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# Bus Bombings and a Baby's Custody: Insidious Victories for Terrorism in the Context of International Custody Disputes

Andrew A. Zashin

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**BUS BOMBINGS AND A BABY'S CUSTODY:  
INSIDIOUS VICTORIES FOR TERRORISM IN  
THE CONTEXT OF INTERNATIONAL  
CUSTODY DISPUTES**

*ANDREW A. ZASHIN*

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# Bus Bombings and a Baby's Custody: Insidious Victories for Terrorism in the Context of International Custody Disputes

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Andrew A. Zashin\*

## I. Introduction

The threat of terrorism is used effectively against the Western world. Playing on the fears and emotions of an American and Western public, forever changed by 9/11, terrorism achieves political agendas. The psychological fallout is such that most aspects of American society have been altered, including the courts. The effects of terrorism are obvious; orange alerts, shoe inspections at airports, paranoid news reports, real and perceived intrusions into civil liberties are but a few. Perhaps nowhere is terrorism's impact on the western courts more evident but less expected than in international child custody disputes. Desperate parents are pointing to terrorist attacks as evidence that their children will not be safe in certain countries.<sup>1</sup> This is a dangerous problem for increasingly intercontinental families. Simply put, the fear of terrorist attacks skews custody decisions which in and of itself is a victory for terrorism. Deciding where to build a home and raise children is an essential aspect of free society. To deny law abid-

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<sup>1</sup> See *Silverman v. Silverman*, 338 F. 3d 886 (8th Cir. 2003).

ing people this choice is to deny normalcy, a fundamental goal of terrorism.<sup>2</sup>

This article will address the problematic intersection of terrorism and child custody battles. The most immediate consequences of a terrorist attack are loved ones lost and buildings reduced to rubble. These losses are devastating, shocking and scary. But to end an analysis of terrorist victories with a body count is a fatal mistake. Americans fervently shout we cannot let "them" win, but how do we decide if they are winning? What do the terrorists want? It is not the goal of terrorists to simply kill Americans, causing death and destruction. That is merely a horrific means to their end. Terrorists want to permanently destroy Western civilization. It is not just about killing Westerners. It is about fundamentally destroying our way of life. One way of examining whether terrorists are succeeding is to examine the effects of terrorism on ordinary life.

International child custody law provides a means to evaluate that question in the legal arena. Part II of this article describes the Hague Convention on International Child Abduction,<sup>3</sup> which represents a multi-national attempt to create one superseding set of rules for custody disputes. The Hague Convention is the dominant law used to retrieve a child from another country when taken from his home state by a parent. Exceptions to this law provide a method by which parents can exploit the fear of terrorism to sway court decisions in such disputes.

To properly examine this issue, it is necessary to consider a brief background in international child custody law. After summarizing the basic conception and current state of the Hague Convention, this section will address why and how some exceptions in the law could begin to overtake the rule, giving both unscrupulous and well-meaning attorneys a means of manipulating

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<sup>2</sup> "There are not enough airplanes in the universe to blow up the entire United States. That was never anyone's intent. The goal of terror is to change the enemy through the psychology of threats and fear. Each new step we take to modify our lifestyles and our dreams, because of such attacks, moves us further away from the totally free society we built so long and so painfully, and closer to the cultural imprisonment our enemies seek to impose." *9/11: The Psychological Fallout*, Broadcast Interview Source, Inc. Yearbook of Experts News Release Wire, Sept. 11, 2006.

<sup>3</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, A.S.I.L., 19 I.L.M. 1501 (1980).

the court system to get what they want. The next section provides an illustration of an important international custody dispute case, *Silverman v. Silverman*,<sup>4</sup> to demonstrate how the current law and exceptions to it may be used to skew a custody case.

Finally, this article offers suggestions on what can be done to help fix this problem. The insidious influence of terrorism distorting outcomes in international child custody cases must be addressed now, before the damage becomes so severe it is irreversible. This section will address necessary changes to current international custody law, in particular, the establishment of a "Clean Hands" doctrine. The courts are integral forums that can make or break the realization of victory against terrorism and its threat to basic family life, and a "Clean Hands" doctrine is one tool for change.

## II. The Hague Convention

### A. Background: The Hague Convention

The Hague Conference on Private International Law exists to prevent a parent from artificially establishing jurisdiction in a country of his or her choosing. Parents try to forum shop primarily to obtain or alter the legal determination of a child's custody.<sup>5</sup> The seeds for the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>6</sup> were sown at a 1976 Hague Special Commission meeting which convened in response to the growing concern over international child abductions.<sup>7</sup> The Commission was especially concerned with the resultant risk of harm to the child and distress to the parents wrongfully deprived of their children.<sup>8</sup> The 1980 Convention is guided by the underly-

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<sup>4</sup> 338 F.3d 886 (8th Cir. 2003).

<sup>5</sup> See Elisa Perez-Vera, Explanatory Report on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, 428-29, Sections 11, 13, and 15 (1982), available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2779](http://www.hcch.net/index_en.php?act=publications.details&pid=2779).

<sup>6</sup> Convention on the Civil Aspects of International Child Abduction (1980) [hereinafter 1980 Convention].

<sup>7</sup> See Patricia M. Hoff, The Hague Convention on the Civil Aspects of International Child Abduction: A Curriculum for American Judges and Lawyers, 32 (1997 American Bar Association) (available at <http://www.abanet.org/ftp/pub/child/haguecur.doc>).

<sup>8</sup> Thomson v. Thomson [1994] 3 SCR 551(Canada)

ing purposes of maintaining the *status quo*<sup>9</sup> while protecting affected children from the harmful effects of wrongful removal or retention.<sup>10</sup> These fundamental orienting purposes are given life through the Convention's establishment of a system that does not seek to make any substantive determinations of custody rights. Rather the Convention establishes a collaborative mechanism for securing the prompt return of a wrongfully removed or retained child to the country of his or her habitual residence—the forum in which it is presumed the best determination of the child's interests can be made.<sup>11</sup> To date, at least 78 nations have adopted the 1980 Convention.<sup>12</sup>

By its terms, the Convention applies only to children age sixteen (16) years or younger<sup>13</sup> who were habitually residing in a contracting state prior to the removal or retention,<sup>14</sup> and who were residing with a person who was actually exercising custody

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<sup>9</sup> *Supra* Note 3.

<sup>10</sup> *Supra* Note 3.

<sup>11</sup> *See* Perez-Vera, *supra* note 2, at 430-432, paragraphs 20-26.

<sup>12</sup> As of March 23, 2007, 78 countries have either ratified or acceded to the 1980 Convention. *See* Hague Conference on Private International Law, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited April 23, 2007); United States State Department at [http://travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_1487.html](http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html).

These countries include: Argentina, Australia, Austria, Bahamas, Belarus, Belize, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, Peoples Republic of China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Republic of Moldova, Monaco, Montenegro, Nicaragua, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Romania, Saint Kitts and Nevis, San Marino, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela, and Zimbabwe. For more information and further updates regarding newly contracting states, *see* Hague Conference on Private International Law, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited April 23, 2007), or the United States State Department at [http://travel.state.gov/family/abduction/hague\\_issues/hague\\_issues\\_1487.html](http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html).

<sup>13</sup> 1980 Convention, Article 4.

<sup>14</sup> *Id.*

rights at the time of removal or retention.<sup>15</sup> As previously noted, the Convention is not itself concerned with the law determining the actual custody of children.<sup>16</sup> Rather, substantive custody determinations are left to the law of the child's habitual residence<sup>17</sup> and are dealt with in different Hague Conventions.<sup>18</sup> The primary focus of the 1980 Convention is to establish a cohesive system of cooperation between contracting states to ensure the swift return of parentally abducted children.<sup>19</sup>

The 1980 Convention accomplishes this by establishing an overriding preference for the return of a removed or retained child to the state of his or her habitual residence. A concurrent preference exists for determinations to be made by the state of the child's habitual residence.<sup>20</sup> These preferences control so long as application and commencement of proceedings for return of the child have been begun within one year from the date of the wrongful removal or retention.<sup>21</sup>

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<sup>15</sup> 1980 Convention, Articles 3(b), 13(a).

<sup>16</sup> See 1980 Convention, Article 16 ("the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention. . ."); Article 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."); see also Perez-Vera, *supra* note 2, at 435, paragraph 36.

<sup>17</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 11, A.S.I.L., 19 I.L.M. 1501 (1980) [hereinafter Hague].

<sup>18</sup> See, e.g., Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Minors.

<sup>19</sup> Perez-Vera, *supra* note 2, at 435-36, paragraphs 35 and 40; see also Legal Analysis, 51 F.R. 10,494, Appendix C, Section I (Mar. 26, 1986).

<sup>20</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 11, A.S.I.L., 19 I.L.M. 1501 (1980) [hereinafter Hague].

<sup>21</sup> 1980 Convention, Article 12. It should also be noted that there must additionally be a determination that the removal or retention is, in fact, wrongful. See, e.g., *id.* at Article 1 ("return of children wrongfully removed"), Article 3 (discussing determination of "wrongful"), and Article 13(a) (discussing defense of acquiescence or consent). Furthermore, the preference and superiority of concern for the well-being of the child is manifest in the Convention's requirement on Contracting States and their authorities to order the return of wrongfully removed or retained children even after the expiration of the one



B. *The "Grave Risk of Harm" Exception: Article 13(b)*

The Hague signatories adopted several exceptions to the rule that one must immediately return an abducted child to the country from which the child was abducted.<sup>22</sup> These exceptions allow the judicial or administrative authorities of a country to which the child is abducted to reject a custodial parent's petition to return the child under various circumstances. One of these exceptions is Article 13(b), the "grave risk of harm" exception. Under Article 13(b), the judicial or administrative authorities of the country to which a child is taken can deny a request to return an abducted child "if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."<sup>23</sup>

In the past, parents utilized Article 13(b) to avoid returning abducted children in cases of abuse, domestic violence,<sup>24</sup> or in cases of regional turmoil. In recent years, the rise of global terrorism has increased the frequency with which the "grave risk of harm" exception has been utilized in international child custody disputes.

Specifically, however, many parents have used the 13(b) exception to exploit a political conflict for their own benefit in international child custody cases. The terrorist bombings in Israel in recent years "have made it the subject of the most widespread use of the grave physical harm defence."<sup>25</sup> Many of these instances involve an abducting parent that initially chose to move to Israel, often at a time when terrorism was just as prevalent as it is at the time of their lawsuit. An example of this occurrence is *Silverman v. Silverman*.<sup>26</sup>

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(1) year limitation, unless such State or authority finds that the child is now established in its new environment. See 1980 Convention, Article 12.

<sup>22</sup> *Id.* at art. 13, 20.

<sup>23</sup> *Id.* at art. 13(b).

<sup>24</sup> See generally Merle H. Weiner, *International Child Abduction and the Escape From Domestic Violence*, 69 *FORDHAM L. REV.* 593 (2000).

<sup>25</sup> Edwin Freedman, *International Terrorism and the Grave Physical Risk Defence of the Hague Convention on International Child Abduction*, *INT'L FAM. L.J.* (May 2002).

<sup>26</sup> 338 F.3d 886.

In *Silverman*, a mother abducted her children from Israel to the United States and raised the “grave risk of harm” exception in an attempt to obtain custody of her children. Concurrent to a hearing on custody issues in a Minnesota state court, the United States Eighth District Court heard the case under the Hague Convention. After the federal district court determined that it did not have jurisdiction, the Eighth Circuit Court of Appeals reversed and remanded the case to the district court once again. This time the district court decided that Israel constituted a “zone of war” under Article 13(b).<sup>27</sup> Demonstrating the significance of the issue, the Eighth Circuit heard the *Silverman* appeal en banc. Ultimately, a majority of the *Silverman* court overturned the district court’s decision that terrorist attacks in Israel made the country a “zone of war,” and posed a “grave risk of harm” to the children.<sup>28</sup>

Given that Israel was essentially founded as a refuge state for the Jewish people, a place where all people of Jewish descent are welcome, the potential implications of these cases are even more severe.<sup>29</sup> One of the main goals of terrorism is to deny people normalcy in their everyday lives. When courts allow parents to use this exception in cases involving places like Israel, which are often subject to terror attacks, they are in effect awarding those who wish to deny Israel and its citizen’s normalcy. This represents a fundamental victory for terrorists. Ironically, the terrorists themselves do not even realize how successful they have actually been.

### III. International Custody Case Law

#### A. *The Silverman Case*

Although hundreds of international child abduction suits have been brought under the Hague Convention, perhaps none

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<sup>27</sup> *Silverman v. Silverman*, 2002 U.S. Dist. LEXIS 8313 (D. Minn.).

<sup>28</sup> *Silverman*, 338 F.3d at 886.

<sup>29</sup> Other cases dealing with Israel and its unique existence include: *Cornfeld v. Cornfeld* (Superior Court of Justice-Ontario), File No. 01-FA-10575, (November 30, 2001); *Watkins v. Watkins*, docket no. 1F3709/00, District Court of Zweibruecken, Germany, (January 25, 2001); *Azoulay v. Benatouil*, RG no. 0143442, Paris District Court of Family Affairs, (December 21, 2001).

stands out more than *Silverman v. Silverman*.<sup>30</sup> In *Silverman*, Robert and Julie Silverman were both dual citizens of the United States and Israel. They had a history of marital problems.<sup>31</sup> The couple decided to permanently move with their two sons to Israel in the belief that "Israel would be the right place to raise children."<sup>32</sup> As the time to make a permanent move to Israel approached, Julie began to have reservations about relocating. Julie was having an extra-marital affair and was not sure that she wanted to remain in the marriage.<sup>33</sup> Julie agreed to do so, however, as a "final effort to reconcile the marriage."<sup>34</sup> Both "testified in the district court that the move to Israel was Julie's idea and that she was the one pushing for the family to make the move."<sup>35</sup>

The Silvermans subsequently sold their home and moved all of their possessions and pets to Israel in January of 1999.<sup>36</sup> Initially, the Silvermans lived with family, but eventually they rented an apartment.<sup>37</sup> Robert and Julie both obtained employment and both of their children enrolled in elementary school.<sup>38</sup> The children learned to speak Hebrew, made friends, and performed well in school.<sup>39</sup> There was no obvious indication that either of the Silvermans' move to Israel was anything other than permanent.

In October 1999 Julie flew to Minnesota to file for bankruptcy.<sup>40</sup> When Julie returned to Israel Robert confronted Julie about her affair and Julie learned that Robert had obtained a restraining order, which prevented Julie from leaving Israel.<sup>41</sup> The two agreed to reconcile their marriage and Robert dismissed

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30 338 F.3d 886 (8th Cir. 2003).

31 *Silverman v. Silverman*, 2002 U.S. Dist. LEXIS 8313 (D. Minn.).

32 *Id.* at 4.

33 *Id.* Robert discovered the affair by searching through internet files and Julie's e-mail messages.

34 *Id.* at 5.

35 *Silverman v. Silverman*, 338 F.3d 886.

36 *Id.* at 889.

37 *Id.* at 889-90.

38 *Id.* at 890.

39 *Id.*

40 *Silverman*, 338 F.3d at 890.

41 *Id.*

the restraining order.<sup>42</sup> Julie testified that over the course of the next few months “Robert threatened her, used force against her and attempted to coerce her.”<sup>43</sup> The Eighth Circuit noted there were never any allegations or findings that Robert committed any acts of violence towards the children, and that Julie engaged in physical violence towards Robert.<sup>44</sup>

Julie hired an Israeli attorney who advised her that under the circumstances of her case she was not likely to receive custody of her children in the Israeli rabbinical courts<sup>45</sup> were she to separate from Robert.<sup>46</sup> When Robert learned that Julie was consulting an attorney about separating, he filed for divorce in the Israeli courts, but subsequently cancelled the proceeding.<sup>47</sup>

In June 2000 Robert allowed Julie to take “what she represented would be a summer trip to the United States” with their two children.<sup>48</sup> Indeed, Julie purchased round-trip tickets.<sup>49</sup> At the airport Robert threatened Julie due to his concern that she would not return to Israel.<sup>50</sup> Julie later testified that she decided not to return to Israel at that moment at the airport.<sup>51</sup>

Julie was scheduled to return to Israel on August 30, 2000.<sup>52</sup> Instead, Julie filed for separation from Robert and for custody of their children in Minnesota state court on August 20.<sup>53</sup> Robert was served a summons in Israel.<sup>54</sup> Robert moved to dismiss Julie’s action based on Article 16 of the Hague Convention, argu-

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at n.6.

<sup>45</sup> Religious Jews divorce and adhere to divorce laws governed by special rabbinical courts. As religious Jews, both Robert and Julie expected to be governed by these principles. However, as the Eighth Circuit noted, Julie’s attorney may have advised her that the rabbinical court likely would not award her custody of the children because of her adulterous relationship.

<sup>46</sup> The court noted that it was unclear whether the attorney’s advice was based on Julie’s adulterous relationship or other reasons. *Silverman*, 338 F.3d at 890 n.7.

<sup>47</sup> *Id.* at 890.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Silverman*, 338 F.3d at 890

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

ing that the state court lacked authority to decide custody issues because "wrongful removal and retention" and "habitual residence" had not been decided.<sup>55</sup> Pursuant to the Hague Convention, Robert filed a "Request for Return of Abducted Children" with the National Center for Missing and Exploited Children (NCMEC).<sup>56</sup> NCMEC suggested that Robert pursue a determination of whether Julie's removal of the children was wrongful under the Hague from the Israeli Court system.<sup>57</sup> In addition to the state court matter, Robert also filed a Hague petition for return of the children in the United States Court for the District of Minnesota.<sup>58</sup> In the meantime, the state court granted Julie temporary custody of the children and she moved to Massachusetts to be near her boyfriend.<sup>59</sup>

Julie moved for dismissal of Robert's Hague petition in the federal district court based on abstention grounds.<sup>60</sup> The district court dismissed Robert's petition, but the Eighth Circuit determined that abstention does not apply in Hague cases and reversed and remanded the case for an evidentiary hearing.<sup>61</sup> Meanwhile the Israeli courts determined that the Silverman children's habitual residence was Israel pursuant to the Hague Convention definition and, therefore, that Julie's failure to return the children violated the Hague and constituted a "wrongful retention."<sup>62</sup> At the same time, the Minnesota state court, which was on notice of the Hague litigation, ignored the Convention and awarded Julie custody.<sup>63</sup> The Minnesota court only used state law in making its determination, rendering a true determination of the meaning of "habitual residence" impossible since the state meaning differs from that of the meaning under the Hague.<sup>64</sup> As a result, the state court rendered no Hague determinations.<sup>65</sup>

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<sup>55</sup> *Id.*; Hague, *supra* note 1, at art. 16.

<sup>56</sup> *Silverman*, 338 F.3d at 891.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Silverman*, 338 F.3d at 891.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 891-92.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

In May of 2002 the federal district court ruled in favor of Julie with regard to Robert's Hague petition.<sup>66</sup> The district court concluded that Minnesota was the children's habitual residence and that even if Israel was their habitual residence, they should not be returned to Israel under the "grave risk of harm" exception because the violence in Israel made it a "zone of war," rendering Israel dangerous for children.<sup>67</sup> The method by which the district court determined that Israel was a "zone of war" was particularly disturbing. The district court relied on news reports from the New York Times, the Minneapolis Star Tribune, and NBC News relating to the security situation in Israel to make its determination.<sup>68</sup>

On appeal, the Eighth Circuit overturned the district court's decision. The Eighth Circuit determined that the district court's analysis was flawed with regard to its determination that the children's "habitual residence" was Minnesota.<sup>69</sup> The Eighth Circuit further disagreed with the district court's finding that Israel constitutes a "zone of war" rendering it "a grave risk of physical or psychological harm" within the meaning of The Hague.<sup>70</sup>

#### B. *Israel as a "Zone of War"-The Grave Risk of Harm Analysis*

The *Silverman* district court held that even if Israel was the children's "habitual residence," under Article 13(b) the children should not be returned to Israel because they faced a "grave risk

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<sup>66</sup> *Silverman*, 338 F.3d at 891-92.

<sup>67</sup> *Id.* at 892-93.

<sup>68</sup> *Silverman*, 2002 U.S. Dist. LEXIS 8313 at 29-33. The news reports on which the court relied were: *15 Killed by Suicide Bomber; Sharon Cuts Short U.S. Visit After a Meeting with Bush*, N.Y. TIMES, May 8, 2002, at A1, A14; *Ambush Kills 13 Soldiers: More Dead Today as Bus Blast Kills at Least 5 Near Haifa*, MINNEAPOLIS STAR TRIB., Apr. 10, 2002, at A1; *Bomb Kills at Least 19 in Israel as Arabs Open Beirut Meeting*, N.Y. TIMES, Mar. 28, 2002, at A1; *Bomb Rips at Peace Effort*, MINNEAPOLIS STAR TRIB., Apr. 13, 2002, at A1; *Jerusalem Bomber Kills 3 and Shakes U.S. Peace Effort*, N.Y. TIMES, Mar. 22, 2002, at A1; *Sharon Says Israel Is in a War After Suicide Bombing Kills 14; More Tanks Move in West Bank*, N.Y. TIMES, Apr. 1, 2002, at A1; *State Department Issues New Travel Warning for Americans in Israel*, 2002 WL 3319550, NBC NEWS: TODAY, Apr. 3, 2002;.

<sup>69</sup> *Silverman*, 338 F.3d at 900.

<sup>70</sup> *Id.* at 901.

of physical harm” in that country.<sup>71</sup> First, the Eighth Circuit determined based on precedent that the Article 13(b) affirmative defense of “grave risk of harm” had to be proven through “clear and convincing evidence.”<sup>72</sup> The court of appeals looked at *Ryder v. Ryder*, in which they determined that the evidence must demonstrate “specific evidence of potential harm to the children.”<sup>73</sup> Next, *Friedrich v. Friedrich*<sup>74</sup> and *Blondin v. Dubois*<sup>75</sup> showed that the two situations of grave risk of harm provided for in Article 13(b) are sending children to a “zone of war, famine or disease,” or situations involving “serious abuse or neglect.”

Because the *Silverman* district court determined that Israel constituted a “zone of war,” the Eighth Circuit looked to a prior case in which the “zone of war” defense had been asserted in an international custody dispute involving Israel.<sup>76</sup> In that case, *Freier v. Freier*,<sup>77</sup> the court determined that Israel did not constitute a “zone of war,” because the “fighting was fifteen to ninety minutes from the children’s home, no schools were closed, businesses were open, and the mother was able to travel to and from the country.”<sup>78</sup> Furthermore, the Eighth Circuit found no other cases which found Israel to be a “zone of war” under the Hague Convention.<sup>79</sup> The court of appeals also found that the district court cited no evidence that the *Silverman* children were in any more danger living in Israel than when Julie *Silverman* voluntarily moved to Israel in 1999.<sup>80</sup> Instead, the Eighth Circuit found that the news reports the district court utilized as evidence that Israel constituted a “zone of war” demonstrated regional violence that threatened everyone in Israel, but did not demonstrate that the *Silverman* children faced a “grave risk of physical or psychological harm” under the Hague Convention.<sup>81</sup> Accordingly,

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<sup>71</sup> *Id.* (citing *Silverman*, 2002 U.S. Dist. LEXIS 8313 at 8).

<sup>72</sup> *Id.* at 900.

<sup>73</sup> *Id.* (citing 49 F.3d at 373).

<sup>74</sup> 78 F.3d 1060, 1069 (6th Cir. 1996).

<sup>75</sup> 238 F.3d 153, 162 (2d Cir. 2001).

<sup>76</sup> *Silverman*, 338 F.3d at 900.

<sup>77</sup> 969 F. Supp. 436, 443 (E.D. Mich. 1996).

<sup>78</sup> *Silverman*, 338 F.3d at 900-01 (citing *Freier*, 969 F. Supp. at 443).

<sup>79</sup> *Silverman*, 338 F.3d at 901.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

the court of appeals held that Julie had not met her burden under Article 13(b), and that Israel is not a “zone of war.”<sup>82</sup>

The *Silverman* decision contained a dissent and one partial concurrence plus dissent.<sup>83</sup> The concurrence agreed that Israel is not a “zone of war,” and with most of the majority’s opinion.<sup>84</sup> However, the district court had found that one of the Silverman children was of sufficient age to determine whether he wanted to live in Israel or Minnesota.<sup>85</sup> Therefore, the partially concurring opinion thought that the case should be remanded “to determine the views, if any, of the [children], and for a further determination as to whether each child attained an age and degree of maturity for which it would be appropriate to take into consideration their views.”<sup>86</sup>

The dissent disagreed with the majority’s opinion regarding “habitual residence,” as well as whether the Article 13(b) “grave risk of harm” exception applied.<sup>87</sup> Particularly noteworthy is the fact that the dissent agreed with the majority that Israel is not a “zone of war.”<sup>88</sup> The dissent’s disagreement with the majority focused on “whether [the children] would be subjected to psychological harm if they [we]re separately or collectively removed from their mother’s home in the United States and forced to return to Israel.”<sup>89</sup>

The majority also held that the district court should not have taken into account the fact that the Silverman children were “settled in their new environment.”<sup>90</sup> Rather, the majority found that “[a] removing parent ‘must not be allowed to abduct a child and then - when brought to court - complain that the child has grown used to the surroundings to which they were abducted.’”<sup>91</sup>

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82 *Id.*

83 *Id.* at 901, 902 (concurring in part, and dissenting in part, and dissent).

84 *Silverman*, 338 F.3d at 901-02 (concurring in part, and dissenting in part).

85 *Id.*

86 *Id.*

87 *Id.* at 902 (dissenting).

88 *Id.* at 906 (dissenting).

89 *Silverman*, 338 F.3d at 907 (dissenting).

90 *Id.* at 901.

91 *Id.*



*C. Unresolved Issues in the Wake of Silverman*

Julie Silverman utilized the “grave risk of harm” defense, opportunistically claiming Israel is a “zone of war.” Indeed, in an interview following the district court’s ruling that Israel is a “zone of war,” Julie Silverman’s Minnesota attorney indicated that raising this defense was actually his, not Julie’s, idea, and that he thought of it “since terrorism in Israel was front-page news at the time.”<sup>92</sup>

If the district court’s determination that Israel is a “zone of war” had not been overturned by the Eighth Circuit, the terrorists would have been awarded a fundamental victory.<sup>93</sup> Moreover, because terrorism now threatens the United States in the same manner that Israel faced the threat of terrorism when the district court rendered its controversial opinion, this same opinion could be applied to the United States. Imagine a court in another country determining that the United States constitutes a “zone of war” under the “grave risk of harm” exception because of the terrorist attacks on September 11th or the constant warning of future terrorist attacks on the United States. This possibility is not so far-fetched.<sup>94</sup>

The *Silverman* district court should not have been so quick to label Israel a “zone of war” in order to award Julie Silverman custody. The district court acted provincially, without contemplating the potential repercussions. The Court’s reasoning could extend to include the United States as a “zone of war.” Indeed, as President George W. Bush, with regard to the United State’s fight against global terrorists, pointed out, “we are engaged in a

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<sup>92</sup> Netty C. Gross, *Now It’s Official: Israel Is a War Zone*, JERUSALEM REP. 24, 25 (January 13, 2003), at 25.

<sup>93</sup> Instead, the terrorists enjoyed the partial victory of creating a situation wherein Jews who choose to move to the Jewish homeland turned against their adopted country on the basis of the danger created by those terrorists who wish to literally destroy the Jewish State.

<sup>94</sup> Terrorism’s influence on the judiciary is not limited to the war zone exception. See Lexi Maxwell, Comment, *The Disparity in Treatment of International Custody Disputes in American Courts: A Post-September 11th Analysis*, 17 Pace Int’l L. Rev. 105 (2005), for a discussion of how terrorism influences judicial decisions by creating fear of travel to a non-signatory of the Hague Convention.

long war against a determined enemy,"<sup>95</sup> and the war on terrorism has "no [definite] end in sight."<sup>96</sup> Although America does not see actual fighting on U.S. soil on a day to day basis, citizens are constantly reminded of the threat of future attacks on the United States whether such threats are issued by the heightened threat level via the Department of Homeland Security or from Osama Bin Laden himself. Thus, it is necessary to adjust the Hague Convention to accommodate the new reality of the "war on terror".

In *Silverman*, the district court chose to focus on news reports painting the entire country of Israel as a horrific war zone.<sup>97</sup> However, the district court was also presented with another opinion of the security situation in a sworn affidavit from Tex Ritter, California Deputy District Attorney for Riverside County's Child Abduction Unit, who spent four days in Israel in January of 2002. The district court, however, chose to disregard Mr. Ritter's contrary view of Israel's security situation, in favor of the publicized media reports.<sup>98</sup> Ritter had traveled to Israel to appear in a Jerusalem Family Court in the course of his official duties.<sup>99</sup> In his affidavit Mr. Ritter stated:

I traveled in Tel-Aviv, Jerusalem and in other parts of Israel and can inform the court that there is no war going on. I traveled by car, bus and taxi. There are no air raids and there is no fighting. There is heightened security, similar to the security we have at court houses and airports and concert venues . . . . Business is conducted, people go to bars and nightclubs and walk on the streets at night and shop and go to school and tourist attractions and holy sites.<sup>100</sup>

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<sup>95</sup> President George W. Bush, State of the Union Address (Jan. 31, 2006), available at <http://www.whitehouse.gov/stateoftheunion/2006/>.

<sup>96</sup> Josh White & Ann Scott Tyson, *Rumsfeld Offers Strategies for Current War: Pentagon to Release 20-Year Plan Today*, WASH. POST, Feb. 3, 2006, at A8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/02/AR2006020202296.html>.

<sup>97</sup> *Silverman*, 2002 U.S. Dist. LEXIS 8313 at 30-32.

<sup>98</sup> Gross, *supra* note 92, at 24.

<sup>99</sup> *Silverman*, Appellant's Reply Brief at 14.

<sup>100</sup> Affidavit of Tex Ritter, California Deputy District Attorney for Riverside County's Child Abduction Unit, referenced in *Silverman*, Appellant's Reply Brief at 14.

Ritter also wrote that the conditions in Israel “do not describe a zone of war” and that he “traveled freely, visiting discos and Christian religious sites.”<sup>101</sup>

Americans all look to the news media for a general indication of the current events occurring both at home and around the globe. Nevertheless, hardly anyone would disagree that the news media sensationalizes events for its own purposes and is often biased,<sup>102</sup> whether one believes that the media is too conservative or too liberal.<sup>103</sup> Sometimes the media reports outright lies.<sup>104</sup> For example, in a recent reporting scandal, former CBS chief anchor Dan Rather reported allegations regarding President George Bush’s service with the National Guard.<sup>105</sup> To support the story Rather cited memos that CBS received from what he referred to as a “‘solid’ source.”<sup>106</sup> The memos were supposedly written by President Bush’s deceased squadron officer and evidenced that President Bush received special consideration in his admission to the National Guard and did not fulfill his service obligations.<sup>107</sup> When the documents came under attack, Rather insisted that they were supported by other reporting and had been authenticated by document experts. Shortly thereafter, the documents were proven to be fabrications.<sup>108</sup>

Indeed, media critics assert that “[t]he organizational and rewards system in most newsrooms are constructed in such a way

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<sup>101</sup> Gross, *supra* note 92, at 25.

<sup>102</sup> See generally BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* (2002).

<sup>103</sup> Sam Hananel, *Survey: U.S. Trusts the News but Sees Bias*, ABC NEWS, Apr. 27, 2005, available at <http://abcnews.go.com/US/wireStory?id=707810>; George Kennedy, *New Research Shows Americans’ Love-Hate Relationship with Journalism*, Missouri School of Journalism, Apr. 27, 2005, available at <http://journalism.missouri.edu/news/2005/04-27-love-hate-journalism.html>; see also Bernard Goldberg, *Networks Need a Reality Check*, WALL ST. J., Feb. 13, 1996.

<sup>104</sup> ALEXANDRA KITTY, *DON’T BELIEVE IT: HOW LIES BECOME NEWS* 50 (2005) (“Journalists should look inward to find the reason why they not only fall for lies, but also why a disturbing number of reporters deliberately spread them.”)

<sup>105</sup> *CBS Ousts Four Over Bush Guard Story*, CNN.com, Jan. 11, 2005, <http://www.cnn.com/2005/SHOWBIZ/TV/01/10/cbs.guard/index.html>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; see also *CBS News Admits Bush Documents Can’t Be Verified*, MSNBC.com, Sept. 21, 2004, <http://www.msnbc.msn.com/id/6055248/>.

that speed is more important than accuracy.”<sup>109</sup> Jurists must recognize that news reports should not serve as the basis on which custody disputes are decided and countries legally rendered zones of war.

Another issue is the tremendous financial impact that such decisions have on litigants. While costs associated with litigation are to be expected in international child abduction suits, it is unfair to subject a litigant to such astronomical costs due to a district court’s irresponsibility. As the Eighth Circuit’s decision in *Silverman* evidences, the district court’s declaration that Israel constitutes a “zone of war” is untenable.<sup>110</sup> The costs of the litigation for Mr. Silverman were very real. Most litigants do not have the resources to appeal a district court’s decision. It would be extremely unfair for parents to lose their children when they lack financial resources to defend a lengthy assault on their legal custody rights, particularly when the basis for the extra litigation appears to be groundless.<sup>111</sup>

#### IV. Suggestions for Change

In *Silverman*, the Eighth Circuit was not swayed by television reports and reached a decision using logic and law.<sup>112</sup> The potential repercussions of a decision such as the one rendered by the *Silverman* district court, however, give rise to new concerns. The Hague Convention should be updated to provide for the new age in which the threat of terrorism is a frightful reality whether one lives in Israel, France, or the United States.

From the vantage point of child custody law, the problem can be fixed through multilateral efforts on the part of the

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<sup>109</sup> *Id.*

<sup>110</sup> It is hardly impossible to believe that courts too are biased. Perhaps bias against Israel accounts in part for the district court’s opinion. At the very least, the extensive efforts which the district court exerted to rule in favor of Julie Silverman arguably amounts to judicial activism.

<sup>111</sup> Interestingly, once the *Silverman* case was litigated in the appropriate forum, Israel, the Mother was granted primary custody of the children and allowed to return to the United States with them. (See Tel Aviv area Family Court file number 85641/00). The Silverman children continue to reside with their Mother, Julie Silverman, in the United States, enjoying regular visitation with their Father.

<sup>112</sup> *Silverman*, 338 F.3d at 886.

lawmakers, the judiciary, and individual litigants and attorneys. First, the lawmakers need to make a decisive effort to rewrite the exceptions to clearly delineate when they will and more importantly, when they will not, apply. Individual courts must act more responsibly and examine the full range of repercussions caused by their decisions in international child abduction disputes. Courts must avoid interpreting exceptions under the Hague Convention broadly because the Convention clearly specifies that such exceptions should be interpreted narrowly.<sup>113</sup> Individual litigants and their legal counsel must use the law as it was intended, to return a child to his rightful home. A single victory in the courtroom does not justify the resultant destruction to individual freedom.

A. *Proposed revision to the Hague Convention: The "Clean Hands" Doctrine*

When parents choose to move their family to a new country, they are thereby choosing to accept the new risks and environmental dangers associated with that country.<sup>114</sup> One should not be allowed to move to a country, then upon deciding to leave, use "terrorism" as a means to force relocation of their children during a custody dispute. It is disingenuous and such actions should not be rewarded. Yet, this is a recurring problem.<sup>115</sup> A means of solving this problem is the addition of a "Clean Hands" doctrine to the Hague Convention.

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<sup>113</sup> See Hague, *supra* note 1, at art. 13(b); see also *Danaipour v. McLarey*, 286 F.3d 1, 16 (1st Cir. 2002) ("The Article 13(b) exceptions are narrow, and should be construed narrowly by the courts."); Galit Moskowitz, *The Hague Convention on International Child Abduction and the Grave Risk of Harm Exception: Recent Decisions and Their Implications on Children from Nations in Political Turmoil*, 41 FAM. CT. REV. 580 (Oct. 2003).

<sup>114</sup> (This is particularly the case with a country like Israel, where one cannot claim they moved there without prior knowledge of the country's political strife and social upheaval.)

<sup>115</sup> See, e.g., *Cornfield v. Cornfield*, Superior Court of Justice- Ontario, file No. 01-FA-10575, (November 30, 2001); *Azoulay v. Benatouli*, RG no. 0143442, Paris District court of Family Affairs (December 21, 2001); *Watkins v. Watkins*, District Court of Zweibruecken, Germany, docket no. 1F 3709/00 (January 25, 2001). For an excellent discussion of this issue, see Edwin Freedman, *International Terrorism And The Grave Physical Risk Defence Of The Hague Convention On International Child Abduction*, INT'L FAM. L. J. (May 2002).

The "Clean Hands" doctrine would create the following rule: A parent who voluntarily moves to a country and in spite of safety risks, cannot later exploit such fears for personal gain by arguing it constitutes a defense under the Hague Convention.<sup>116</sup> A fact-based test would be employed, and the parent seeking to use an Article 13(b) defense would be held to a high burden of proof such as the "clear and convincing" standard.<sup>117</sup> That parent would be required to either prove that this move to the country at issue was not voluntary or that they were truly ignorant of any physical risks or dangers associated with the country in question, and that upon learning of physical dangers immediately sought relocation. If a parent could not make such a showing, they would immediately lose under an Article 13(b) defense.

When a parent uses fears of terrorism as a means of achieving personal gain, they are doing the terrorists' work for them. A "Clean Hands" Doctrine would aid in the fight against terrorism in family law courts, as it would prevent parents from using threats of terrorist attack as an instrumentality for personal gain. Additionally, this doctrine would promote equity and fair play; helping to ensure the appropriate parent retained physical custody of the children.

## V. Conclusion

Unfortunately, terrorists continue to wreak havoc around the world and recruit many new converts to their causes. Whatever their specific tools it is clear that "terrorists don't want what we have; they don't want us to have what we have."<sup>118</sup> One common thread binding all civilized societies is an independent and dependable judiciary. Allowing terrorist actions to effect a

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<sup>116</sup> See Edwin Freedman, *International Terrorism And The Grave Physical Risk Defence Of The Hague Convention On International Child Abduction*, INT'L FAM. L. J. (May 2002). See also footnote 80, *supra*, where the Court noted that Mrs. Silverman knew the situation in Israel before she moved, she moved anyway, and the situation had not changed meaningfully since Mrs. Silverman had moved there.

<sup>117</sup> Courts seeking an intermediate standard of proof not as high as "beyond a reasonable doubt" but stronger than the normal civil standard often pick "clear and convincing evidence". See Mueller & Kirkpatrick, *Federal Evidence*, 2d ed.1994, p. 320; Ehrhardt, *Florida Evidence*, 2004, p. 93.

<sup>118</sup> Sen. Johnny Isakson, Senate Floor, Feb. 16, 2006.

decision as fundamental as where one can raise a family would be both devastating and cowardly, that strikes at the heart of civilized society. Therefore, the Hague Convention needs to be reexamined and redefined to address this.

Everyone knows of the obvious effects of terror on civilized societies. Of course we are aware of the immediate destruction. Of course we are aware of the important but annoying precautionary measures taken to prevent terrorist attacks. Nonetheless, we must focus our attention on the subtle and insidious effects of terror. We must identify these inconspicuous repercussions and find ways to combat them. Otherwise, the terrorists win—even if the bomb doesn't explode.