Alternatively, the judge recommended use of assigned "liaison judges" to promote cooperation between Hague contracting

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385 *Id.* (citing R v. P [2017] EWHC (Fam) 1804 [10] (Eng.)).

386 *Id.* (citing R v. P [2017] EWHC (Fam) 1804 [10] (Eng.)).

387 *Id.* (citing R v. P [2017] EWHC (Fam) 1804 [10] (Eng.)).

388 *Id.* (citing R v. P [2017] EWHC (Fam) 1804 [10] (Eng.)).

389 *See id.*

390 Re E (Children) [2011] UKSC 27, [2012] 1 AC 144 [42] (appeal taken from Eng.).

states.[391] Such conferences should utilize the existing International Hague Network of Judges to confer regarding potential ameliorative measures.[392]

ii. Mirror Orders

Where possible, courts should direct the left-behind parent to initiate proceedings in the courts of the country of habitual residence for the purpose of entering an order that mirrors the protections agreed to in the United States ("mirror orders").[393] This will help ensure the measures are already in place when the child returns and are enforceable through court order.

To do this, a party can file an application by consent for domesticating a foreign order, accompanied by a translation into the appropriate language when necessary in a court of the country of habitual residence.[394] In common law jurisdictions, the country generally will issue the order within two to three weeks of the application.[395] Although it will cost money to obtain the mirror order, it is likely minimal compared to the significant monetary guarantee or cash deposit the left-behind parent may otherwise be ordered to pay as an alternative ameliorative measure.[396] Moreover, the cost to obtain this order is likely still less costly than retaining a foreign expert to testify as to the safety and security of the country of habitual residence and enforceability of return orders.[397] In civil law jurisdictions, courts may rely on affirmations from the relevant central authority to provide

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391 *Id.*

392 *See The International Hague Network of Judges*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/pecialized-sections/child-abduction/ihnj (last visited Nov. 24, 2023).

393 *See* JAMES D. GARBOLINO, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 150 (2d ed. 2015) ("The orders are 'mirror images' of one another, containing the same terms with differences only in syntax. They are enforceable in both jurisdictions.")

394 *See* Brief of the Int'l Acad. of Fam. Laws., *supra* note 343, at 5.

395 *Id.*

396 *See generally* Golan v. Saada, 142 S. Ct. 1880, 1891 (2022) (granting certiorari after the district court ordered the left-behind parent to pay $150,000 as cash judgment to assist Mother with returning to Italy).

397 *See* Brief of the Int'l Acad. of Fam. Laws., *supra* note 343, at 5; Weiner, *You Can and You Should*, *supra* note 47, at 285 (noting petitioners often hire experts to testify on protective measures, but foreign judges are often biased towards "overstat[ing] the efficacy of their legal system").

assurances regarding enforcement of protective measures rather than pursuing a mirror order.[398]

Where entry of a protective order is appropriate, courts should consider whether there is an effective law enforcement agency to enforce these orders and remedies available pursuant to protective orders. Protective orders in the country of habitual residence with a potential threat of arrest have a higher potential for efficacy. These orders theoretically provide a parent with a court order enforceable through law enforcement or criminal or civil courts in the event the abusive parent violates the order's terms.[399] Ideally, these bodies would compel compliance with the underlying orders and issue sanctions against individuals who fail to comply fully. Although past surveys found only one in five mirror orders were implemented as planned, the partial implementation rate in some circumstances may still justify entry of mirror orders in cases where appropriate.[400]

iii. Assurances

At the hearing, the court should consider whether, if allegations are true, the country of habitual residence is able to impose adequate measures to protect the child and work to obtain assurances as to enforcement of those measures.[401] This necessitates a fact-specific inquiry by the courts to gauge not only whether the proposed measure will be effective but also other barriers to imposing those measures. This may include difficulty for an abducting parent to obtain legal representation in the country of habitual residence and the limitations of measures in being reactive following harm rather than proactive.[402]

Courts may also consider requiring parties to produce a letter from the local district attorney, central authority, or equivalent assuring that they will not file an action against the left-behind order.[403] Alternatively, courts may impose a monetary guarantee as in *Golan* to assist the abducting parent upon return of the child.[404] For financial support ordered, courts should require the left-behind parent to identify an account certain with proof of funds from which the support

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398 Brief of the Int'l Acad. of Fam. Laws., *supra* note 343, at 5–6.

399 *See* Reece, *supra* note 64, at 123.

400 *See* Edleson et al., *Fleeing for Safety*, *supra* note 44, at 104.

401 *See* Brief of Amici Curiae Professors, *supra* note 270, at 18.

402 *See* Weiner, *You Can and You Should*, *supra* note 47, at 289.

403 Brief of Amici Curiae Professors, *supra* note 270, at 6.

404 *See* Saada v. Golan, No. 1:18-CV-5292, 2020 WL 2128867, at *5 (E.D.N.Y. May 5, 2020).

can be paid, and a timeline for payment. Here, courts should err on the over-inclusive side of ordering financial support for housing and daily needs, recognizing the inherent speculation the left-behind parent engages in, and how they are likely to underestimate the amount of money needed for the relocation.[405]

V. CONCLUSION

The Supreme Court's decision in *Golan v. Saada* provided much needed guidance for state and federal courts adjudicating international child abduction cases pursuant to the Hague Convention and ICARA. The decision, however, left courts with the responsibility to determine its procedural means and extent to which it considers ameliorative measures, if at all. Courts must move towards uniformity in employed practices to ensure judicial efficiency and the consistent protection of minor children from international abduction. Courts should adopt this Article's proposed judicial framework to adjudicate "grave risk of harm" cases. Following these "best practices" will ensure protection for all parties' rights and voices—but most importantly—those of the children.

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405 *See id.*


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