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# INTERNATIONAL CHILD ABDUCTION AND THE ESCAPE FROM DOMESTIC VIOLENCE

Merle H. Weiner\*

The violence went on for nine months . . . . By the end, the beatings were happening weekly, sometimes three times a week . . . . It always went on in front on the kids . . . . It was so serious, and so violent, and so horrible for the kids . . . . My daughter still asks, 'Why'd papa try to break your arms and legs?' . . . I left France when I realized after nine months that there was nothing I could do there to do to stop the violence.<sup>1</sup>

## INTRODUCTION

Within the last decade, the American public and its politicians have come to acknowledge the horrors of domestic violence, and, in particular, the impact that it can have on children. Every state now makes civil protection orders available to victims,<sup>2</sup> treats domestic abuse as a crime,<sup>3</sup> and considers domestic violence relevant to the

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1. Telephone Interview with Debra Mosesman Prevot, Respondent in *Prevot v. Prevot*, 855 F. Supp. 915 (W.D. Tenn. 1994), *rev'd*, 59 F.3d 556 (6th Cir. 1995) (June 26, 1997) [hereinafter *Prevot Telephone Interview*].

2. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 843 n.204 (1993) (citing states' statutes).

3. Some states have criminal provisions specifically directed to domestic violence perpetrators. See, e.g., Alaska Stat. § 11.41.220 (Michie 1998); Ark. Code Ann. §§ 5-26-303 to 309 (Michie 1997); Cal. Penal Code § 243(e)(1) (West 1992); Idaho Code § 18-918 (Michie 1997); 720 Ill. Comp. Stat. 5/12-3.2 (1993); Iowa Code § 708.2A (1993); Mich. Comp. Laws § 750.81 (Supp. 2000); Minn. Stat. § 609.2242 (Supp. 2000); Mont. Code Ann. §§ 46-6-601 to 603 (1999); N.M. Stat. Ann. §§ 30-3-12-16 (Michie 1978); Ohio Rev. Code Ann. § 2919.25 (Anderson 1996); S.C. Code Ann. §§ 16-25-20 & 16-25-65 (Law. Co-op. 1985 & Supp. 1999); Vt. Stat. Ann. tit. 13, §§ 1043-1044 (1974 & Supp. 1999); Va. Code Ann. § 18.2-57.2 (Michie 1996); W. Va. Code § 61-2-28 (1997). Other states make clear in their criminal codes that law enforcement agencies should treat domestic abuse the same as crimes occurring between strangers. The legislatures from these states indicate that the regular criminal laws should be sufficient to deal with the problem of domestic violence and they do not enact statutes

adjudication of child custody.<sup>4</sup> The federal government also has made tremendous strides in recognizing and addressing the problem of domestic violence.<sup>5</sup>

The United States is not the only country tackling the problem of domestic violence. Various solutions are being implemented around the world. In certain places, the legislative and judicial response has been pronounced.<sup>6</sup> Reformers now are focusing attention on

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to make domestic assault its own crime. *See, e.g.*, R.I. Gen. Laws § 12-29-1 (1994); Tenn. Code Ann. § 36-3-618 (1996); Wash. Rev. Code § 10.99.010 (1990).

4. Two-thirds of the states have laws requiring that evidence of domestic violence be considered in custody determinations. *See* Principles of the Law of Family Dissolution: Analysis & Recommendations, § 2.13, reporter's notes, cmt. c (Tentative Draft No. 3, Part 1, 1998) (citing cases therein). Other states reach the same result through case law. *See* Joan Zorza, *Protecting a Battered Woman's Whereabouts From Disclosure*, Domestic Violence Rpt., Oct./Nov. 1995, at 3 ("[e]very state now has case law allowing courts to consider domestic violence in their custody decisions"); *see also* Nancy K. D. Lemon, *Custody and Visitation Trends in the United States in Domestic Violence Cases*, in *Children Exposed to Domestic Violence: Policy Development and International Issues* 329 (2000) (discussing how domestic violence is treated in custody and visitation cases).

5. Beginning in the mid-eighties, Congress passed legislation to address the problem of domestic violence and to help ensure domestic violence victims' safety. *See, e.g.*, the Family Violence Prevention and Services Act of 1984, 42 U.S.C. § 10401 (authorizing the expenditure of \$65 million to help states provide shelter for victims of domestic violence and to coordinate research, training and clearinghouse activities); the Crime Victims Fund Act of 1984, 42 U.S.C. § 10601 (providing federal money for both crime victim compensation and state agency services for domestic abuse victims). Congressional efforts continued in the 1990s. *See, e.g.*, Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 104 Stat. 4544 (1990); Battered Women's Testimony Act of 1992, Pub. L. No. 102-527, 106 Stat. 3459 (1992); Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, §§ 306, 317, 319, 106 Stat. 187 (1992); International Parental Kidnapping Crime Act of 1993, Pub. L. No. 103-173, § 2, 107 Stat. 1998 (1993); Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994) [hereinafter VAWA].

After VAWA was enacted, Congress continued to pass new legislation addressing issues related to domestic violence. *See, e.g.*, Pub. L. No. 101-112, 103 Stat. 685 (1989) (declaring October National Domestic Violence Awareness Month); Pub. L. No. 104-191, 110 Stat. 1936 (1996) (preventing insurance discrimination based on domestic violence); Pub. L. No. 104-201, § 1069, 110 Stat. 2655 (1996) (creating the crime of interstate stalking); Pub. L. No. 104-208, 110 Stat. 3004 (1996) (providing vital public health services for victims of domestic abuse); Pub. L. No. 104-208, 110 Stat. 3009-371-72 (1996) (making the possession of firearms criminal for those convicted of a misdemeanor crime of domestic violence); Pub. L. No. 105-244, § 821, 112 Stat. 1581 (1998) (providing funding for the prevention of violent crimes against women on campus); Pub. L. No. 105-276, § 514, 112 Stat. 2461 (1998) (stating Congress' preference that victims of domestic violence receive priority for public housing assistance).

6. *See, e.g.*, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *1999 Country Reports on Human Rights Practices*, at Belgium, Colombia, Honduras, Hungary, Israel, Italy, Mexico, Panama, Spain, New Zealand, South Africa, Venezuela § 5 (Feb. 25, 2000) available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/99hrp\\_report\\_toc.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/99hrp_report_toc.html) [hereinafter *1999 Country Reports on Human Rights*]. *See generally* Ed Schollenberg & Betsy Gibbons, *Domestic Violence Protection Orders: A Comparative*

countries where legal protection is nonexistent, or where reform has been incomplete or slow.<sup>7</sup>

Consistent with this trend, judges, practitioners, and researchers around the world have recently realized that domestic violence sometimes exists in the lives of women who "abduct" their own children. In 1993, Geoffrey Greif and Rebecca Hegar published a study of 368 left-behind parents whose children were abducted by the other parent.<sup>8</sup> The study revealed that mothers constituted the majority of abductors, contrary to previous assumptions. Their study also indicated that "the marriages of the parents tended to be characterized by domestic violence."<sup>9</sup> They found that,

some abducting parents in our study were fleeing abuse of themselves or their children. Because our information came primarily from the left-behind parents, we expected to hear relatively few admissions of having been violent to a spouse or abusive toward a child. However, during telephone follow-up interviews, 30% of the left-behind parents did admit that they either had been accused of or had engaged in acts of family violence.<sup>10</sup>

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*Review*, 10 Can. J. Fam. L. 191 (1992) (comparing civil protection order schemes in Australia, New Zealand, Great Britain and the United States). See also Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 Willamette L. Rev. 773, 807-08 (1997) (citing constitutional provisions addressing domestic violence, explicitly or implicitly, in Brazil, Colombia, Ethiopia, Vietnam and Uganda). Armatta provides a helpful survey of criminal and civil protections for abused women in numerous countries. *Id.* at 808-32.

7. See, e.g., Armatta, *supra* note 6, at 782-805 (reviewing "legal complicity" of many countries in domestic violence); Isabel Marcus, *Preliminary Comments on Dark Numbers: Research on Domestic Violence in Central and Eastern Europe*, 21 U. Ark. Little Rock L. Rev. 119, 125 (1998) (discussing the respondents' estimate of the incidence of violence for all women in Poland (30-40%), Hungary (25-30%), Russia (50-75%), and Romania (20-25%)); Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 Am. U. J. Gender & L. 369, 410-23 (1998) (discussing legal response to family violence in Albania, Bulgaria, Croatia, Czech Republic, Hungary, Kosovo, Poland, Romania, Russia, and Serbia); Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 Alb. L. Rev. 943, 957-58 (1997) (describing limitations of the Prevention of Family Violence Act in South Africa). For disturbing accounts of the ways in which legal systems can seriously fail to address domestic violence, see *infra* notes 139, 141 and Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 Alb. L. Rev. 1119 (1995).

8. See Geoffrey L. Greif & Rebecca L. Hegar, *When Parents Kidnap 18-19* (1993).

9. *Id.* Violence was present in 54% of the relationships. *Id.* at 36; see also Geoffrey L. Greif, *Impact on Children of International Abduction*, in American Bar Association Center on Children and the Law, North American Symposium on International Child Abduction: How to Handle International Child Abduction Cases 2-3 (1993) [hereinafter *How to Handle International Child Abduction Cases*].

10. Greif & Hegar, *supra* note 8, at 268-69. Greif and Hegar also found that the incidence of domestic violence in relationships that experience child abduction is twice as high as compared with domestic violence in the general population, and higher than the violence experienced among divorcing couples. See *id.* at 30. Most left-behind parents claimed to be the sole victim, "with a handful describing



The same year that Greif and Hegar published their study, the United States Congress recognized that abductors sometimes flee to escape domestic violence. In passing the International Parental Kidnapping Crime Act of 1993, Congress provided an explicit defense for parents fleeing from domestic violence.<sup>11</sup> More recently, at the conclusion of the third meeting of the Special Commission to discuss the operation of the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"),<sup>12</sup> the participants recognized: "[T]he majority of children . . . were taken away from their country of habitual residence by their mothers, who not infrequently alleged that they or the children had suffered hardship and domestic violence at the hands of the father."<sup>13</sup>

The formal recognition that child abductors can be victims of domestic violence is relatively recent.<sup>14</sup> This raises concerns about the

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themselves as the sole perpetrator or claiming that both parents were violent." *Id.* In fact, the abductor was reportedly the only violent partner 90% of the time. *See id.* at 36. Greif and Hegar's statistic undoubtedly underestimates the number of left-behind parents who are perpetrators. Their data was obtained from fourteen organizations in the United States and Canada whose sole purpose was to help parents search for missing children. *Id.* at 16. "[P]arents who are wanted by the police, have a police record, or have battered their spouses or children are less inclined to provide the background information and documentation that missing children's organizations often require." *Id.* at 17. In addition, survey respondents naturally desire to place themselves in the best light possible when answering the questions, and there was no benefit to admitting being violent. In fact, approximately 25% admitted being *accused* of physically abusing the children or committing violence against the abductor. *See id.* at 35. The denial by the left-behind parents that they committed violence also conflicts with more general statistics about who are the victims of domestic violence. "Women were about 6 times more likely than men to experience violence committed by an intimate." Bureau of Justice Statistics, *Violence Against Women: Estimates From the Redesigned Survey 1* (1995).

11. International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204(c)(2) (1993).

12. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter *Hague Convention on Child Abduction*].

13. Lord Chancellor's Department, Child Abduction Unit, Report on the Third Meeting of the Special Commission to Discuss the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Apr. 8, 1997, at 1 (authored by Michael Nicholls).

14. In the first and second Special Commission Meetings to Review the Operation of the Hague Convention, held in 1989 and 1993 respectively, domestic violence appeared only once as an issue that received any comment at all, and not by virtue of it being on the agenda. In the context of an inquiry about whether courts in the various countries have refused the return of a child on the grounds set out in Article 13(b) (allowing a judicial or administrative authority to refuse to return the child if there "is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"), the following was stated:

An observer pointed out that an abducting parent may refuse to return because of fear of domestic violence. In Ireland, the only State to mention such a case, the Court refused an order to return partly on the grounds that

primary legal mechanism that addresses the problem of international child abduction—the Hague Convention on the Civil Aspects of International Child Abduction, completed by the Hague Conference on Private International Law in October 1980.<sup>15</sup> The Hague Convention's signatories proclaimed their firm conviction that "the interests of children are of paramount importance in matters relating to their custody," and sought "to protect children" from the harms

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any domestic violence would pose a severe psychological risk to the children.

Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Jan. 18-21, 1993, 33 I.L.M. 225, 241 (1994) [hereinafter Report of the Second Special Commission].

15. Hague Convention on Child Abduction, *supra* note 12, at 1501. See generally Elisa Pérez-Vera, *Report of the Special Commission*, Preliminary Doc. No. 6, May 1980, in Hague Conference on Private International Law, III Actes et documents de la Quatorzième Session, October 6-25, 1980, at 14-16 [hereinafter Pérez-Vera Report] (describing analogous bilateral and international agreements). See, e.g., European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, *opened for signature* May 20, 1980, E.T.S. No. 105 [hereinafter European Convention]; Inter-American Convention on the International Return of Children, adopted at Montevideo, Uruguay on 15 July 1989, 29 I.L.M. 63 (1990) [hereinafter Inter-American Convention].

The European Convention is concerned with the enforcement of custody and access orders. See European Convention, *supra*, Art. 7, Art. 11. The European Convention requires a custody or access decision in order to invoke its provisions. See *id.* Art. 4. There are provisions that, in some instances, might permit a court not to enforce a foreign order if the beneficiary of that order is also a perpetrator of domestic violence. See, e.g., *id.* Art. 10 (1)(a), (b) ("[i]f it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed; if it is found that by reason of a change in the circumstances . . . the effects of the original decision are manifestly no longer in accordance with the welfare of the child"). For a description of the European Convention, see generally Anne Marie Hutchenson & Henry Setright, *International Parental Child Abduction* 7-9 (1998); Cathy S. Helzick, Note, *Returning United States Children Abducted to Foreign Countries: The Need to Implement the Hague Convention on the Civil Aspects of International Child Abduction*, 5 B.U. Int'l L.J. 119, 136-39 (1987); and Robin Jo Frank, Note, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. Int'l L. & Pol. 415, 429-30, 437-40, 445-47 (1984). The European Convention is "complementary" to the Hague Convention on Child Abduction, and presents "no conflict" in principle. See Hague Conference on Private International Law: Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Oct. 26, 1989, 29 I.L.M. 219, 233 (1990) [hereinafter Conclusions of 1989 Special Commission]. There have been no practical problems either: "The Permanent Bureau and the Council of Europe have an excellent working relationship on the interplay between these Conventions." Report of the Second Special Commission, *supra* note 14, at 246.

The Inter-American Convention is modeled, in part, on the Hague Convention and is also compatible with it. See Inter-American Convention, *supra*, at 63-64 (Introductory Note of Heidi V. Jimenez). The Inter-American Convention contains, however, one defense that may be broader than anything contained in the Hague Convention. Article 25 states that "[a] child's return under this Convention may be refused where it would be manifestly in violation of the fundamental principles of the requested State recognized by universal and regional instruments on human rights or on the rights of children." *Id.* at 71.

attending wrongful removal or retention.<sup>16</sup> The Convention, described in detail below,<sup>17</sup> affords left-behind parents a remedy "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "[t]o ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>18</sup> The Convention is presently in force in over sixty countries, including the United States.<sup>19</sup>

The time is ripe for an in-depth exploration of the Hague Convention's application to parents who take their children across international borders to escape from domestic violence.<sup>20</sup> Part I of

16. Hague Convention on Child Abduction, *supra* note 12, Art. 1.

17. *See infra* Part II.

18. Hague Convention on Child Abduction, *supra* note 12, Art. 1.

19. As of April, 2000, the Convention had been ratified or acceded to by Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bermuda, Bosnia & Herzegovina, Brazil, Burkina Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Federal Republic of Yugoslavia, Fiji, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Isle of Man, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Macedonia, Macau, Malta, Mauritius, Mexico, Moldova, Monaco, Montserrat, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, Turkmenistan, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, and Zimbabwe. *See* Hutchenson & Setright, *supra* note 15, at 56-57; Hague Conference on Private International Law, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, preparations for a fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in Support of the Convention, Prelim. doc. No. 6 of April 2000, at 2; News: Child Abduction, 25 Fam. L. Rep. 1171 (Feb. 9, 1999).

20. Most authors who have addressed the Convention from a legal standpoint have not mentioned the problem of the domestic violence victim as abductor. A few authors acknowledge that abductors are sometimes women fleeing from domestic violence, but these authors fail to address that fact in their analysis in any important way. *See, e.g.,* Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 Fam. L.Q. 557, 588-89 (1998) (arguing that while courts make "right mistakes" when they manipulate the Convention to refuse the child's return in this sort of situation, courts should still order the child's return if the child can remain with the abducting parent until the merits are adjudicated); June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 Ariz. J. Int'l & Comp. L. 791, 832 (1998) (arguing that the Hague Convention does not promote children's interests in the same manner as does the U.N. Convention on the Rights of the Child).

Only two authors have addressed the issue with any sort of depth. My approach complements both of these authors' efforts. Regan Fordice Grilli in her student comment, *Domestic Violence: Is it Being Sanctioned by the Hague Convention?*, 4 Sw. J.L. & Trade Am. 71 (1997), bases her analysis on one case, *Nunez-Escudero v. Tice Menley*, 58 F.3d 374 (8th Cir. 1995). My Article extends far beyond Grilli's analysis because the issues in the *Nunez-Escudero* case and Grilli's discussion were limited to the Hague Convention's habitual residence requirement and grave risk exception. Unexamined by Grilli were how other provisions of the Convention are affected by domestic violence, the Convention's general minimization of the relevance of domestic violence, and the possible solutions to the problem. Miranda Kaye also

this Article explains that a general perception existed when the Hague Convention was drafted that the abductors were men who had lost or feared losing custody to the children's mothers.<sup>21</sup> To the extent that domestic violence was considered at all by policy makers, fathers were sometimes thought to abduct their children as a way of abusing the children's mothers. Against this backdrop, the Hague Convention's quick "right of return" remedy and its limited defenses made perfect sense. However, the Hague Convention framework makes far less sense as a remedy for abductions by primary caretakers, often women, who take their children with them when they flee from domestic violence.

Part II describes the minimal legal relevance domestic violence has to a Hague Convention proceeding initiated by a batterer to obtain the return of his children from his victim, the abductor. The Convention contains no defense stating that an abduction is justified if it occurred to escape from domestic violence. Moreover, none of the current defenses readily encompass that argument.<sup>22</sup> Battered women seeking to negate elements of the petitioner's prima facie case also obtain minimal assistance from the fact that they were battered by the petitioner.<sup>23</sup> Consequently, the domestic violence victim's ability to defeat a Hague Convention application for the return of her child, if possible at all, often turns more on fortuity and the judge's sympathy than on any principled rule of law.

Part III explores possible solutions for eliminating or mitigating the injustice that can result to domestic violence victims and their children under the Hague Convention. The options evaluated range from the rather modest possibility that courts extract undertakings from

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examines the problem in her article, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four*, 13 Int'l J.L. Pol'y & Fam. 191 (1999). Professor Kaye analyzes Convention cases "mainly from England and Australia," *id.* at 192, whereas my Article focuses mainly on cases from the United States. Professor Kaye focuses "mainly" on Article 13(1)(b), *id.* at 195, whereas my Article examines all of the possible defenses available under the Hague Convention that a domestic violence victim might be able to invoke. Professor Kaye's principal contribution is her identification of themes in the cases that suggest that judges adjudicating Hague Convention cases have an incomplete understanding of domestic violence. For example, Professor Kaye suggests that judges view the mothers as "hostile and manipulative," have an "unrealistic [view of] . . . the ability of the legal system to protect women and children from violence," and "underestim[ate]" the harm children experience from domestic violence. *Id.* at 192. Consistent with Professor Kaye's observations, this Article finds a general unwillingness among United States judges to interpret the Convention in a manner beneficial to victims trying to escape from domestic violence with their children. However, unlike Professor Kaye, this Article also analyzes potential options for mitigating courts' use of "[l]anguage and themes . . . which minimize, trivialize or normalize violence against women and children." *Id.* at 205.

21. See *infra* Part I.A.

22. See, e.g., *infra* Part II.B.2.e.

23. See *infra* Part II.B.1.

petitioners that guarantee an abductor's safety<sup>24</sup> to the more radical adoption of an explicit domestic violence defense.<sup>25</sup> This Article also explores whether the new *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("Protection Convention")<sup>26</sup> can ameliorate the problems faced by domestic violence victims who are served with a Hague Convention petition.<sup>27</sup> Lastly, this Article examines the possibility that domestic violence victims and their children could remain in the countries to which they fled, while the parties litigate custody in the courts of their children's habitual residence.<sup>28</sup>

The goals of this Article are to help ensure that the Convention is not another obstacle for women seeking to escape abusive situations, that women are not compelled to litigate custody in an unsafe venue, and that women are not required to litigate in a forum that was chosen solely by their batterers and imposed upon them by force. These goals must be accomplished without undermining the important framework of the Hague Convention. Hopefully, policy makers at the fourth meeting of the Special Commission to review the operation of the Convention, scheduled for March 2001,<sup>29</sup> will agree with these goals and strive for their achievement, regardless of whether this Article's specific solution finds favor.

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24. See *infra* Part III.A.

25. See *infra* Part III.C.

26. Hague Conference on Private International Law: Final Act of the Eighteenth Session with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, Oct. 19, 1996, 35 I.L.M. 1391 (1996) [hereinafter *Protection Convention*].

27. See *infra* Part III.B.

28. See *infra* Part III.D.

29. Preliminary documents prepared to help plan for the fourth Special Commission meeting suggest that the issues raised in this Article will be before that body. See, e.g., Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Preparations for a Fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in support of the Convention, April 2000, Prel. Doc. No. 6 of April 2000, at 4-5, ¶ 5 (listing principal agenda items as including "[i]ssues surrounding the safe return of the child (and the custodial parent, where relevant)"). In fact, one of the "four major areas of concern" identified by Professor William Duncan, First Secretary of the Hague Conference on Private International Law, in *Action in Support of the Hague Convention. A View from the Permanent Bureau*, is the:

concern that the Convention, when applied with rigour, is too drastic a remedy for some of the situations to which it has commonly come to be applied. The case particularly in point is that in which the abductor is the primary caretaker, usually a mother with joint custody, and in which the father is using the return application essentially as a means to safeguard his visitation rights.

*Id.* at 8.

As described below, these goals may be achievable with a strong commitment from member states to interpret the existing Convention, particularly the term "habitual residence" and the Article 13(b) defense, in a manner consistent with these goals. Because these interpretations may not be uniformly adopted, this Article ultimately recommends a two-pronged solution. First, there should be a total defense to the Convention's remedy of return for battered women who are forced to flee a country and settle abroad with their children. Second, there should be a procedure similar to that found in the United States' Uniform Child Custody Jurisdiction and Enforcement Act for those women who voluntarily go to a foreign country, and then flee to escape from domestic violence. The procedure would allow these victims to litigate issues of custody from the country to which they fled. The return of their children would be stayed until this litigation was complete. At this time, this two-pronged solution offers the best hope for addressing domestic violence victims' concerns without undermining the Convention.

## I. COMPLETING THE PICTURE

### A. *The Forgotten Abductors*

Although every international child abduction is factually distinct, all international child abductions converge with the transportation of a child across national borders. Some common patterns emerge and deserve attention because specially tailored solutions to these abductions may make the most sense. For example, abductions by strangers are often treated differently by law enforcement than abductions by relatives.<sup>30</sup> Among abductions committed by parents,<sup>31</sup> it is useful to focus on the abductor's gender and motives. One can then segregate those cases where the abductor claims to have abducted her children to escape from domestic violence. This subset of cases raises unique issues for policy makers, as described below.<sup>32</sup>

Policy makers historically have tended to treat international child abduction by parents as a monolith, despite significant differences between the types of abduction. In the United States, for example, reformers used the image of a "typical" international child abduction to guide their efforts.<sup>33</sup> The prototype is not traceable to any one

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30. See Martha Winterbottom, *The Nightmare of International Child Abduction: Facing the Legal Labyrinth*, 5 J. Int'l L. & Prac. 495, 497-98 (1996) (discussing how law enforcement does not wish to be involved with domestic disputes).

31. See David Finkelhor et al., *Missing, Abducted, Runaway and Thrownaway Children in America: First Report: Numbers and Characteristics National Incidence Studies*, at 62 (8 out of 10 cases involve "parental figures" as abductor) (May 1990). Only abductions by one parent from the other parent are addressed in this Article.

32. See *infra* Part I.B.

33. It is obviously impossible to generalize the United States' experience to other

source, nor is it scientifically verifiable. Rather, the prototype emerges from the documents that accompanied policy makers' attempts to address the problem of international child abduction and from stories of abduction highlighted in the popular press. A similar image also exists in the materials that guided the formation of the Hague Convention on Child Abduction by members of the Hague Conference on Private International Law.

In the United States, widespread attention first focused on the problem of international child abduction during the late 1970s and the early 1980s.<sup>34</sup> From this period until the early 1990s, the stereotypical image of an international child abduction was the following: the abductor was a male non-custodial parent, usually a foreign national, who removed the child from the child's mother and primary caretaker, typically an American national.

This stereotype dominated Congressional proceedings in 1986 for the ratification of the Hague Convention.<sup>35</sup> Examples employed by Representative Stark of California, in urging his colleagues to ratify

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countries; nevertheless, the material from the United States provides insight into one country's motivation for adopting the Hague Convention, and hopefully will encourage further research to either confirm or disprove this "prototype" for other countries.

34. See Finkelhor, *supra* note 31, at 43 ("Attention to the problem of family abduction is a fairly recent phenomenon dating from the late 1970s and early 1980s."). Canada proposed having a convention on international child abduction in 1976, see Adair Dyer, *Childhood's Rights in Private International Law*, 5 Australian J. of Fam. L. 103, 112 (1991), and the topic received scholarly attention and increased media coverage in this country at approximately the same time. See Michael W. Agopian, *Parental Child-Stealing* 3-4 (1981) (claiming to be the first formal study dealing with the patterns of parental child-stealing).

35. The United States became a signatory of the Convention on December 23, 1981. See *Parental Kidnapping: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong. 35 (1983) [hereinafter *Parental Kidnapping*] (statement of James G. Hergen, Assistant Legal Adviser for Consular Affairs, Office of the Legal Adviser, U.S. Department of State). The Convention was transmitted to the Senate on October 30, 1985. See Letter of Transmittal, Hague Convention on the Civil Aspects of International Child Abduction, S. Treaty Doc. No. 99-11, at 1 (1985). There was strong support for the Convention throughout the country. See *Parental Kidnapping*, *supra* (statement of James G. Hergen) (commenting that "the American Bar Association, state and federal authorities, the academic community and parents groups, among others, have shown strong support for the Convention"). The Senate unanimously ratified it on October 9, 1986, with several reservations. See 132 Cong. Rec. S29885 (1986) (reflecting a vote of ninety-eight Senators in favor, none against, and two not voting). The reservations, explicitly permissible by the Convention, relate to a required English translation of all documents sent to the United States Central Authority (pursuant to Arts. 24 and 42), and the refusal to assume costs or expenses in connection with legal counsel or court proceedings related to return of children except as a legal aid program may cover those expenses (pursuant to Arts. 26 and 42). See *id.* at S29885. For a general history of the United States' response to the Hague Convention, see Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 Fam. L.Q. 35, 35-38 (1990) [hereinafter Pfund, *Availability of Counsel*].

the treaty, are illustrative.<sup>36</sup> He spoke of two cases that, for him, were paradigmatic of the "serious problem" of international child abduction. Both involved abductions by male non-custodial parents,<sup>37</sup> and a "deprived parent in the United States."<sup>38</sup> Congressional testimony also reinforced the image that the abductor was the non-custodial parent,<sup>39</sup> male,<sup>40</sup> and that the left-behind parent was an American.<sup>41</sup>

A similar prototype of abduction helped secure passage of the United States' implementing legislation, the International Child Abduction Remedies Act of 1988 ("ICARA").<sup>42</sup> For example, Senator Dixon, a self-proclaimed "leader in the effort to pass [ICARA],"<sup>43</sup> told the following story:

In January 1986, a constituent of mine, Patricia Rousch, saw her two daughters Alia and Aisha off for an overnight stay with their father,

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36. 132 Cong. Rec. E2677 (daily ed. July 31, 1986).

37. The abductors' gender was implicitly male because most custodial parents at this time were women. See J. Thomas Oldham, *The Appropriate Child Support Award When the Noncustodial Parent Earns Less Than the Custodial Parent*, 31 Hous. L. Rev. 585, 598 (1994) (stating that women were custodial parents after divorce in 89% of situations in 1980 and 86% of situations in 1990).

38. 132 Cong. Rec. E2677 (daily ed. July 31, 1986) (remarks of Rep. Stark)

39. See 133 Cong. Rec. S1248-01 (1987) (letter from Sen. Dixon to George P. Shultz, Secretary of State, Jan. 28, 1987, urging more active State Department involvement in child abduction cases and claiming that State Department records show that in all of the "more than 2000 cases of international parental child abduction . . . the victimized parent has been given sole legal custody of the child by the U.S. Courts").

40. James Hergen highlighted six cases for a Senate subcommittee exploring parental kidnapping. See *Parental Kidnapping*, *supra* note 35, at 74-76. Four of the stories involved a mother living in America (often the person's citizenship was difficult to assess), and a husband, usually a foreign national, but occasionally a naturalized U.S. citizen, who took the child abroad. *Id.* The children were taken to Lebanon, Saudi Arabia, Yemen, and Israel. *Id.* The other two cases did not involve a mother absconding with the children, but rather involved unusual fact patterns. One case involved a child who was being held in India against the parents will by the child's aunt and uncle. *Id.* at 75 (document provided with statement of James G. Hergen). The other case involved a fifteen-year-old girl who had run away to Israel with her husband. *Id.* at 76.

41. See 132 Cong. Rec. S29881 (1986) (statement of Arthur W. Rovine, Chairman, Section of International Law and Practice, American Bar Association) (arguing that "victim parents in the United States and their lawyers face very real and too often insurmountable obstacles in securing the return to the United States of a child who has been taken abroad," and that it is much more likely that children wrongfully brought to the U.S. will be returned to their country of origin under section 23 of the UCCJA).

42. The President signed the United States' implementing legislation, the International Child Abduction Remedies Act on April 29, 1988. See International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437-42 (codified as amended at 42 U.S.C. §§ 11601-11610 (1989)). The United States deposited its instrument of ratification at the Hague on that same day. Pfund, *Availability of Counsel*, *supra* note 35, at 38. The Convention went into force in the United States on July 1, 1988. Exec. Order No. 12648, 53 Fed. Reg. 30637 (Aug. 11, 1988).

43. 137 Cong. Rec. S14,142, 43 (1991).



a Saudi national, who at that time was legally divorced from Pat, but had gained limited visitation rights. Pat had legal custody of the children. That cold January night was the last time Pat Rousch saw her children. Her ex-husband stole the children out of the country on a plane to Saudi Arabia.<sup>44</sup>

Other legislators related similar stories. Then-Senator Gore spoke of Holly Planells, a woman whose son was taken by her ex-husband to Jordan, even though she had full legal custody and the judge had imposed restrictions on the father's weekend visitation.<sup>45</sup> Senator Simon spoke of the "American children living with their fathers [in Jordan] in violation of U.S. court custody orders."<sup>46</sup> Representative Hughes said that "most" cases involved abduction by the non-custodial parent,<sup>47</sup> an assumption shared by other legislators,<sup>48</sup> which

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44. *Id.*; accord 133 Cong. Rec. S13789, 91 (1987) (statement of Senator Dixon); see also *International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971 before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong. 58 (1988) (statement of Sen. Dixon). Her husband allegedly drank heavily and beat her and the children. Patricia had custody of the children. 137 Cong. Rec. S17,078,79 (1991) (statement of Sen. Dixon); see also 134 Cong. Rec. H3335 (1988) (statement of Rep. Lipinski) (speaking of Patricia Roush-Samuta, whose daughters were removed by their father, a Saudi Arabian national, and held "against their will").

45. 133 Cong. Rec. S7889 (1987) (statement of Sen. Gore). The stories about abductors to Middle Eastern countries were misleading to the extent that they implied that these abductors would be covered by the new Hague Convention. Most Middle East countries were not parties to the Hague Convention, and few have chosen to sign on to the Convention subsequently.

46. 134 Cong. Rec. S4344 (1988).

47. Child abduction "is just an effort on the part of the non-custodial parent to escape the jurisdiction of the court that has awarded custody of the child or children to one particular parent." 134 Cong. Rec. H8558 (1988).

48. For instance, Senator Cranston referred to "the difficulties that parents from . . . California have experienced in attempting to recover their children after they have been taken abroad by a non-custodial parent." 133 Cong. Rec. S7888, 89 (1987); accord 132 Cong. Rec. S298841 (1986). Representative Lantos spoke generally of the "great deal of support for a system to return children wrongfully taken from their country by a non-custodial parent." 134 Cong. Rec. H5335 (1988) (commenting on his discussions with representatives of European parliaments and legislatures). Representative Frank stated that ICARA and the Hague Convention were responsive to a "serious problem where in cases of divorce or separation there have been cases of the non-custodial parent abducting the child from the custodial parent." 134 Cong. Rec. H8557 (1988). The House Judiciary Committee Report stated, "there has been growing concern about the number of instances in which children [are] abducted from the custodial parent and taken to another country." H.R. Rep. 100-525, 134 Cong. Rec. H5334 (1988) (statement of Rep. Shaw about the recovery of children by the "rightful custodial parent"). Senator Dixon used the phrase "rightful return of a child to its custodial parent" in describing ICARA. 134 Cong. Rec. S6482, 83 (1988); see also 133 Cong. Rec. S7885 (1987) (statement of Sen. Simon discussing how the Convention addresses the problem of "[t]he abduction of children from their legal custodians"). There is the occasional story of the American non-custodial parent being denied visitation, but this is by far the exception. See, e.g., 134 Cong. Rec. S6482, 83 (1988) (statement of Sen. Dixon referencing case with New Jersey father and Czechoslovakian mother).

implied that most abductors were male.<sup>49</sup> The stories typically involved an American left-behind parent.<sup>50</sup> Senator Dixon, invoking nationalist sentiment, told his colleagues that children who are abducted are often "brainwashed into hating their American parent... [and] taught to hate their native country, the United States."<sup>51</sup>

Domestic violence between the abductor and the left-behind parent was not usually part of the paradigm, probably because domestic violence was not as highly visible a political issue in the late 1970s and the early 1980s as it is today. Domestic violence, however, was sometimes relevant to policy makers to the extent that the abduction comprised a continuation of domestic violence.<sup>52</sup> For example, Senator Dixon made a point of emphasizing that Patricia Roush was a victim of domestic violence.<sup>53</sup>

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49. See *supra* note 37.

50. See, e.g., 134 Cong. Rec. S2794 (speaking of the number of child abductions from the U.S. and emphasizing that "the Convention will permit future left-behind parents in the United States to benefit") (letter from J. Edward Fox, Assistant Secretary, Legislative & Intergovernmental Affairs, to James C. Wright, Jr., Speaker of the U.S. House of Representatives) (daily ed. Mar. 23, 1988); 134 Cong. Rec. 5334 (1988) (statement of Rep. Shaw referencing recent increase in "abduction of children into foreign countries"); 134 Cong. Rec. H8558 (1988) (statement of Rep. Rodino) ("Enactment of H.R. 3971 offers hope to the anguished parents who lose their children abroad in violation of our laws and international law. At present, it is estimated that over 3,000 children have been abducted across international boundaries and now live in foreign countries in violation of custody orders.").

51. 134 Cong. Rec. S6482, 83 (1988) (statement of Sen. Dixon); see also *International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971*, *supra* note 44, at 60 (statement of Sen. Dixon).

52. *Parental Kidnapping*, *supra* note 35, at 166 (testimony of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.) ("[T]he searching parent hears repeated over and over again the myth, 'at least the child is 'safe,' he's with his own parent.' That is not much consolation to a parent who has been beaten and abused by a violent, temper-prone spouse."); *id.* at 167 ("According to statistics, more than half of all parental abductions occur before any court takes action, while custody is yet unclear. Who disappears with a child before any court issues a directive? A parent who feels that, because of drug abuse, child abuse, spouse abuse, or any other number of abuses, they don't stand a chance to win custody in a Court of Law."); *id.* at 169 (relating story of three-year-old Jennifer whose father "hurt her mommy a lot" and abducted Jennifer); see also *International Parental Child Abduction Act of 1989: Hearings on H.R. 3759 Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 101st Cong. 125 (1990) (letter to Subcomm. from Barbara Mezo describing, inter alia, how her husband abused her before he abducted her children to Egypt), *microformed on* CIS No. 91-H521-46 (Cong. Info. Serv.) [hereinafter *International Parental Child Abduction Act of 1989: Hearings on H.R. 3759*]; *id.* at 126 ("He would punch me, twist my arm behind my back and threaten me if I did not comply with his demands."); *id.* at 129 ("The father would also threaten not to let me see my children anymore and would say that he can kill me."). Sometimes the violence even accompanied the abduction. See *International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971*, *supra* note 44, at 58 (statement of Sen. Dixon) (describing how "a mother was taken to a motel room and held at knife-point while her children were abducted").

53. See *supra* note 44 and accompanying text. When she went to Saudi Arabia to

During this same period, the popular press in the United States also portrayed a similar picture of international child abduction. First, the vast majority of stories in the press involved fathers who had abducted their children. For example, the American public was told about Rebecca Hickman, who had been staying in a battered women's shelter after months of "mental and physical abuse," and who had been awarded custody of her three-year-old daughter by the court.<sup>54</sup> Her husband, however, abducted her daughter to Iran. Similarly, the public learned about the woes of Dana Svoboda,<sup>55</sup> Lilly Izumi,<sup>56</sup> Kristine Uhlman,<sup>57</sup> Cathy Mahone,<sup>58</sup> and others.<sup>59</sup> The stories of

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see if she and her husband could reconcile, "[her husband] beat her in front of her daughters, breaking several of her ribs." 133 Cong. Rec. S2113 (1987) (statement of Sen. Dixon); 133 Cong. Rec. S13793 (1987) ("He beat his wife. He beat his children."). After Ms. Roush and her daughters returned to the United States, her husband followed them and "began to harass the Roush family." 133 Cong. Rec. S2113 (1987). See generally Elizabeth Fernandez, *Guns, Money & Tears: Patricia Roush's 11-year Odyssey for the Return of Her Kidnapped Daughters from Saudi Arabia*, S.F. Examiner Apr. 20, 1997, at M8 (explaining that before the abduction of Roush's two daughters to Saudi Arabia, her husband assaulted her causing her to suffer broken ribs and a cardiac contusion).

More commonly, the male abductor was portrayed as a potential threat to the children. For example, one witness related the story of a father who shot to death his children and himself twenty miles from their home, and the witness spoke of cases in which children were drowned. *Parental Kidnapping*, *supra* note 35, at 93 (statement of Hon. Christopher Foley, Municipal Court Judge, Milwaukee, Wis.). Another witness spoke of how the child he was searching for "could easily have become another grim statistic of an unidentified dead child." *Id.* at 119 (statement of James W. Scutt, Investigator, Alexandria Police Department, Alexandria, Va.). Yet another witness spoke of a child who, after having been safely restored to the mother's custody, said, "Mommy. . . I don't understand what daddy meant when he circled a day on the calendar in red ink and said, on that day we are going to take pills together, and then we'll be together forever." *Id.* at 168 (testimony of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.). Children's Rights of Pennsylvania claimed that "the death of 4000 children result from parental kidnapping," and that "most abducting parents have a record of child abuse and 60% have criminal records." *Id.* at 162 (letter from Charles Blickhahn, Co-Director of Children's Rights of Pennsylvania, Inc., to the Honorable Arlen Specter) (citing the National Missing Children's Locator Center in Portland, Oregon for the statistic).

54. *Mother Finds No Help for Child Held 'Hostage' in Iran*, Seattle Times, July 21, 1985, at A10; *U.S. Hands Tied in International Custody Cases*, L.A. Times, July 21, 1985, at A30.

55. The children's father, then charged with murder, abducted the children to Mexico during a weekend visit. Jerry Crimmins, *2 Abducted Children Returned From Mexico*, Chi. Trib., Sept. 4, 1987, at 3.

56. Her ex-husband abducted his four children to Libya during a Christmas visit. Roy Bragg, *Man Who Abducted Children to Libya Had Outstanding Felony Charge*, Hous. Chron., Jan. 9, 1987, at 14.

57. John Stebbins, *Mother in Saudi Tangle Yearns for 'Stolen' Kids*, Chi. Sun-Times, Jan 2, 1988, at 2 (portraying mother sympathetically and explaining that the mother originally took the children from Saudi Arabia to the U.S. when she was subjected to domestic violence, but then the father kidnapped the children and took them back to Saudi Arabia); see also Jim Drinkard, *Parents Visit State Department to Plead for More Attention to Problem*, Associated Press, Oct. 16, 1987, available at 1987 WL 3184257 (describing how abducted children did not recognize their mother

Patricia Roush and Holly Plannells, told frequently in Congress, were also reported repeatedly in the popular press.<sup>60</sup> While there were occasional stories of mothers abducting their children,<sup>61</sup> especially Norwegian mothers successfully abducting their children to Norway with the apparent assistance of the Norwegian government,<sup>62</sup> mothers were not the dominant image of abductors captured by the press.

Second, the press, like the myopic United States legislators, focused almost exclusively on the American left-behind parents, and not on the American abductors returning to the United States. For example, the Associated Press described the Convention in terms that made it seem as if Americans had nothing to lose from the Convention's application: "The convention was written to cover instances such as one in which an American marries a German while stationed in West Germany with the armed forces, they have a child and settle in the

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when she visited them in Saudi Arabia).

58. Cathy Mahone hired a group of former Delta Force members to return her abducted daughter from Jordan. See Jack Friedman & Anne Maier, *Going Beyond the Law*, People, May 16, 1988, at 44.

59. Bill Lohmann, *U.S. Parents Struggle to Regain Children Kidnapped by Foreign Spouses*, L.A. Times, Nov. 12, 1987, at 34 (telling story of Elaine Mordo whose husband abducted her child to Turkey, and telling the story of Susan Mubaydin whose ex-husband abducted their son to Jordan); Charles Mount, *10 Years Later, A Mother Still Hunts for Son*, Chi. Trib., Sept. 1, 1987, at 1 (emphasizing father's abduction of son, although mother had also abducted son previously).

60. Michael Briggs, *Dixon Demands U.S. Help Mom Get 2 Girls Back*, Chi. Sun-Times, Jan. 29, 1987, at 40 (article about Patricia Roush); Drinkard, *supra* note 57 (same); Robin Goldstein, *Custody Fight Spans Globe*, Orange County Reg., Aug. 16, 1987, at A1 (article about Holly Planells); Carl Hartman, *House Panel Considers Bill on Abducted Children*, Associated Press, Feb. 3, 1988, available at 1988 WL 3766774 (same); Sandy Johnson, *Mother Seeks U.S. Help to Bring Back Daughters Taken by Father to Saudi Arabia*, Associated Press, Jan. 28, 1987, available at 1987 WL 3130198 (article about Patricia Roush); Lohmann, *supra* note 59 (including stories about Roush and Planells); Julie Mason, *Plano Dad Asks Congress to Help Retrieve Kids*, Dallas Morning News, Oct. 17, 1987, at 34A (article about Patricia Roush); Associated Press, *Mom Urges U.S. Help to Get Daughters From Saudi Father*, Chic. Trib., Jan. 29, 1987, at 11 (same).

61. See, e.g., Goldstein, *supra* note 60, at A1 (father had custody when the father and child went to Turkey, and then Turkish mother refused to allow child to return with father to U.S.); Lohmann, *supra* note 59, at 34 (telling story of mother abducting child to Israel); D.J. Hill, *Custody Case Goes Overseas LI Father Seeks Return of Daughters Ex-Wife Took to West Germany*, Newsday, Mar. 9, 1987, at 4 (father had joint custody at time of abduction; also discussing case of Mandi Liebling who was taken by father to Costa Rica); Mason, *supra* note 60, at 34A (mother abducted children to Israel).

62. Charles Burruss & Bill Gordon, *Norway Blamed in 'Kidnap' in S.F. Child Custody Case*, S.F. Chron., Jan. 21, 1987, at 1 (father had joint custody at the time of the abduction); Leslie Guevarra, *Teacher Sues Norway To Get His Kids Back*, S.F. Chron., Apr. 20, 1988, at A3; John Stebbins, *Norway Helped Wife Steal Son, Dad Says*, Chi. Sun-Times, Jan. 18, 1987, at 38 (father had physical custody at the time of the abduction); John Stebbins, *Pact Could Curb Child Abductors Fleeing U.S.*, Chi. Sun-Times, Jan. 20, 1987, at 7. Apparently 60 Minutes highlighted this particular type of child abduction on January 18, 1987. Stebbins, *Norway Helped Wife Steal Son*, *supra*, at 38.

United States, and the German partner then returns to Germany with the child."<sup>63</sup> Political support for the Convention, almost uniform,<sup>64</sup> arguably may have waned somewhat if the Associated Press passage had read: "The convention was written to cover instances such as one in which an American marries a German while stationed in West Germany with the armed forces, they have a child and settle in Germany, and the American then returns to the U.S. with the child to escape the domestic violence perpetuated upon her by her partner."

An examination of the work documents for the Hague Convention reveals that a similar image—albeit not one reflective of nationalist sentiment—may have influenced the drafters of the Convention, although the Report of the Special Commission, written by Elisa Pérez-Vera, suggests that the drafters were guided by no set image of abduction. The Special Commission's Report stated, "[W]e dare not advance ideas on the possible psychological motivations leading to 'abduction'; this remains an obscure domain for the jurist."<sup>65</sup> Yet included in the work documents was a report by Adair Dyer that contained a paradigmatic abduction. A section entitled, "Typical elements of the situation which results in an abduction," constructed a model of "the typical situation which produces the abduction of a child by one of his parents."<sup>66</sup> The model suggested that the abductor is most typically the non-custodial parent who abducts because of frustration due to diminished influence and access to the child.<sup>67</sup> While the model suggests that "fear" can also lead a parent to abduct a child, the model restricts the relevant fear to that which may accompany losing custody or access to the child because of nationality

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63. *President Signs Measure on International Child Custody Disputes*, 1988 WL 3780359 (Apr. 29, 1988). As a Washington Post editorial said at approximately the same time: "The media have reported on a number of these cases, in which the parent who has been given custody of a child by an American court almost always loses that child forever." Editorial, *International Child-Snatching*, Wash. Post, May 6, 1988, at A20; see also Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 Transnat'l Law. 589, 589 (1989) ("the American public generally has focused on the abduction of American children to foreign countries").

64. Lawrence H. Stotter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction Has Reached Capitol Hill*, 9 Hastings Int'l & Comp. L. Rev. 285, 286 (1986) (reporting that "[t]he Convention has received widespread legal support" and that "[p]ublic opinion appears almost unanimous that governments of the world must crack down on people who abduct children, including parents in custody battles").

65. Pérez-Vera Report, *supra* note 15, at 174.

66. Adair Dyer, *Report on International Child Abduction by One Parent ("Legal Kidnapping")*, Prel. Doc. No. 1, Aug. 1978, in Hague Conference on Private International Law, III Actes et documents de la Quatorzième Session, October 6-25, 1980, at 19 [hereinafter Dyer, *Legal Kidnapping*].

67. *Id.* at 20-21 (speaking of how encouragement from the child may "contribute to the decision of a non-custodial parent" to abduct and describing the effects of abduction including the loss of stability and particularly "the traumatic loss of contact with the parent who has been in charge of his upbringing").

bias in the courts, superior resources of the other parent, or the other parent's efforts to abduct and conceal the child.<sup>68</sup> Fear of personal violence perpetuated by the other parent is not mentioned as a common motivating factor for abduction.

There is some hint that the Conference also viewed the typical abductor as male. While the model in Adair Dyer's report is generally written in gender-neutral terms,<sup>69</sup> the male pronoun does creep into the discussion and perhaps reveals the author's preconception of the abductor's gender. The author writes, for example, "[T]he typical abductor must think that he has something to gain by his act of self-help."<sup>70</sup> In addition, since most non-custodial parents were men, that the author most likely envisioned a male abductor.

It is impossible to know whether Mr. Dyer's model influenced the drafters of the Hague Convention. However, Ms. Pérez-Vera explicitly mentions relying upon Adair Dyer's report in drafting the Convention.<sup>71</sup> She also mentions relying upon the International Social Services Report,<sup>72</sup> which provided a similar model. Yet, to some extent, whether Mr. Dyer's model influenced the drafters is irrelevant. For if the drafters failed to consider the abductors' motivations in formulating the Convention, as Ms. Pérez-Vera wrote, and if some abductors are motivated by a need to escape from domestic violence, then the drafters' omission has the same effect as if they overtly assumed the abductor is the male non-custodial parent.

The prototype that existed in the early years was not necessarily inaccurate for many international child abductions,<sup>73</sup> although it

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68. *Id.* at 20; see also *Summary of Findings on a Questionnaire Studied by International Social Service*, Prel. Doc. No. 3, Feb. 1979, in Hague Conference on Private International Law, III Actes et documents de la Quatorzième Session, October 6-25, 1980, at 134-35 [hereinafter *Summary of Findings*] (discussing motivations for abductions and "to achieve safety for abducting parent" appears nowhere).

69. Dyer, *Legal Kidnapping*, *supra* note 66, at 20.

70. *Id.*

71. Pérez-Vera Report, *supra* note 15, at 176.

72. See *infra* notes 74-75 and accompanying text.

73. Criminologist Michael Agopian, one of the first people to explore the phenomenon of parental abduction, Greif & Hegar, *supra* note 8, at 12, found that the abductor was most commonly a male. Agopian, *supra* note 34, at 59 (explaining that parental child-stealers are 71% male). The National Incidence Studies' *Missing, Abducted, Runaway, and Thrownaway Children in America* ("NISMART") First Report in 1990 also indicated that the perpetrators of family abduction were men three-quarters of the time. Finkelhor, *supra* note 31, at 54. Former husbands/boyfriends constituted 42% of all abductors, while current husbands/boyfriends comprised 21% of all abductors. *Id.* According to NISMART, a former or current wife or girlfriend abducted the child only 11% of the time. *Id.* A more limited survey conducted by Rosemary Janvier found similar results. While 62% of the domestic kidnappers were the female parent, a male parent perpetrated 81% of international kidnappings. Rosemary F. Janvier, Kathleen McCormick, & Rose Donaldson, *Parental Kidnapping: A Survey of Left-Behind Parents*, 41 *Juv. & Fam. Ct. J.* 1, 2, tbl. 1 (1990). Men are probably the abductors to certain countries

became a stereotype when used to describe all international child abductions or to formulate policy. In a somewhat limited study of international child abduction by the International Social Service, which constituted part of the work documents for the Hague Convention, 80 out of 110 cases examined involved an abduction by the father or the father's relatives.<sup>74</sup> The report cautions, however, that women may abduct as frequently as men, but that these abductions often do not come to authorities' attention because the fathers are not initiating actions, "either because they consent to the transfer . . . or because they feel that their plight is hopeless to begin with."<sup>75</sup>

Even individuals who were sensitive to the problem of domestic violence somehow missed the fact that some abductors might be domestic violence victims. Illustrative is Michael W. Agopian's 1981 study on patterns of parental child-stealing.<sup>76</sup> He dedicated an entire chapter to domestic violence.<sup>77</sup> While he presented the data "to sketch a perspective of the family structure as a unit considerably more crime prone than previously conceived,"<sup>78</sup> he concluded that his data did "not imply any direct association between various types of violence or parental child-stealing."<sup>79</sup> Throughout his analysis, Agopian implies that the abductor is typically the batterer.<sup>80</sup> He fails to recognize that the domestic violence victim may be abducting the child to escape from her abuser.<sup>81</sup>

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more than others. Cf. Fernandez, *supra* note 53, at M8 (reporting that of the 45 cases at the State Department of American children abducted to Saudi Arabia, "virtually all [are] by men").

74. Summary of Findings, *supra* note 68, at 134.

75. *Id.* (quoting German branch of International Social Services).

76. Agopian, *supra* note 34; see also Finkelhor, *supra* note 31, at 43 (citing motives for parental abductions and omitting domestic violence).

77. Chapter Two was entitled "A Perspective of Family Violence." Agopian, *supra* note 34, at 13.

78. *Id.* ("Parental child-stealing can be viewed as one type of crime within the increasingly violent domestic environment.")

79. *Id.*

80. Agopian explains how an abduction is sometimes used as a mechanism to influence the relationship between the parties. *Id.* at 84-85. As he states, "[a]n offender may refuse to accept that a marriage is terminated, even after divorce. Possession of the child, therefore, becomes the ultimate weapon with which to induce a renewed attempt by the ex-spouses to reunite the family." *Id.* at 97. His work suggests that the fathers were sending the "coercive message" to "influence a reconciliation." *Id.* at 84.

81. There are several possible explanations for the omission. One, of course, is that no data indicated that abductors were fleeing for this reason. Agopian indicated that the crime reports, from which he obtained some of his information about motivations, "tend to be rather sketchy in regards to motivational information." *Id.* at 97-98. In fact, "the motivations of the offender probably would not work their way into the official record." *Id.* at 98. Second, a left-behind parent who was a domestic violence perpetrator would be less likely to have made it into the study. As the author admits, the left-behind parent in some instances may be unwilling to report the crime. *Id.* at 7. Similarly, the police serve as a screening device and may not file a

The picture of international child abduction started becoming more complete in this country sometime prior to 1993. After 1993, there was a pronounced increase in the recognition that abductors might be mothers who were fleeing domestic abuse.<sup>82</sup> It is impossible to pinpoint one story that helped reformulate the image of international child abduction in this country, but probably two notorious cases were significant in this regard. First, there was the case of Elizabeth Morgan, who hid her daughter Hilary in New Zealand to protect Hilary from her father, Eric Foretich, who allegedly was sexually abusing Hilary.<sup>83</sup> While the initial abduction occurred in 1987, near the time of ICARA's adoption, the press attention to the case increased over time as Morgan was jailed for contempt and as Congress passed legislation to limit the time a person could be held for civil contempt in a child custody proceeding.<sup>84</sup> Second, in 1987

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report when the left-behind parent is a domestic abuse perpetrator. Cf. *id.* It is probable that some female abductors were motivated by the need to escape domestic violence, especially since that motivation is evident in so many women's stories. See, e.g., *supra* text accompanying note 1; see also *International Child Abduction: Hearings Before the Subcomm. on Human Rights and International Organizations and on International Operations of the House Comm. on Foreign Affairs*, 100th Cong. 59 (1988) (prepared statement of Bennie Ennsour) (explaining how she and her four children were trying to flee Jordan in order to escape "physical and mental abuse," but that her children could not leave the country). Third, it is also possible that this information did appear in Agopian's database and that he failed to make the connection.

82. See, e.g., Mark Brown, *Divorce, Custody an International Battle: Argentine Dad Fighting to Get Kids*, Chi. Sun-Times, Nov. 21, 1996, at 4 (discussing Iris Perretta, an American who abducted her children from Argentina after she had been physically abused by her husband); Pat Jordan, *Rescue Impossible*, Playboy, Feb. 1, 1996, at 96 (relaying story of Laurie Swint Ghidaoui who was abused by Tunisian husband and tried to remove child to America); Kristina Marlow, *Justice Outside Borders: Mom Tracks Girls to Mexico*, Chi. Trib., Aug. 14, 1994, at 1 (mentioning how mother was a victim of domestic abuse and that she fled with her daughters to Ecuador even though it was in violation of a court order). There were also more stories about mothers abducting children. See, e.g., Linda L. Creighton, *Parents Who 'Kidnap': The Hell Moms and Dads go Through When Ex-Spouses Snatch the Kids*, U.S. News & World Rep., Mar. 20, 1995, at 69, 76; Michael Croan, *Walter, Please Forgive Me For Leaving You This Way*, Roanoke Times & World News, June 22, 1996, at A1; Jan Goodwin, *The Baby Savers*, Ladies' Home Journal, Oct. 1995, at 78, 83; Michael Granberry, *A Call in the Night: She Took Their Child from her Family*, L.A. Times, July 17, 1994, at B1; Evelyn Iritani, *Lost in a Loophole. Foreigners Who Are on the Losing End of a Custody Battle in Japan Don't Have Much Recourse*, L.A. Times, Sept. 19, 1996, at E1; Angelina Lopez, *'Visitation Rights' Are a Cruel Joke to Iowa Dad*, Des Moines Reg., Apr. 28, 1997, at 1; Marci McDonald, *A Father's Fight for His Boys*, Maclean's, July 24, 1995, at 44; Randolph Ryan, *Custody Win is Little Consolation; Wife's Kidnapping of Son, 5, Has Father on Mission of Love*, Boston Globe, Sept. 3, 1994, at 21.

83. See, e.g., Barton Gellman, *New Zealand A Haven in Foreign Custody Disputes*, Wash. Post, Mar. 3, 1990, at B1.

84. During 1987 and 1988, few magazines covered the story of Elizabeth Morgan's plight. However, after becoming incarcerated for civil contempt, Morgan began receiving numerous headlines in popular journals such as *People* and *Time*. For instance, in 1988, neither *Time* nor *People* magazines published articles concerning



Betty Mahmoody published *Not Without My Daughter*. The story became a motion picture in 1991 starring Sally Field, and by 1992 over a million copies of the book had been sold.<sup>85</sup> The story documented Ms. Mahmoody's abduction of her daughter from Iran, which she described as "a country where the laws decreed that [the husband] was [the wife's] absolute master,"<sup>86</sup> in order to escape her husband's physical and psychological abuse.<sup>87</sup> Ms. Mahmoody shared her story with Congress in 1990.<sup>88</sup> She told legislators how her husband beat them, and repeatedly threatened to kill her and, at one time, their daughter.<sup>89</sup>

By 1993, United States legislators clearly understood that international child abductors could be women fleeing from domestic abuse. In 1993, the United States enacted the International Parental Kidnapping Crime Act ("IPKCA") and made it a felony to remove a child from the United States or to retain a child (who has been in the United States) outside the United States "with intent to obstruct the

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Morgan. By the end of 1989, however, *Time* had written two articles featuring Morgan, while *People* published seven articles either featuring or mentioning Morgan's circumstances (including one that listed her among the "25 Most Intriguing People of the Year"). See, e.g., *Elizabeth Morgan*, *People Weekly*, Dec. 25, 1989, at 97. In 1990, a documentary concerning the battle between Morgan and Foretich was aired on cable television in the United States. *Appeals Court Gives Go-Ahead to Lifetime Documentary*, *Broadcasting*, Apr. 16, 1990, at 73. Several months afterwards, a television movie "with clear roots in the case of Dr. Elizabeth Morgan" aired on CBS. David Hiltbrand, *In the Best Interest of the Child*, *People Weekly*, May 21, 1990, at 14; see also Edwin Chen & Marlene Cimon, *Southbound Feud Custody: New Zealand, a Potential Haven from U.S. Family Law is the Latest Battleground in the Custody War over Hilary Foretich*, *L.A. Times*, Mar. 6, 1990, at 1 (discussing the Morgan case).

85. Betty Mahmoody & William Hoffer, *Not Without My Daughter* (paperback ed. 1988). In 1992, publisher sales figures for the paperback reprint of *Not Without My Daughter* were listed at 1,300,000 copies. Penny Kaganoff, *Way Out Front: Leading Trade Paper Doubles Last Year's Numbers*, *Publisher's Weekly*, Mar. 1, 1993, at S25.

86. Mahmoody & Hoffer, *supra* note 85 at 68.

87. For example, her book describes one incident when her husband's "right fist crashed into the side of [her] head." She then reported the following: "'I am going to kill you!' he screamed in English, glaring at me. Then, turning his gaze defiantly toward the teachers, he clutched my wrist, holding me in a viselike grip . . . 'I am going to kill her,' he repeated quietly, venomously." *Id.* at 186. Her husband continued the violence. When she asked how he was going to kill her, he said, "With a big knife. I am going to cut you up in pieces." *Id.* at 187; see also *id.* at 68 (husband kicked and slapped daughter, drawing blood); *id.* at 113 (husband threatened to beat five-year-old daughter for crying on her first day of school); *id.* at 73 (husband threatened to kill wife if she ever left the house); *id.* at 186 (husband kicked and slapped daughter and pushed her into a wall); *id.* at 198 (husband slapped daughter); *id.* at 199 (husband punched and bit wife deeply in the arm, drawing blood); *id.* at 200 (husband threw, kicked, slapped, and dragged wife across the floor by her hair); *id.* at 200-06, 226-44 (husband imprisoned wife inside the apartment); *id.* at 338 (husband slapped wife and threatened to imprison her again).

88. *International Parental Child Abduction Act of 1989: Hearings on H.R. 3759*, *supra* note 52, at 66-69 (statement of Betty Mahmoody).

89. *Id.*

lawful exercise of parental rights.”<sup>90</sup> The statute recognizes as an affirmative defense, among others, that “the defendant was fleeing an incidence or pattern of domestic violence.”<sup>91</sup> This defense appeared in various versions of the bill,<sup>92</sup> and the defense appears to have been noncontroversial during the bill’s drafting and passage.<sup>93</sup> Similarly a number of states recognized domestic violence as a defense to the crime of parental kidnapping, which was a criminal offense in all fifty states,<sup>94</sup> even before ICARA’s passage.<sup>95</sup>

The media clearly has moved away from its almost monolithic image of child abduction, undoubtedly aided by coverage of Hague Convention cases in this country. The press now reports on mothers

90. International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204(a) (1994).

91. *Id.* § 1204(c)(2).

92. 137 Cong. Rec. 17,078 (1991) (statement of Presiding Officer).

93. *Cf.* 139 Cong. Rec. 31,243, at 31,244 (1993) (statement of Rep. Sensenbrenner commenting only how the defense regarding circumstances beyond one’s control was “the subject of some controversy” among House and Senate staff). The domestic violence defense may have been uncontroversial because the scenario where it would be invoked may not have been perceived as prevalent. For example, Senator Dixon, a sponsor of the Bill in the Senate, stated:

In most instances, the abducting parent is not acting in the best interests of the child. He or she is acting out against the other parent or legal custodian, and the child is used as a pawn. In those instances where a parent takes a child out of the country for legitimate purposes, or in compliance with a valid court order of custody, there are affirmative defenses provided in the bill.

137 Cong. Rec. 17,078-79 (1991) (emphasis added).

94. House Comm. on the Judiciary, International Parental Kidnapping Crime Act of 1993, H.R. Rep. No. 103-390, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2419, 2420 (citing testimony of Ernest E. Allen, President, National Center for Missing and Exploited Children, in *International Parental Child Abduction Act of 1989: Hearings on H.R. 3759*, *supra* note 52).

95. It appears that many states added this defense in the late 1980s. *See, e.g.*, Cal. Penal Code § 278.7(b) (West 1999) (excluding from liability a person “with a right to custody of a child who has been a victim of domestic violence who, with good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm”) (enacted in 1996; originally enacted in 1984 as Cal. Penal Code § 277); Fla. Stat. Ann. § 787.03(6) (West 2000) (“This section shall not apply in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger”) (enacted in 1988); 720 Ill. Comp. Stat. Ann. 5/10-5(c)(3) (West 1993 & Supp. 2000) (“It shall be an affirmative defense that . . . [t]he person was fleeing an incidence or pattern of domestic violence.”) (enacted in 1984); Minn. Stat. Ann. § 609.26 Subd. 2(2) (West Supp. 2000) (“It is an affirmative defense if a person charged under subdivision 1 proves that . . . the person reasonably believed the action taken was necessary to protect the person taking the action from physical or sexual assault”) (enacted in 1984 as amended in 1988); Mo. Ann. Stat. § 565.160(3) (West 1999) (“It shall be an absolute defense to the crimes of parental kidnapping and child abduction that . . . [t]he person was fleeing an incident or pattern of domestic violence.”) (enacted in 1988); R.I. Gen. Laws § 11-26-1.1(b)(3) (1994) (“It shall be an affirmative defense that . . . [t]he person was fleeing an incidence or pattern of domestic violence.”) (enacted in 1988).

who abduct, and how these abductions are sometimes motivated by a need to escape from domestic abuse or to protect their children from the other parent's maltreatment.<sup>96</sup> Because these mothers, typically U.S. citizens, often lose under the Convention, the U.S. press now conveys, often with dismay, how the Convention can require that children be sent away from their custodial parent to a foreign country for the adjudication of the underlying custody dispute.<sup>97</sup>

This new media image of child abduction, with the accompanying skepticism about the Hague Convention, was recently evident in articles in the *Boston Herald*<sup>98</sup> and *Boston Globe*.<sup>99</sup> A federal judge informed an American woman, just before Christmas, that her four- and nine-year-old children would have to return to Ireland. The newspapers relayed how one child "was born in Boston,"<sup>100</sup> and that the father was a "wife-beater."<sup>101</sup> The mother was interviewed and shared some of the details of her violent life: "her husband [broke] into her house three times and destroyed her belongings—in violation of the Irish version of a restraining order."<sup>102</sup> Apparently, "[s]he brought the children . . . back to the United States in 1997, fearing for their safety and her own."<sup>103</sup> One paper then reproduced the court's ruling:

The evidence demonstrates that John is intemperate and often

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96. Sonya Colberg, *A Mother's Courage: A Tulsan Escapes Bangladesh, Returns for Daring Rescue*, *Tulsa World*, June 8, 1997, at D1; Pamela Coukos, *Letters: Where Are My Girls?*, *Time*, June 1, 1998, at 17; Steve Lopez, *Hide and Seek: Bipin Shah has Spent Over \$1 Million Searching for His Runaway Ex-Wife and Two Little Girls. They're Hidden Away in Children of the Underground*, *Run by Faye Yager. And She's Not About to Give Them Up*, *Time*, May 11, 1998, at 56; Stephen Nohlgren, *A Search Born of Love*, *St. Petersburg Times*, Jan. 10, 1999, at 1B; Abdon M. Pallasch and Beschetta Jackson, *Polish Man Reunited with Son: Settlement Lets Dad See His 9-Year-Old Boy After Five Years*, *Chi. Trib.*, Oct. 23, 1998, at 3; Stacey Winakur, *Protection or Child Abduction? Custody Battles Cross Borders in Latest Maryland Case, Judge Cites 'Intolerable Situation' to Avoid Sending Children Back to Father in Venezuela*, *Baltimore Daily Rec.*, Feb. 4, 1999, at 1C; see also *infra* notes 99-104 and accompanying text.

97. Rhonda Bodfield, *5-Year-old Gets Early Birthday Gift*, *Ariz. Daily Star*, Feb. 6, 1998, at 1A; Joe Costanzo, *Fate of Girl in Tug-of-War to Be Decided in Sweden*, *Deseret News*, June 4, 1997, at B1; John T. Dauner, *Kansas Supreme Court Rules in International Custody Case*, *Kan. City Star*, Apr. 23, 1999, at B4; Cindy Starr Post, *The Battle for Carina; Mom Flees with Daughter; Dad Thwarted by Courts*, *Cincinnati Post*, Feb. 8, 1999, at 1A; Associated Press, *Federal Judge Lets Swedish Courts Decide Custody Case*, *Salt Lake Trib.*, May 22, 1998, at D2; Associated Press, *Swedish Judge to Decide Dispute Over Utah Man's Child; 2-1 Appellate Court Ruling Sends Custody Case to Mother's Homeland*, *The Salt Lake Trib.*, June 5, 1997, at D4.

98. Ralph Ranalli, *Fed Ruling 'Shocks' Malden Mom of Two; Judge: Give Kids to Dad in Ireland*, *Boston Herald*, Dec. 23, 1998, at 6.

99. Patricia Nealon, *Court Order Casts Pall on Family's Christmas*, *Boston Globe*, Dec. 24, 1998, at B2.

100. See *id.*

101. See Ranalli, *supra* note 98.

102. Nealon, *supra* note 99.

103. Ranalli, *supra* note 98.

unkind to his children and that he spans and slaps them for minor childish infractions, and, of course, there is the constant exposure to verbal and physical conflict within the home . . . . As regrettable, and indeed as reprehensible as this state of affairs may be, it does not furnish grounds to deny this petition.<sup>104</sup>

The fact that the abductor might be a mother and a victim of domestic violence also has received global attention recently. As mentioned above, the participants at the third meeting of the Special Commission to discuss the operation of the Hague Convention concluded that mothers are the majority of abductors and that these mothers frequently allege that the fathers perpetrate domestic violence against them or the children.<sup>105</sup> At the Second World Congress on Family Law and the Rights of Children and Youth, held in San Francisco in 1997, one expert, reporting on her study identifying characteristics of parents in families experiencing international child abduction, stated: "Family violence is characteristic of most of these families. Allegations of spouse abuse, child abuse and serious child neglect are frequent, with many having sought restraining orders or reporting abuse to authorities."<sup>106</sup> A review of Hague Convention cases confirms that there are numerous cases where the mother abducts and alleges that she was the victim of domestic violence.<sup>107</sup>

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104. Nealon, *supra* note 99.

105. See *supra* note 13 and accompanying text. One Munich lawyer estimated that "up to 70 percent of abductions are done by mothers, but they're not always called abductions because often the men don't go to court and many mothers get away with it." Ian Traynor, *Child Abductors Play Elusive Game in Europe*, Cleveland Plain Dealer, Aug. 6, 1998, at 6F. According to Ruth Fitzgerald of Reunite, a London group that monitors and counsels parents who experience child abduction, "We're getting as many calls from dads as from moms these days." *Id.*

106. Linda Girdner, Janet Chiancone, & Janet Johnston, International Child Abductors: Profile of the Abductors Most Likely to Succeed 3 (June 3, 1997) (unpublished manuscript, distributed at the Second World Congress on Family Law and the Rights of Children & Youth, San Francisco, on file with author).

107. See, e.g., *Tabacchi v. Harrison*, No. 99-C4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000) (describing severe abuse of respondent); *Blondin v. DuBois*, No. CIV. 98-4274, 2000 WL 23214, at \*2 (S.D.N.Y. Jan. 12, 2000) (describing severe physical abuse of respondent and child); *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459 (D. Md. 1999) (alleging physical and psychological abuse of respondent and son); *In re Walsh*, 31 F. Supp. 2d 200, 202 (D. Mass. 1998) (describing respondent as "victim of random beatings"); *Journe v. Journe*, 911 F. Supp. 43, 45 (D.P.R. 1995) ("There is credible evidence in the record to suggest that in the time before their separation, Ms. Soto was subject to physical and emotional abuse by her husband."); *Wipranik v. Superior Court*, 63 Cal. App. 4th 315, 318 (Cal. Ct. App. 1998) (alleging physical and verbal abuse of her and the child); *Turner v. Frowein*, 752 A.2d 955, 961-62 (Conn. 2000) (alleging physical and emotional abuse of respondent, and sexual abuse of child); *Renovales v. Roosa*, No. FA 91-03922325, 1991 WL 204483, at \*1, \*4 (Conn. Super. Ct. Sept. 27, 1991) (describing her petitioner-husband as "domineering, excessively controlling, hostile and temperamental man" and explaining that respondent had obtained an ex parte temporary restraining order against him); *Dalmasso v. Dalmasso*, No. 83,895, 2000 WL 966746, at \*2 (Kan. July 14, 2000) (alleging physical

A more complete and accurate picture of international child abduction than the narrow stereotype that prompted the Hague Convention now exists at both the international and national levels. This awareness, in and of itself, does not necessarily presage a change in the law, or even a need to change the law. A change in the law becomes necessary only if 1) the harm to children from abduction differs depending upon the gender of the abductor and the reason for the abduction, and/or 2) women who flee with their children to escape domestic violence have their safety or their children's safety unreasonably compromised by the Hague Convention, or otherwise suffer unfairly from the Hague Convention's application to their situation. This Article suggests that both of these conclusions have validity.

### B. *The Harm From the Failure to Abduct*

The drafters of the Hague Convention assumed that international child abduction almost always harms children.<sup>108</sup> The image of the abductor as the non-custodial, and sometimes abusive, parent made it

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and emotional abuse in front of children); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (alleging physical abuse of respondent); *Viragh v. Foldes*, 612 N.E.2d 241, 244 n.4 (Mass. 1993) (alleging that petitioner abused and verbally threatened abductor on a number of occasions both prior to and following their divorce, including slapping her in the face, approaching her in a threatening manner, striking her father when he intervened to protect her, and threatening to kill the children if she divorced him); *Re F*, 3 All E.R. 641 (C.A. 1995) (alleging violence directed against respondent and child); *Re D*, 2 F.L.R. 626 (Fam. Div. 1999); cf. *United States v. Amer*, 110 F.3d 873, 876-77 (2d Cir. 1997) (describing ICARA case where abductor "regularly abused [mother] both verbally and physically" and "threatened to kill" her when she refused to move with the children back to Egypt). In some cases, there are vague, but inconclusive suggestions that domestic violence may have existed. See, e.g., *Burns v. Burns*, No. Civ.A. 96-6268, 1996 WL 711274, at \*2 (E.D. Pa. Dec. 6, 1996) ("[M]arital relations . . . were strained at best."); *Brooke v. Willis*, 907 F. Supp. 57, 59 (S.D.N.Y. 1995) ("At first, Respondent allowed Petitioner to visit with his daughter several times, but she then filed an ex-parte restraining order against him in a California state court."). Given that domestic violence is largely irrelevant to a Hague application, see *infra* Part II.B, some litigants probably omit this information from their legal argument. Similarly, some courts may choose to ignore it.

108. The Report of the Special Commission accompanying the Preliminary Draft Convention stated, without qualification, that abduction has "painful consequences" and that families are "destroyed" and "children emotionally upset and uprooted." Pérez-Vera Report, *supra* note 15, at 174. Interestingly, the fact that some international abductions may have a "positive effect on the child," particularly when "removing [the child] from an unstable or uncertain environment," was contained within the work documents of the Hague Convention. Dyer, *Legal Kidnapping*, *supra* note 66, at 22; *id.* at 138 ("[N]otwithstanding the rude way in which only too often kidnapping is carried out and the traumatic effect this may have on a child, no confirmation could be found for the hypothesis that kidnapping is *always* bad for a child.") (emphasis in original). Some commentators, however, were skeptical of the reports and suggested possible bias on the part of social workers when they were citizens of the abductor's home country. *Id.* at 22.

easy to articulate the harms of child abduction: children were removed from their primary caretakers and often subjected to life underground, to lies about their mothers, and to physical abuse. The accompanying instability and disruption of emotional attachment led many people and institutions to equate child abduction with child abuse, even absent actual physical abuse or neglect.<sup>109</sup>

The harm to children from international child abduction is often expressed without qualification, leaving policy makers with an incomplete understanding of the effects of child abduction. For example, one witness testified in the 1980s before Congress and said, without citation to any social science literature, "Studies show that *all* abducted children are severely emotionally traumatized by [parental kidnapping]." <sup>110</sup> In 1990, another witness stated, "An increasing number of studies by scholars in the field of human behavior have identified that *no child victim of a parental kidnapping escapes from severe and prolonged, if not permanent, psychic damages as the result of being taken from the other parent.*" <sup>111</sup> The hyperbole extended beyond congressional testimony and entered the legal community. William Hilton, a practitioner in the United States and expert on the

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109. See, e.g., *Parental Kidnapping*, *supra* note 35, at 167 (testimony of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.) ("Parental kidnapping is child abuse in the strongest sense of the term. At best, the identity changes, instilled fear of police authorities, lies about other parent . . . separation from a parent the child is psychologically dependent on, and the fugitive lifestyle in general, constitutes a harrowing form of emotional abuse; at worst, as pressures mount, the very life of the child is at stake."); 137 Cong. Rec. 14142 (1991) (statement of Sen. Dixon) (quoting child psychologists from the Illinois State Police who called parental kidnapping "one of the most horrendous forms of child abuse"); H.R. Rep. No. 103-390, *supra* note 94, at 2 (calling parental kidnapping "one of the worst forms of child abuse") (footnote omitted); National Center for Missing & Exploited Children, *Missing and Abducted Children: A Law Enforcement Guide to Case Investigation and Program Management* 67 (Stephen E. Steidel ed. 1994) (suggesting that family abduction is "an insidious form of child abuse").

110. *Parental Kidnapping*, *supra* note 35, at 171 (testimony of Kathy Rosenthal, Executive Director of Children's Rights of Florida, Inc.) (emphasis added). Similarly, Judge Christopher Foley, Municipal Court Judge in Milwaukee, spoke of the "extremely detrimental impact that parental kidnapping has on the children of divorce." *Id.* at 102. While Judge Foley stated that this impact "is becoming increasingly well documented," he failed to give any citation to these supporting sources. *Id.* at 102 n.1. Arthur W. Rovine, Chairman of the Section of International Law and Practice of the American Bar Association, testified in favor of ratification of the Hague Convention and stated:

Whatever the provocation, parental kidnapping is rarely, if ever, in the child's best interest. Rather, the child is uprooted from home, family, friends, school, and all that is familiar, and forced into an existence similar to that of a fugitive—a life on the run, frequently with new identities, denial of all past relationships, and above all, the loss of emotional security and stability that is so crucial to normal child development.

132 Cong. Rec. S29881 (1986).

111. *International Parental Child Abduction Act of 1989: Hearings on H.R. 3759*, *supra* note 52, at 111 (letter to Subcomm. from Thomas E. Harries).

Convention,<sup>112</sup> stated at an ABA-sponsored event: "No one would seriously question the premise that the unilateral removal of a child from its habitual residence is, at the minimum, detrimental to the child and it has been considered a form of child abuse."<sup>113</sup> The belief that children are indelibly harmed from international child abduction has also found support abroad.<sup>114</sup>

Despite a greater understanding today of who abducts and why, some individuals continue to suggest that abductions almost always harm children. For example, Marilyn Freeman recently reviewed the results of major research in her article entitled, *The Effects and Consequences of International Child Abduction*,<sup>115</sup> and wrote, "What does seem clear is that, in most cases, an abducted child would be at risk of a spectrum of disorders related to adjustment."<sup>116</sup> She claims that it is "inconceivable that those involved . . . do not seriously suffer as a consequence of abduction,"<sup>117</sup> and asserts that the "effects do not differ significantly depending upon the 'justifiability' of the abduction."<sup>118</sup>

Professor Freeman's sweeping conclusions seem unfounded. First, she herself critiques the available research. She finds that "[v]ery little research on the subject" exists,<sup>119</sup> problems riddle the available studies,<sup>120</sup> and inconsistent results characterize the literature.<sup>121</sup> She

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112. See Marilyn Feuchs-Marker, *Bringing a Hague Case for Return When a Child Has Been Abducted From the U.S.*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 7 (calling Hilton "an international child abduction expert").

113. William M. Hilton, *Dreaming the Impossible Dream: Responding to a Petition Under the Convention on the Civil Aspects of International Child Abduction, Done at the Hague on 25 Oct 1980*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 1. To be fair, Mr. Hilton acknowledges that there may be "some very rare instances," that are "few and far between" where the child should not be returned. *Id.* Betty Mahmoody, the author of *Not Without My Daughter*, stated at the same ABA sponsored symposium that "all cases of international parental child abduction are severely traumatic to the children and the left-behind parent." Betty Mahmoody, *One World for Children*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 2 (emphasis added).

114. See Honourable Justice Kay, *The Hague Convention—An Update On a Paper First Delivered to a Family Law Conference in Adelaide 1994* 1 (June 1997) (presented at the Second World Congress on Family Law and the Rights of Children & Youth, San Francisco, on file with author) (reporting that "[c]hildren who have been abducted by family members are sometimes physically and always psychologically harmed as a result of their abduction").

115. Marilyn Freeman, *The Effects and Consequences of International Child Abduction*, 32 *Fam. L.Q.* 603 (1998).

116. *Id.* at 605.

117. *Id.* at 620.

118. *Id.* at 617.

119. *Id.* at 606.

120. See *id.* at 606-07.

121. Compare, for example, Finkelhor's study, that "found that most of the children involved did not suffer serious harm as a result of the episode," *id.* at 611 (citing David Finkelhor, Gerald Hotaling & Andrea Sedlak, *Children Abducted by Family Members: A National Household Survey of Incidence and Episode*

concludes that "the available research is unsatisfactory in terms of reliable conclusions."<sup>122</sup> Her assessment of the research, in this respect, seems accurate.<sup>123</sup> Second, none of the research she reviews appears to control for "justifiability." We simply do not yet know if abductions motivated by benevolent reasons cause less harm to children than abductions motivated by malevolent reasons, although common sense suggests that this would be true. None of the research makes comparative assessments about whether a child is better off with the consequences of abduction, even assuming the consequences are negative, or with the consequences of what life might have been without the abduction (e.g., living in an abusive household where one parent is ultimately killed). Third, and most importantly, the vast majority of the harm attributed to abduction, especially where the children are abducted for benevolent reasons, comes from living a life of secrecy. No study has examined the impact on a child when the child is abducted for protective reasons and does not have to live "underground." Logic suggests that a child secure in the knowledge that her mother has escaped domestic violence and that neither the child nor her mother will be forced to return to the place of the abuse, would exhibit a different psychological profile after abduction than the child yanked away from her primary caretaker and forced to live a life underground.

A more accurate statement about the harm to children from abduction is that the effects fall along a continuum. The impact will depend upon whether the child is being removed from a traumatic

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*Characteristics*, 53 J. Marr. & Fam. 805, 814 (1990-91)), with Agopian's study that found "some trauma to the children" was reported by "all parents," *id.* at 608 (citing Michael W. Agopian, *The Impact on Children of Abduction by Parents*, 63 Child Welfare 511 (1984)).

122. Freeman, *supra* note 115, at 620.

123. One study cited by Freeman states: "Despite growing interprofessional attention to this problem that lies at the intersection of psychiatry and the law, little is known about how formerly abducted children are affected. Even less information is available concerning how children fare over time following abduction by one parent and recovery by the other." Rebecca L. Hegar & Geoffrey L. Greif, *How Parentally Abducted Children Fare: An Interim Report on Families Who Recover Their Children*, 21 J. Psychiatry & L. 373, 374 (1993). Some research suggests the harm to children is far from universal. For example, the National Study of Law Enforcement Policies and Practices Regarding Missing Children and Homeless Youth interviewed fifty-eight parents or caretakers in six metropolitan areas between March and July 1989 whose children had been abducted by a family member. Office of Juvenile Justice and Delinquency Prevention, *Law Enforcement Policies and Practices Regarding Missing Children and Homeless Youth*, Research Summary 3, 5 (1993). Only 5% of the parents interviewed indicated that their child had been physically abused and only 19% believed the child had been harmed mentally. *See id.* at 5. While 75% of the children in the study were returned in seven days or less, many of the cases appeared to be serious, with the abducting parent concealing the child in 55% of the cases, threatening or demanding something of the other parent in 42% of the cases and taking the child out of state in 21% of the cases. *See id.*



family situation,<sup>124</sup> whether the child already has been uprooted from his or her familiar environment as part of the typical chaos accompanying separation and divorce, whether the child is too young to experience separation, whether the abductor is the primary caretaker,<sup>125</sup> whether the child's emotional bonding with the left-behind parent is a product of traumatic bonding (something not worthy of protection<sup>126</sup>), and whether the abductor poses a risk of physical abuse to the child.<sup>127</sup> It is critical also to consider whether the child will be forced to live in hiding. As researchers Greif and Hegar stated,

It must be remembered, though, that there are as many variations as there are children. At one end of the spectrum are children being taken away from an abusive situation by the parent to whom the child feels closest. This may not be damaging to the child, especially when compared with the alternatives. At the other end of the continuum are children who are removed from a parent with whom they have formed a close bond and are placed in an abusive or neglectful environment where life is chaotic. One could predict that the latter situation would be damaging to a child of any age. These cases we have come to know fall along this wide spectrum.<sup>128</sup>

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124. As the National Center for Missing and Exploited Children recognized, the child might be leaving a horrific family situation:

To truly appreciate the plight of a child abducted by a family member, an officer must first realize what preceded the abduction. For this dramatic flight to occur one would have to assume it was prefaced by the impending breakdown of the family unit. In this process the child may well have been exposed to domestic violence, alcoholism, abuse, and other problems that commonly affect dysfunctional families.

National Center for Missing & Exploited Children, *Missing and Abducted Children: A Law-Enforcement Guide to Case Investigation and Program Management* 63 (Stephen E. Steidel ed., 1994).

125. One study of child abduction found that in international marriages, the abductor "was perceived by the other parent as having been significantly more involved in two aspects of child rearing—physical care and supervision—than was true for the general sample." Greif & Hegar, *supra* note 8, at 190; Dyer, *Legal Kidnapping*, *supra* note 66, at 21 (attributing the damaging effects of abduction to loss of stability and particularly "the traumatic loss of contact with the parent who has been in charge of his upbringing").

126. Researchers have documented that the apparent closeness between perpetrators of domestic violence and their children sometimes can be explained by "traumatic bonding." Stephen E. Doyme et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 *Juv. & Fam. Ct. J.* 1, 7 (1999) (citing Donald Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* 3-10, 191 (1995)). Simply, "children may appear emotionally close to violent parents because they are afraid of them." *Id.*

127. See, e.g., Oregon Domestic Violence Council, *A Collaborative Approach to Domestic Violence: Oregon Protocol Handbook* 45 (1996) [hereinafter *Oregon Protocol Handbook*] ("Perpetrators of domestic violence are also more likely to abuse their children.").

128. Greif & Hegar, *supra* note 8, at 144. The authors are somewhat inconsistent in their approach to whether abduction is harmful or not. In their last chapter they state,

One of the situations in which an abduction may be, on balance, beneficial, is when a primary caretaker removes the child from a home filled with domestic violence. Most of the children in homes with domestic violence witness the violence,<sup>129</sup> and children are present 25% of the time when an abuser kills his victim.<sup>130</sup> "Clearly, witnessing violence in the home has a profoundly disturbing affect [sic] on children."<sup>131</sup> Children can experience emotional problems,

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Life on the run takes a serious toll on children, regardless of the kind of life they are escaping. Fear of one parent, unanswered questions about the past, isolation from relatives and friends, and the need for secrecy and deceit are destructive to the normal growth and development of children. When a well-intentioned abductor is caught, children face further difficult changes and their relationship with the abducting parent sometimes ends.

*Id.* at 246 (footnote omitted).

129. In my home state, it is clear that children are witnessing domestic violence: Sixty percent of Oregon children under 18 years of age living in abusive households are estimated to have seen or heard the abuse of their mothers or caregivers during the past year. This translates into more than 1 of every 6 (15% or 123,400) Oregon children who witnessed domestic violence during the past year. Two-thirds (81,400) of these children saw or heard the abuse at least once per month.

Oregon Health Division and Multnomah County Health Department, 1998 Oregon Domestic Violence Needs Assessment: A Report to the Oregon's Governor's Council on Domestic Violence 1 (1999) at ii [hereinafter Oregon Domestic Violence Needs Assessment]. "[N]early three-fourths of the children living in abusive households during the past year were at home when the abuse occurred, and the number of additional children who might have seen or heard the abuse without their mother's or caregivers' knowledge is unknown." *Id.* at 6. The estimate that 15% of Oregon's children are exposed to domestic violence is consistent with the numbers at the national level. *Id.*; see also Lenore E. Walker, *Terrifying Love* 136 (1989) ("About one half of batterers batter their children as well as their wives.") (footnote omitted).

130. Doyne, *supra* note 126, at 3 (citing M. Crawford & R. Gartner, *Woman Killing, Intimate Femicide in Ontario: 1974-1990* (1992)).

131. Klein & Orloff, *supra* note 2, at 1171; 1998 Oregon Domestic Violence Needs Assessment, *supra* note 129, at 1 ("children who witness the physical abuse of their mothers or caregivers are known to be at increased risk of behavioral and developmental problems"); Oregon Protocol Handbook, *supra* note 127, at 45 ("[J]udges must recognize that domestic violence is a relevant factor and that children who are exposed to abusive conduct are at serious risk of physical and emotional harm. Perpetrators of domestic violence can jeopardize children's well-being and place them at significant risk. Children who witness domestic violence are more likely to experience behavioral, somatic and emotional problems. . . . Boys who witness the violence of their fathers toward their mothers are at elevated risk for perpetrating domestic violence in their adulthood. Finally, girls who witness maternal abuse may tolerate abuse as adults more than girls who do not.") (citations omitted); see also Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1090 (1991) ("[D]omestic violence . . . traumatizes and terrorizes [children] when they witness their fathers abusing their mothers, and it teaches them that violence is acceptable. Second, a parent's disregard of the effect of violence on his children indicates that the parent may not be able to care adequately for the children's needs. Finally, women may be disadvantaged because of the violence, thus experiencing economic and psychological problems.") (footnote omitted); Zorza, *supra* note 4, at 3 ("between half and three-quarters of spousal batterers deliberately physically abuse (and virtually all abusers emotionally abuse) their children"); Principles of the Law of Family Dissolution,

including feelings of fear, insecurity, anxiety, stress, low self-esteem, or guilt.<sup>132</sup> They can stall or regress developmentally.<sup>133</sup> They can also exhibit physical manifestations of their emotional turmoil, cope by abusing drugs and alcohol, and internalize the appropriateness of violence to resolve conflicts.<sup>134</sup> Harm to the child can occur even if the child never actually sees the abuse, but instead just hears it.<sup>135</sup> Specific research comparing the benefits and disadvantages of abduction for children who are taken from abusive households by their primary caretakers would be extremely useful.

Such empirical research would also help us better assess the moral reprehensibility of the abductor's conduct. When harm to the child from abduction seems inevitable, society characterizes the abductor as morally blameworthy:

Various reasons are given for kidnapping, including the "best interest of the child." However the evidence clearly states, that with rare exceptions involving major breaches of responsibility by social protective agencies, a parental kidnapping is most correctly explained as an act motivated by selfishness, egocentric need, pathological hate, spite or mental incompetence on the part of the kidnapping parent; an act which is done without regard for the rights and needs of the victim child.<sup>136</sup>

Once we acknowledge that harm does not befall every abducted child, or that the harm experienced from abducting may be less than

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*supra* note 4, at § 2.13, reporter's notes, cmt. c ("[T]here is general agreement that children are harmed by witnessing the abuse of their parent."); *id.* at § 2.02, reporter's notes, cmt. h ("There is broad consensus that domestic violence is harmful to children, as well as extreme hostility between parents, especially when this hostility focuses on the children themselves."). For an example of the threat to children, see *State ex rel. State Office for Services to Children & Families v. Frazier*, 955 P.2d 272, 284 (Or. Ct. App. 1998) (en banc) (affirming termination of father's rights and explaining how violence put child at serious risk of harm); *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-62 (D. Md. 1999) (recounting testimony of a fearful child who witnessed father's abuse of mother and the court's finding that Article 13(b) defense had been made out).

132. See Doyne, *supra* note 126, at 4.

133. See *id.*

134. See *id.* These children are at a greater risk of juvenile delinquency and other problems. See generally Peter G. Jaffe et al., *Children of Battered Women* 28-29 (1990). Children in homes with domestic violence are more likely to repeat the role of the parent of the same gender as they grow older. See Doyne, *supra* note 126, at 4-5. A possible indication of the inter-generational effect of domestic violence is the fact that in Greif and Hegar's study, "almost one-fifth witnessed violence between their parents." Greif & Hegar, *supra* note 8, at 27.

135. See Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 *Mediation Q.* 347, 348 (1990).

136. *International Parental Child Abduction Act of 1989*, *supra* note 52, at 111 (letter to Subcomm. from Thomas E. Harries). But see *Parental Kidnapping*, *supra* note 35, at 1 (statement of Lawrence Lippe, Chief, General Litigation Section, Criminal Division, U.S. Department of Justice) ("As often as not, the abducting parent is a kind, loving parent who is doing this out of love for the child.").

the harm encountered from not abducting, we can begin to appreciate that some abductors do not abduct for selfish reasons. Many mothers abduct to protect themselves and their children from the effects of living in an abusive household, or to become better parents by freeing themselves from oppression. In this country, we recognize the importance of removing a child from an abusive household. The state sometimes even removes children from their mothers when the mothers fail to take action to protect their children from domestic violence.<sup>137</sup> Consequently, when a mother abducts her children to remove the family from an abusive household, we should recognize that she probably acts not for selfish reasons, but because she has determined that the move is best for them.<sup>138</sup>

In addition, we must remember the moral blame that belongs on the shoulders of the domestic violence perpetrator. The Hague Convention assumes that forum shopping by abduction is both harmful to children and unfair to the left-behind parent. Yet, forum shopping by violence and coercion is also harmful to children and unfair to the other parent. The incidental forum shopping that often accompanies an escape from domestic violence is certainly less reprehensible than the initial forum shopping achieved by violence and coercion, or even the violence itself.

Some readers may have the following reaction at this point: while witnessing domestic violence can be devastating for children, the domestic violence, in many instances, can be addressed in the country where it occurs and international flight is not required to obtain safety. Therefore, the argument continues, one must compare the potential harm to the child from international abduction with the potential harm to the child from having the mother obtain legal protection and redress in the country where the domestic violence occurs.

This argument, while theoretically valid, has several shortcomings in practice. First, some Abduction Convention signatories have inadequate laws relating to domestic violence.<sup>139</sup> Second, some

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137. See Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 Nw. U. L. Rev. 1459, 1465 (1998) (discussing passive mother's possible criminal liability and possible loss of custody due to actions of abusive spouse).

138. In most other contexts, we presume that custodial parents act in their children's best interest. While that presumption is always strained in the context of family break-up, a mother who takes her children back to her homeland (and often to her birth family), to free them from an abusive household, has typically determined that her children will benefit, on balance, from the move.

139. The many types of laws that may benefit domestic violence victims, including specific criminal laws, general criminal laws, and civil protection order schemes, complicate any attempt to assess the adequacy of the law-on-the-books for domestic violence victims in a particular country. Generally, our American experience tells us that the availability of a full panoply of legal remedies is important to combat domestic violence effectively. For example, when the criminal law treats domestic violence as a private matter, then batterers receive a message that makes victims' civil

countries undermine their adequate law-on-the-books by ineffective law enforcement or inadequate implementation of the civil law.<sup>140</sup> The U.S. State Department issues reports about the human rights practices in other countries; these reports suggest that various Hague Convention signatories fail to protect domestic violence victims despite adequate laws-on-the-books.<sup>141</sup> Third, even assuming a

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protection orders less authoritative. Similarly, the inability to obtain a civil protection order may leave a woman inadequately protected despite criminal law remedies. She may be unwilling to invoke the state's criminal law machinery because, for example, she depends financially upon her batterer. Therefore, the lack of either civil or criminal laws addressing domestic violence strongly suggests that a country's laws inadequately protect victims. With this in mind, see generally 1999 *Country Reports on Human Rights Practices*, *supra* note 6. For example, in Poland, "The law has no provision for restraining orders to protect battered women against further abuse. . . . [I]n divorce cases courts frequently . . . do not issue a property settlement, sending the woman back to live with the abusive husband. This problem is exacerbated by a lack of alternative housing in the country." *Id.* In St. Kitts and Nevis, "There is no domestic violence legislation." *Id.* In the Czech Republic, "[a]n attack is considered criminal if the victim's condition warrants medical treatment (incapacity to work) for 7 or more days. If medical treatment lasts less than 7 days, the attack is classified as a misdemeanor and punished by a fine not exceeding approximately \$100 (3,000 Czech crowns—approximately one-fourth of the average monthly wage). Repeated misdemeanor attacks do not impose stricter sanctions on the abuser." *Id.* In Georgia, "[t]here are no laws that specifically criminalize spousal abuse or violence against women." *Id.* In Romania, "[p]rosecution of rape is difficult because it requires both a medical certificate and a witness, and a rapist can avoid punishment if he marries the victim. There is no specific legislation dealing with spousal abuse or rape, and successful prosecution of spousal rape is almost impossible. Police are often reluctant to intervene in instances of domestic violence." *Id.*; see also *supra* note 7.

140. For a discussion concerning the efficacy of legal interventions in the United States, see Sherry L. Hamby, *Partner Violence: Prevention and Intervention*, in *Partner Violence: A Comprehensive Review of 20 Years of Research* 210, 240 (Jana L. Jasinsky & Linda M. Williams eds., 1998).

141. See generally 1999 *Country Reports on Human Rights*, *supra* note 6. For example in Colombia, "Rape and other acts of violence against women are pervasive in society, and like other crimes, seldom are prosecuted successfully." *Id.* In Greece, an independent government agency, the General Secretariat for Equality of the Sexes (GSES), asserts that "police tend to discourage women from pursuing domestic violence charges and instead undertake reconciliation efforts, although they are neither qualified for nor charged with this task. The GSES also claims that the courts are lenient when dealing with domestic violence cases." *Id.* In Hungary, domestic abuse is "believed to be common, but the vast majority of such abuse is not reported, and victims who step forward often receive little help from authorities. . . . Police attitudes towards victims of sexual abuse are often reportedly unsympathetic, particularly if the victim was acquainted with her abuser." *Id.* In Ireland in 1997, a government task force on violence against women concluded that the problem, in particular domestic violence, is widespread and that many women believe that existing services are incapable of responding to their needs. The task force found that many women believe that the legal system minimizes the seriousness of crimes committed against them, fails to dispense justice, and makes them feel at fault for what happened.

*Id.* In the former Yugoslav Republic of Macedonia, "Cultural norms discourage the reporting of such violence, and criminal charges on grounds of domestic violence are very rare." *Id.* In Mexico, "[P]olice are reluctant to intervene in what society considers to be a domestic matter. Police also are inexperienced in these areas and

country provides adequate legal protection for domestic violence victims and their children, a victim may reasonably believe that departing the country is the only way that she can ensure her safety. Sometimes obtaining the legal remedies takes too much time and a victim has nowhere safe to go in the interim. Some countries lack sufficient shelters for battered women.<sup>142</sup> As one study indicated, the domestic violence victim who is an immigrant can be "alienated from major social institutions," with "family/social support in another geographic area."<sup>143</sup> Similarly, the victim may feel that she cannot access the resources for obtaining safety in her present location, even if they are available. She may not speak the language.<sup>144</sup> She may be without money, transportation, or even phone service, all of which may stop her from utilizing existing legal or social service remedies. She may find little support for her efforts to stop the domestic violence because it may be viewed as a private matter.<sup>145</sup> As Greif and

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unfamiliar with appropriate investigative technologies." *Id.* In Poland, "According to NGO's [sic], the courts often treat domestic violence as a minor crime, pronounce lenient verdicts, or dismiss cases." *Id.* In Panama, "The 1995 Family Code criminalized family violence, . . . although convictions are rare unless a death occurs." *Id.* In Spain, "Currently, a restraining order is issued only after a guilty verdict." *Id.* In South Africa,

Abused women have difficulty getting their cases prosecuted effectively and also often are treated poorly by doctors, police, and judges. . . . The Prevention of Family Violence Act of 1993 defines marital rape as a criminal offense, and it allows women to obtain injunctions against their abusive husbands and partners . . . . However, the implementation process is inadequate, as the police generally are unwilling to enforce the act. As a consequence, a limited number of women pressed complaints under the law.

*Id.* In Venezuela,

Violence against women is a problem, and women face substantial institutional and societal prejudice with respect to rape and domestic violence . . . . Domestic violence against women is very common . . . . According to local monitors, the police generally are unwilling to intervene to prevent domestic violence, and the courts rarely prosecute those accused of such abuse. In addition, poor women generally are unaware of legal remedies and have little access to them.

*Id.*; see also *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 460-61 (D. Md. 1999) (describing Venezuelan police's indifference to repeated incidents of domestic violence).

142. See, e.g., 1999 *Country Reports on Human Rights*, *supra* note 6, at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/southafr.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/southafr.html) ("the number of shelters for battered women remained insufficient").

143. See Girdner, *supra* note 106, tbl. 2.

144. See *id.* at 2.

145. See 1999 *Country Reports on Human Rights*, *supra* note 6, at Belgium ("A 1997 parliamentary report described domestic violence against women as still 'covered by a culture of silence.' In one academic study, an eminent sociologist found that slightly less than 1 percent of the women in a particular town had reported incidents of domestic violence to the authorities." (citation omitted)); *id.* at Cyprus ("Domestic violence cases are rare in the Turkish Cypriot legal system, since they often are considered a 'family matter.'"); *id.* at Georgia ("[A]s it is a social taboo to go to the police or otherwise to raise the problem outside the family, it is reported or punished only rarely."); *id.* at Poland ("Violence against women remains hidden, surrounded by taboos and accompanied by shame and guilt, particularly in small

Hegar explain, some women chose to abduct their children rather than to seek legal custody or the modification of a custody order "because they despaired of getting what they wanted through legal channels, whether that was protection for themselves or the child . . . , [they lacked] a sense of control in a new and unfamiliar situation."<sup>146</sup> Finally, the victim may appreciate that accessing legal redress will increase the immediate danger to herself and to her child, as separation is the most dangerous time for domestic violence victims.<sup>147</sup> Geographic distance may be the only avenue to reduce the likelihood of violence.

Consequently, the real question is whether a domestic violence victim who reasonably believes that escape is the only way to assure her safety, because she cannot obtain sufficient legal protection in the country of abuse, either because of the country's shortcomings, her batterer's tenaciousness, or her own limitations, should be subjected to the Hague Convention's remedy of return, described below. The current Convention presumes that the remedy of return should be applied to her, just as it is applied to an abusive non-custodial father who abducts a child for malevolent reasons. This answer suggests that the Convention must be reformed.

### C. *The Story of Debra Mosesman Prevot*

To get a sense of one type of situation I am concerned about, I detail the story of Debra Mosesman Prevot, an American, who married Jean-Claude Prevot, a French citizen, in 1988.<sup>148</sup> The couple had two children: Ben, born in 1989, and Arielle, born in 1991.<sup>149</sup> The couple lived in the United States from the time of their marriage until mid-1991, when Arielle was approximately five months old.<sup>150</sup> The family departed for France because of Mr. Prevot's legal problems, which left him feeling "caged in" by probation requirements and IRS payments.<sup>151</sup>

The violence between Mr. and Ms. Prevot started after they arrived in France.<sup>152</sup> Mr. Prevot beat Ms. Prevot "badly" once at the

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towns and villages."); *id.* at Turkmenistan ("Anecdotal reports indicate that domestic violence against women is common, but no statistics are available. The subject is not discussed in society. There are no court cases available and no references to domestic violence in the media.").

146. Greif & Hegar, *supra* note 8, at 225.

147. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 5-6 (1991) ("At the moment of separation or attempted separation . . . the batterer's quest for control often becomes most acutely violent and potentially lethal."); see also *infra* note 231.

148. *Prevot v. Prevot*, 59 F.3d 556, 558 (6th Cir. 1995).

149. *Id.* at 558-59.

150. *Id.* at 559.

151. *Id.* at 558-59.

152. *Prevot v. Prevot*, 855 F. Supp. 915, 918 (W.D. Tenn. 1994), *rev'd*, 59 F.3d 556 (6th Cir. 1995).

beginning, and again not long thereafter, but the abuse subsided when Ms. Prevot's mother came to visit.<sup>153</sup> After her mother's departure, the beatings occurred "really frequently."<sup>154</sup> By the end of their relationship, the abuse would occur weekly, sometimes as much as three times a week.<sup>155</sup> There was "[n]o pattern" to the beatings.<sup>156</sup>

The abuse was severe. As Ms. Prevot states, "He really beat me violently and always in front of the kids. They were only one and three years old when the abuse started."<sup>157</sup> Mr. Prevot became "vicious" when he sought to obtain the jewelry that Ms. Prevot had inherited.<sup>158</sup> Ms. Prevot believed that he might kill her to obtain it.<sup>159</sup> "When I caught him standing over my son with his arms raised at him I knew I had to get out."<sup>160</sup> The children were so traumatized by the family violence that they hardly spoke when they returned to the United States, despite the fact that they were two and four years old, respectively.<sup>161</sup>

As is typical of many abusers, Mr. Prevot isolated Ms. Prevot. In France, he transferred all of the money out of the account to which she had access.<sup>162</sup> He hid all of her identification, including her passports and the children's birth certificates.<sup>163</sup> He told her that he had given the documents to a lawyer, and he refused to tell her the lawyer's name.<sup>164</sup> Without identification, Ms. Prevot could not even cash checks.<sup>165</sup> The family lived in a trailer in the country, and they had no car.<sup>166</sup> Ms. Prevot stated, "I felt very isolated. It was just the children and me. It was lonely and quiet."<sup>167</sup> Although Mr. Prevot did not live with them for the last three months of their time in France, he would come by and look in the closets to be sure that their possessions

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153. Prevot Telephone Interview, *supra* note 1. The trial court found that there was "conflicting evidence concerning allegations of the husband's physically abusing the wife." *Prevot*, 59 F.3d at 559 (referring to trial court's findings). For purposes of examining the application of the Hague Convention to domestic violence victims who are abductors, I treat Ms. Prevot's allegations as true. I have not interviewed Mr. Prevot.

154. Prevot Telephone Interview, *supra* note 1.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* In addition, Ms. Prevot alleged that Mr. Prevot abused the children. For example, Mr. Prevot would lock the children in the basement of his restaurant. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*



were still there. "He wanted to ensure that we did not try to get away."<sup>168</sup>

Ms. Prevot states that she left France when she "realized after nine months that there was nothing to do to stop the violence. It was only getting worse."<sup>169</sup> She had called the police, but the police did not help.<sup>170</sup> They told her that there was no such thing as a restraining order.<sup>171</sup> They said that because Ms. Prevot was still married to her husband, she could not change the locks on the residence, and she could not stop him from visiting the children.<sup>172</sup> Ms. Prevot sought help from an attorney that had been recommended to her by the American consulate, but the attorney offered her no legal avenue to stop the violence.<sup>173</sup> Her neighbors saw the abuse, but did nothing to stop it.<sup>174</sup> A social worker came once to the house and told Ms. Prevot that there was little Ms. Prevot could do to stop the violence unless she had money to file for a divorce.<sup>175</sup> "No one cared, they just expected me to keep living like that."<sup>176</sup> Ms. Prevot stated that the abuse was "so serious and violent and so horrible for me and the kids. But there was no way out since I had no money and I wasn't French. Never should women and children have to take that."<sup>177</sup> She commented that had she been able to obtain public assistance and some sort of protection (e.g., even if she knew the police would arrest Mr. Prevot if he beat her up), she would have stayed in France and fought for custody there.<sup>178</sup>

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Prevot Telephone Interview, *supra* note 1.

173. *See id.*

174. *See id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *See id.* There is some indication that the legal remedies in France were more extensive than Ms. Prevot believed:

The Penal Code prohibits rape and spousal abuse, and law enforcement authorities vigorously enforce these laws; however, violence against women remains a problem. The Ministry of Interior has reported that in 1998 there were 7,828 rapes and 12,809 instances of other criminal sexual assault. The Government sponsors and funds programs for women who are victims of violence, including shelters, counseling, and hot lines. Numerous private associations also assist abused women.

1999 Country Reports on Human Rights, *supra* note 6, at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/france.htm](http://www.state.gov/www/global/human_rights/1999_hrp_report/france.htm). This gap between the actual help potentially available to Ms. Prevot and her perception of the potentially available help illustrates the problem of relying solely on the written law in assessing the reasonableness of a victim's flight. Of course, it also raises questions about the reasonableness of the flight.

Ms. Prevot decided that for her safety and for the well-being of her children, she and her children had to leave France.<sup>179</sup> To facilitate their departure, Ms. Prevot sold some jewelry, and her mother sent her some money.<sup>180</sup> Ms. Prevot used the money to apply for new passports.<sup>181</sup> Friends brought over plastic bags filled with clothes and toys; she used these items to fill up her closets so that Mr. Prevot would not suspect his family's imminent departure.<sup>182</sup>

After Ms. Prevot left France with her two children and returned to the United States, Mr. Prevot instituted a Hague petition in the United States for the return of the children.<sup>183</sup> Ms. Prevot lost at the trial court level.<sup>184</sup> However, the appellate court reversed the trial court on a technicality.<sup>185</sup> Because her husband was a felon, his departure from the United States made him a fugitive.<sup>186</sup> The court held that he could not invoke the United States judicial machinery to obtain the return of his children.<sup>187</sup> When Ms. Prevot was asked what she would have done had the appellate court upheld the lower court's order to return her children, she said, "I would have returned with them because I'd never put my kids on an airplane without me."<sup>188</sup> She would return even though she stated, "I know that he'd start beating me again."<sup>189</sup>

Ms. Prevot's story provides a backdrop for evaluating the Hague Convention and its appropriateness for abductors who are domestic violence victims. Had the appellate court not reversed the trial court on a technicality, the Prevot children would have been returned to

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179. *See id.*

180. *Id.*

181. *See id.*

182. *Id.*

183. *Prevot v. Prevot*, 855 F. Supp. 915, 916-17 (W.D. Tenn. 1994), *rev'd*, 59 F.3d 556 (6th Cir. 1995).

184. *Id.* at 922.

185. *Prevot*, 59 F.3d at 567.

186. *Id.*

187. *See id.* A similar argument was tried recently in *In re Walsh*, with little success. *See Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. July 25, 2000).

188. *Prevot Telephone Interview*, *supra* note 1.

189. *Id.* After the conclusion of the litigation pursuant to the Hague Convention on Child Abduction, Ms. Prevot continued to live with her children in the U.S. She obtained a restraining order against Mr. Prevot. Mr. Prevot returned to the U.S. and lived near Ms. Prevot. Ms. Prevot feared that Mr. Prevot would abduct the children and take them back to France. The Tennessee court, concerned about this also, required Mr. Prevot to post a bond before Mr. Prevot could have unsupervised visits with his children. Telephone interview with Debra Mosesman Prevot, June 1999. Ms. Prevot later sought to move away from Mr. Prevot. The court granted her request, although Mr. Prevot had contested it. Letter from Edward Bearman to Merle H. Weiner, Aug. 7, 2000. Since the move, he ceased all visitation with the children and fell significantly behind in child support. As of August, 2000, he had not been seen or heard from for several months. *Id.*

France. This result would have been problematic for practical and philosophical reasons.

First, the return of the children to France would have placed Ms. Prevot in physical danger. Even though the court may not have ordered her to return, Ms. Prevot stated that she would have returned to France with her children.<sup>190</sup> Mothers who face the dilemma of being separated from their children or enduring "innumerable financial and practical difficulties" in returning to the children's habitual residence, have chosen to return with their children and "move heaven and earth" to do so.<sup>191</sup> Many primary caretakers will not let their children travel without them back to the abusers' homeland.<sup>192</sup> This attitude is undoubtedly reinforced by some judges' views that mothers have a "parental duty to return with the child to minimize the child's instabilities."<sup>193</sup> Similarly, many parents will want or need to return for the custody proceedings. The mere physical proximity of an abuser and his victim increases the likelihood of violence.<sup>194</sup> Even if the court extracts an undertaking<sup>195</sup> from the left-behind parent that, pending the adjudication of custody, the mother

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190. See *supra* text accompanying notes 181-84.

191. *In re A (A Minor) (C.A.)* (unreported opinion, published in *The Times* June 13, 1987).

192. See, e.g., *id.* (mother says she will return with child if court orders child's return); *Re Arthur*, No. CA1223/87, (Fam. Div. Jan. 13, 1988), at 7 (unpublished opinion) (mother says she will return with child if court orders child's return). However, contrary to my instinct, many abductors who are the primary caretaker allege as part of the 13(b) defense that they "will not return if the child is ordered returned and therefore that the return of the child will cause psychological damage because of separation from that parent." Permanent Bureau Hague Conference on Private International Law, *Checklist of Issues to be Considered at the Third Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Preliminary Document No. 1 of Jan. 1997, at 44 [hereinafter *Checklist of Issues to Be Considered*]. This is a "recurring situation." *Id.* This defense is seldom successful because "the courts... have interpreted the spirit of the Convention in such a way as to oppose this claim of harm which the abductor herself or himself is inflicting on the child." *Id.* at 46. Of course, employing the defense is distinguishable from what custodial parents would really do if the court ordered that their children be returned.

193. *Checklist of Issues to Be Considered*, *supra* note 192, at 46. In many instances, the court or left-behind parent encourages the victim to return with the child. For example, the attorney for Nunez-Escudero suggested at oral argument that "the court could order the child's return to Mexico with Tice-Menley, and subject to the assistance of Mexican or United States authorities." *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 378 n.3 (8th Cir. 1995); *accord* *Sheikh v. Cahill*, 546 N.Y.S.2d 517, 522 (Sup. Ct. 1989) (defendant-father was ordered that "the child is to be returned to the United Kingdom under defendant's care").

194. Cf. Alfred DeMaris & Jann K. Jackson, *Batterers' Reports of Recidivism After Counseling*, 68 Social Casework: The Journal of Contemporary Social Work 8, 462 (1987) (finding that men who live with their partners at the termination of a batterer's treatment program had a much higher recidivism rate—42% versus 18%).

195. In the context of a Hague proceeding, undertakings are verbal assurances given to the court by a litigant, typically through counsel, as a condition of the child's return. See *infra* Part III.A.

maintains physical custody of the children, the father forgoes visitation, and the father stays away from the mother,<sup>196</sup> this undertaking does not guarantee the mother's safety.<sup>197</sup>

Second, an order to return the children to the place where the domestic violence occurred gives the children, the batterer, and the victim harmful messages. The explicit message is that domestic violence is irrelevant to the proceedings; the implicit message is that the system does not care about the abuser's actions. This perspective reinforces the domestic violence victim's view that legal solutions will not help her, and further disempowers her. It tells the batterer that the system will help him exercise power and control over his victim, and thereby reinforces his power.<sup>198</sup> The children are taught that violence is rewarded, and that the system does not care about their mother's plight.

Third, the Convention's underlying philosophy or purpose is not served by its application to someone like Ms. Prevot. A parent who abducts his or her children to another country because that parent fears losing a custody battle is in a fundamentally different moral position than a parent who abducts her children because the other parent endangers her life. The remedy for the abduction should reflect this difference.<sup>199</sup> In addition, applying the Convention to an individual like Ms. Prevot and sending her children back to France in no way provides a disincentive to other women who need to flee

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196. Various courts have held that the Convention does not require that the child be returned to the left-behind parent, but rather only to the child's habitual residence. *In re A (A Minor) (C.A.)* (unreported opinion, published in *The Times* June 13, 1987).

197. See *infra* Part III.A.

198. Depending upon the court's order and the factual circumstances, the woman may not even have rights of access to her child once the child is returned. It is currently unknown whether parents are being afforded rights of access in the child's habitual residence after the child has been returned. "[F]ollow-up information after the return of children was insufficient or even completely lacking." See Report of the Second Special Commission, *supra* note 14, at 236. There was agreement at the 1993 Special Commission that the Central Authorities should cooperate more on determining whether rights of access have been instituted or restored, but "with a view to creating post-return situations conducive to the prevention of future re-abductions." *Id.*

199. For example, the district court in *Blondin v. Dubois*, 19 F. Supp. 2d 123 (S.D.N.Y. 1998), stated:

The Convention recognizes that custody decisions should be made in the country of habitual residence and it seeks to deter parents from wrongfully taking their children across international borders. It therefore grants certain rights and privileges to a parent who has been victimized by the unilateral actions of the other parent. Here, however, [the left-behind parent] is not the victim. Rather, he created his own predicament by abusing and victimizing [the abductor] and the children. His rights under the Convention therefore must give way to the 'primary interest' of the children not to be exposed to 'physical or psychological danger' or the 'intolerable situation' that would surely exist if they are returned to France.

*Id.* at 129.

transnationally to escape domestic violence. The Convention seeks to discourage international abductions, but women concerned about preserving their lives are less concerned with the legal implications of the abduction than with their physical safety. But if, by chance, women stay in an abusive situation because of the Convention's potential application, then the Convention's primary goal of protecting children will be undermined.

#### D. *The Complete Picture Warrants Reexamining the Law*

Given the relatively recent realization that abductors can be domestic violence victims, almost no attention has been given to what the law's response to these abductors should be.<sup>200</sup> As one report indicated:

Laws relating to parental abduction often fail to properly address the situation of parents who flee to protect themselves or their children from abuse. In some instances, moreover, the laws may increase the risks to those who have been abused. Bodies of law and public policy relating to parental abduction have developed independently from those relating to spouse and child abuse.<sup>201</sup>

It is now time to explore how domestic violence victims who abduct their children are, and should be, treated under the Hague Convention.

## II. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

### A. *The Remedy of Return*

The Hague Convention applies to any child who was "habitually resident" in a Contracting State immediately before the left-behind parent's rights were violated.<sup>202</sup> Its expressed objects are "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "[t]o ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>203</sup>

The Convention provides different remedies for violations of rights of custody and rights of access.<sup>204</sup> The remedy of return, whereby a child is returned to its habitual residence, is available solely for a

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200. See *supra* note 20.

201. Linda K. Girdner & Patricia M. Hoff, Obstacles to the Recovery and Return of Parentally Abducted Children, Research Summary 9 (Mar. 1994).

202. Hague Convention on Child Abduction, *supra* note 12, Art. 4.

203. *Id.* Art. 1.

204. *Id.* Art. 5 (defining the terms); see also Pérez-Vera Report, *supra* note 15, ¶ 65 (discussing how access rights and rights of custody cannot be put in the same category).

wrongful removal or retention of a child, and requires that the left-behind parent had rights of custody.<sup>205</sup> Rights of access, in contrast, are vindicated in the state to which a child has been abducted.<sup>206</sup>

Article 12 provides the remedy of return:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.<sup>207</sup>

The *sine qua non* of the return remedy is that it establishes the factual status quo prior to the abduction.<sup>208</sup> The Convention explicitly

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205. Hague Convention on Child Abduction, *supra* note 12, Arts. 3 & 8.

206. *Id.* Art. 21; *see, e.g.*, *Croll v. Croll*, 66 F. Supp. 2d 554, 558-59 (S.D.N.Y. 1999) (granting remedy of return because interim order granting father rights of access also said that child could not be removed from Hong Kong without leave of court or father's written consent); *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860-61 (E.D. Pa. 1998) (holding that federal district court has no authority to enforce the rights of access since remedy is not right of return); *Viragh v. Foldes*, 612 N.E.2d 241, 246-49 (Mass. 1993) (rejecting petition for return of child to Hungary because father only had rights of access, but making effective his rights of access in the United States). This distinction has not always been appreciated by courts in this country. *See, e.g.*, *Harliwich v. Harliwich*, No. FA9868306S, 1998 WL 867328, at \*2-3 (Conn. Super. Ct. Dec. 3, 1998) (granting remedy of return even though father only had rights of access).

207. Hague Convention on Child Abduction, *supra* note 12, Art. 12.

208. *See* Hague Convention on the Civil Aspects of International Child Abduction, S. Exec. Rep. No. 99-25, at 15-16 (1986) (Department of State's legal analysis of the Convention) ("In contrast to the restoration of the *legal* status quo ante brought about by application of the UCCJA, the PKPA, and the Strasbourg Convention [Council of Europe's Convention on the Recognition and Enforcement of Decisions Relating to the Custody of Children, adopted in Strasbourg, France, in November 1979], the Hague Convention seeks restoration of the *factual* status quo ante and is not contingent on the existence of a custody decree. The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests."); *id.* at 28 (calling right of return the "core of the Convention"); *see also* *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (preserving the status quo is a "primary purpose of the Convention"); *International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971*, *supra* note 44, at 58 (statement of Patricia M. Hoff, Co-chair, Child Custody Comm. of the Family Law Section, American Bar Association) ("The Convention's chief objective is expeditiously to restore the factual situation that existed prior to the child's wrongful removal or retention."); 134 Cong. Rec. H5334 (1988) (statement of Rep. Cardin that "It is a simple approach that is taken by this convention, and that is to restore the factual situation that existed prior to the child's removal or retention."); President Reagan's Letter of Transmittal, Hague Convention on the Civil Aspects of

prohibits Contracting States from deciding the merits of a custody dispute until it has been determined that a child is not to be returned under the Convention.<sup>209</sup>

This Article is primarily concerned with the remedy of return and violations of rights of custody. The remedy of return uniquely disadvantages domestic violence victims who have abducted their children—it reverses the accomplishment of the victim's flight by returning the child to the place from which the domestic violence victim has just fled. The remedy puts the victim's most precious possession, her child, in close proximity to her batterer either without her protection (assuming she does not return with the child), or with her protection, thereby exposing her to further violence. In contrast, the remedy of access can occur in the state to which the victim fled,<sup>210</sup> and can occur after the court imposes enforceable conditions for the abductor's safety.<sup>211</sup>

In addition, the remedy of return is an important tool by which batterers can harass and further control their victims. The Hague Convention gives left-behind parents direct access to the courts; there is no screen by which abductors, in appropriate cases, might be relieved from having to respond to an application filed in court for their children's return. Court access is assured despite the fact that the Convention's provisions are implemented through designated Central Authorities in each Contracting State,<sup>212</sup> and the Central Authority can refuse an application when the application manifestly fails to meet the requirements of the Convention or is "otherwise not well founded."<sup>213</sup> The Central Authority's rejection of an application

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International Child Abduction, S. Treaty Doc. No. 99-11, at 1 (1985) ("The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention."); Adair Dyer, *The Hague Child Abduction Convention—Past, Present and Future*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 17 [hereinafter Dyer, *Past, Present and Future*] ("Since an order for the return of the child is not a determination on the merits of any custody issue . . . the parent who removed the child still may contest custody on the merits in the courts of the child's habitual residence. The order simply restores the *status quo* as it existed before the child's removal or retention.").

209. Hague Convention on Child Abduction, *supra* note 12, Art. 16. Article 16 does allow adjudication on the merits if an "application under this Convention is not lodged within a reasonable time following receipt of the notice" of a "wrongful removal or retention." *Id.*

210. See *supra* notes 204-06 and accompanying text.

211. The conditions imposed on the non-custodial parent would be enforceable because visitation would occur in the state where the court that imposed the conditions sat. This contrasts with the undertakings that courts sometimes extract from a non-custodial parent before a child is returned to the child's habitual residence, and that are generally unenforceable. See *infra* Part III.A.

212. Hague Convention on Child Abduction, *supra* note 12, Art. 6; see also *id.* Art. 7 (detailing actions that Central Authorities must take to achieve the objects of the Convention).

213. *Id.* Art. 27. Yet, "[t]here are few cases in which the Central Authority of a

does not hamper an individual's ability to invoke the Convention on his own in the appropriate tribunal of the requested state.<sup>214</sup> Direct applications, in fact, "occur quite frequently."<sup>215</sup> The simplicity and speed with which the Convention operates, as well as the legal aid available for petitioners but not for respondents,<sup>216</sup> helps to make the remedy of return a particularly powerful legal weapon for batterers.<sup>217</sup>

## B. *The General Irrelevance of Domestic Violence to the Hague Convention's Remedy of Return*

### 1. The Prima Facie Case

The Convention makes almost every domestic violence victim who goes abroad with her child subject to the remedy of return. While a petitioner has to establish a prima facie case under the Convention to obtain relief, the two most important requirements, that the child be "wrongfully removed" from its "habitual residence," are easily satisfied. Common sense might dictate that a victim who removes her child from a country in order to escape domestic violence has not engaged in a "wrongful removal" or that a mother who removes her child from a place where the mother has been forced to live, under penalty of death by her child's father, has not removed the child from the child's "habitual residence," but the case law of the Hague Convention sometimes lacks common sense.

#### a. *Wrongful Removal*

The remedy of return applies when there is a "wrongful removal or retention."<sup>218</sup> Article 3 of the Convention defines the removal or retention as "wrongful" when the removal or retention is "in breach of rights of custody," and "those rights were actually exercised."<sup>219</sup> If

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country has used Article 27 to refuse a request." Conclusions of 1989 Special Commission, *supra* note 15, at 232. Unfortunately, the report does not detail the factual scenarios involved when a Central Authority rejects an application.

214. See Conclusions of 1989 Special Commission, *supra* note 15, at 232-33.

215. See Report of the Second Special Commission, *supra* note 14, at 237.

216. See Hague Convention on Child Abduction, *supra* note 12, Art. 26. The United States entered a reservation, pursuant to Article 42, that it is not "bound to assume any costs or expenses resulting from the participation of legal counsel . . . or from court and legal proceedings," except as may be "covered by a legal aid program." Hague Conference on Private International Law, Full Status Report Convention # 28, United States of America, available at <http://www.hcch.net/e/status/stat28e.html#us7>.

217. See Conclusions of 1989 Special Commission, *supra* note 15, at 234-35 (commenting that most speakers stressed the importance of the deterrent effect).

218. Hague Convention on Child Abduction, *supra* note 12, Art. 12.

219. *Id.* Art. 3. Article 3 states that a removal or retention is wrongful when:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which



a parent has rights of custody, that parent is presumed to have been exercising those rights.<sup>220</sup> Therefore, it is most important to focus on the interpretation of "rights of custody." Article 5 of the Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."<sup>221</sup> In addition, Article 3 states: "The rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."<sup>222</sup> Missing from the definition of "wrongful," either explicitly or implicitly through the interpretation of "rights of custody," is any sort of exclusion for justifiable abductions.

"Rights of custody" may appear, at first blush, to be a narrow legal term, but the term has consistently received a wide interpretation. The definition of "rights of custody" in Article 5 is "non-exhaustive."<sup>223</sup> In addition, although Article 3 states that "rights of custody" are to be determined "under the law of the State in which the child was habitually resident immediately before the removal or retention,"<sup>224</sup> this limitation has been disregarded. Rather,

The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression "rights of custody," for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.<sup>225</sup>

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the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

*Id.* Art. 3.

220. Pérez-Vera Report, *supra* note 15, ¶ 73. As the Report states:

This condition . . . requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate . . . [T]he Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it.

*Id.*

221. Hague Convention on Child Abduction, *supra* note 12, Art. 5(a).

222. *Id.* Art. 3.

223. Report of the Second Special Commission, *supra* note 14, at 233.

224. Hague Convention on Child Abduction, *supra* note 12, Art. 3(a).

225. Report of the Second Special Commission, *supra* note 14, at 229; *see also id.* at 242 (statement of Adair Dyer, First Secretary) ("The judge is not bound by a decision made in the State of habitual residence of the child to the effect that the child has been wrongfully removed or retained. Nonetheless, he hoped that courts in returning States would give effect to such pronouncements."). *See, e.g.*, S. Exec. Rep. No. 99-25, *supra* note 208, at 21 ("Nothing in the Convention limits this 'law' to the internal law of the State of the child's habitual residence. Consequently, it could include the laws of another State if the choice of law rules in the State of habitual residence so

Most domestic violence victims who take their children across international borders without their batterers' consent breach their abusers' "rights of custody." For example, the Convention makes pre-decree removals wrongful when the left-behind parent has custody rights *ex lege* either under the internal law of the state of the child's habitual residence *or* the law designated by the conflict rules of that state.<sup>226</sup> When the laws of two states produce divergent answers, the Explanatory Report by Elisa Pérez-Vera,<sup>227</sup> an authoritative document on the Convention's meaning,<sup>228</sup> instructs courts to follow the law that would establish custody rights.<sup>229</sup> Pre-decree abductions are the most common type of abduction,<sup>230</sup> and are probably disproportionately common among domestic violence victims who abduct their children.<sup>231</sup> By making these removals potentially

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indicate.").

226. *In re Michael B.*, 80 N.Y.2d 299, 309 (N.Y. 1992) (stating that biological parent has right of physical custody of child unless and until the right is terminated by law); *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991) (holding that father had "rights of custody" under Convention because under Ontario law he had an equal right to custody of daughter absent agreement or court order to the contrary); see *infra* text accompanying notes 227-32.

227. See Pérez-Vera Report, *supra* note 15.

228. Elisa Pérez-Vera was the official reporter for the Hague Convention. "Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986).

229. Pérez-Vera Report, *supra* note 15, ¶ 68 (citing as an example a conflict between French and Spanish law).

230. See Joan Fisher, Missing Children Research Project: Vol. 1. Findings of the Study. Solicitor General of Canada (1989) (stating that it is three times more common for an abduction to occur before a custody order is entered); Greif & Hegar, *supra* note 8, at 15 ("In approximately one-third of the abduction cases we studied, the child was removed by a parent who was not violating a custody decree: At the time of the abduction, the parents were married and living together or separated without a court having awarded custody."); Pérez-Vera Report, *supra* note 15, ¶ 68 (characterizing these pre-decree abductions as "quite frequent").

231. A domestic violence victim may not bring a custody action because a custody action might trigger a violent reaction in her abuser. Separation is the most dangerous time for a domestic violence victim. See National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence § 405, commentary (1994) ("The risk of domestic violence directed both towards the child and the battered parent is frequently greater after separation than during cohabitation; this elevated risk often continues after legal interventions."). It was recently reported that for Oregon women who end their relationships, "the abuse becomes more frequent or stays the same 25% of the time; harassment, trespassing, or stalking occurs 60% of the time." 1998 Oregon Domestic Violence Needs Assessment, *supra* note 129, at iii; see also Mary Ann Dutton, Empowering and Healing the Battered Woman: A Model for Assessment & Intervention 45 (1992) (noting that data suggest that a woman is in greatest danger of being killed by her batterer when she leaves the relationship) (citing studies); Demie Kurz, *Separation, Divorce, and Woman Abuse*, in 2 Violence Against Women 63, 78 (1996) ("These data demonstrate dramatically how violence continues after separation and creates serious consequences for women."); Mahoney, *supra* note 147, at 6 (discussing the phenomenon of "separation assault"). Alternatively, as mentioned above, the

"wrongful,"<sup>232</sup> the Hague Convention goes well beyond common law<sup>233</sup> and traditional criminal law in the United States.<sup>234</sup>

Even a woman with court-awarded physical and legal custody can engage in a wrongful removal when she goes abroad with her child without the other parent's permission. A post-decree removal is wrongful if the left-behind parent has joint legal custody,<sup>235</sup> an increasingly common judicial award in the United States and abroad.<sup>236</sup> In addition, if the custodial parent must obtain permission from the court or non-custodial parent before moving, a removal without the requisite permission is "wrongful."<sup>237</sup> This can be true even if the left-behind parent only has rights of access.<sup>238</sup>

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domestic violence victim may feel alienated from the foreign country's social institutions and may not have tried to use the court system. See *supra* note 143.

232. But see *C v. S*, 2 A.C. 562 (H.L. 1990) (appeal taken from C.A.) (Brandon of Oakbrook, L.J.) (holding unwed father had no rights of custody under the law of Western Australia because he had not applied for a court order granting him rights, despite the fact that de facto custody was exercised by the parents jointly).

233. Either parent could remove the child without the other parent's consent unless a statute qualified this right. See Carol S. Bruch, *International Child Abduction Cases: Experience Under the 1980 Hague Convention*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 6 n.23.

234. See Girdner & Hoff, *supra* note 201, at 12 ("Although several States have criminal laws prohibiting pre-custody decree abductions, the traditional rule has been that neither parent commits a crime if the child is abducted prior to the issuance of a custody order.").

235. Hilton, *supra* note 113, at 6 ("If the decree states that the parents have joint custody or joint legal custody then there is probably a "Right of Custody" in the left behind parent.").

236. See, e.g., Maria Cancian & Daniel R. Meyer, *Who Gets Custody?*, Demography, May 1998, at 147 (citing Wisconsin study that suggests there has been an increase of joint legal custody of children); Paul Stanway, *Custody Tug of War Needs Action Now*, Edmonton Sun, May 16, 1999, at C21 (discussing Canada's "long-expected" reform of its Divorce Act that would switch the presumption from sole custody to "joint-parenting").

237. *Checklist of Issues To Be Considered*, *supra* note 192, at 14 (citing cases from England, France, Australia, and New Zealand). As Adair Dyer has stated:

The Courts of various States which have interpreted this provision have concluded, almost unanimously, that if a person having access (or visitation) rights with a child, also has the legal right to be consulted and to give or withhold consent before the child's residence may be moved to a different jurisdiction, he or she has 'rights of custody' within the meaning of the Convention, even if these rights are not viewed as being 'custody' rights under the law of the child's place of habitual residence.

*Summary of Remarks by Adair Dyer on the Application of the Hague Child Abduction Convention to Questions of Access (Visitation)*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 2 [hereinafter Dyer, *Summary of Remarks*]. Participants at the 1993 Special Commission agreed that a restriction on removal from the jurisdiction without the other parent's permission did constitute a breach of the other parent's "right of custody." Report of the Second Special Commission, *supra* note 14, at 234 (commenting on disagreement by courts in Austria, Australia, the United Kingdom and the United States with a view expressed by the Tribunal de Grande Instance de Perigueux that such a condition constituted only a "modality attached to the right of custody" and was not joint custody); see, e.g., *Croll v. Croll*, 66 F. Supp. 2d 554, 559 (S.D.N.Y. 1999) (granting remedy of return because interim

In addition, a woman with sole legal and physical custody may engage in a wrongful removal, even if the non-custodial parent had no court-ordered rights of access, if she and the non-custodial parent have derogated from the terms of the custody order. A private custody agreement between the woman and her batterer may supersede the judicial award for purposes of the Convention. Article 17 makes clear, "The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this

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order said child could not be removed from Hong Kong without leave of court or father's permission despite fact that father only had rights of access); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (granting remedy of return because Greek court order established that husband had custodial rights).

238. *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991), is an excellent example of a court giving a parent "rights of custody" even though the parent never had custody rights. The New York Family Court held that a mother's removal of her son to the United States from Canada was wrongful under the Convention, despite a separation agreement that gave the mother custody of the child and the left-behind parent visitation within the vicinity of Toronto. *Id.* at 430. Although the New York court acknowledged that the separation agreement "suspended" the father's "statutory right to custody of their son," the court found the subsequent events determinative. *Id.* at 432. The father had petitioned for and received an interim order preventing the respondent from removing the children from Ontario. *Id.* at 430-31. The mother, in defiance of the order, left the country. *Id.* at 431. The order preventing removal did not alter the rights of custody between the parties. *Id.* at 432. After the mother departed, the father obtained interim orders granting him temporary custody and stating that the mother's actions were wrongful. *Id.* at 431. He then brought an action in New York Family Court for the enforcement of the Canadian court's latter interim orders granting him "custody and access." *Id.* In response to the father's petition for the return of their son, the mother argued to the court that the father only had rights of access and not rights of custody, and that the remedy of return was not available to him. *Id.* at 432. The New York Family Court found that the mother's argument "might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which gave temporary custody of both children to the petitioner." *Id.* The court then gave "full faith and credit" to the interim orders of the Supreme Court of Ontario that held the mother's removal (and retention) of the children was wrongful. *Id.*

The basis for finding that the father had a "right of custody" greatly expanded the interpretation of the Convention. In essence, the mother's "rights of custody" at the time of removal were retroactively transformed by subsequent occurrences. The court's decision is problematic for two reasons. First, the court turned the mother's contemptuous conduct affecting the father's visitation into the equivalent of a violation of a right to custody. The decision suggests that any person with rights of access should petition for custody when his visitation rights are violated and thereby confer on himself "rights of custody" under the Convention, and be eligible for the remedy of return. In short, the decision made a chasing order determinative of the question of who had "rights of custody" initially. Chasing orders are logically irrelevant to the issue whether a party at the time of the removal acted wrongfully. Moreover, as a matter of policy, a chasing order should not control the determination of whether an abduction was wrongful since chasing orders are normally obtained *ex parte*. Second, the Family Court abdicated its own responsibility to determine whether the removal was wrongful, and instead relied exclusively upon the Supreme Court of Ontario's orders, which were obtained *ex parte*.

Convention.”<sup>239</sup> Article 3 allows rights of custody to arise “by reason of an agreement having legal effect under the law of that State.”<sup>240</sup> “Having legal effect” itself has a broad definition. The Pérez-Vera Report indicates that the phrase includes “any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities.”<sup>241</sup>

Finally, the peculiarities of foreign law may also expand the concept of “rights of custody,” despite a seemingly straightforward award of physical and legal custody to the abductor.<sup>242</sup> For example, although a court may award custody of the child to one parent, the court’s retention of jurisdiction to resolve custody disputes may confer on the court “rights of custody,”<sup>243</sup> which may make wrongful a removal by the custodial parent without the court’s permission, and thereby enable a batterer to petition for the remedy of return.<sup>244</sup>

A broad reading of “rights of custody” helps deter child abduction. Yet general deterrence does not discriminate. Among those deterred may be domestic violence victims who need to find safety transnationally with their children because they can not receive adequate protection from the courts in their children’s habitual

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239. Hague Convention on Child Abduction, *supra* note 12, Art. 17. Article 17 allows “the judicial or administrative authorities of the requested State [to] take account of the reasons for that decision in applying this Convention.” *Id.*

240. *Id.* Art. 3.

241. Pérez-Vera Report, *supra* note 15, ¶ 70, at 447. The United States believes that the words “having legal effect” should be “interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgment.” See S. Exec. Rep. No. 99-25, *supra* note 208, at 26. While derogating from a custody order may create a “right of custody,” it may not destroy a right of custody when, for example, a batterer agrees with his victim that he will forego his right to be consulted before the child’s residence is changed. A stale custody order, or an order where the provisions may “have been derogated from subsequently by . . . acquiescence of the parties,” will not automatically prevent the child’s return. Hague International Child Abduction Convention, Text and Legal Analysis, *supra* note 228, 51 Fed. Reg. at 10504-05.

242. See Conclusions of 1989 Special Commission, *supra* note 15, at 222. The Commission cited Australian law, where only one parent may have an award of “custody,” but both parents are left with a residential “guardianship,” which would preclude one parent from unilaterally removing the child from the country. *Id.*; see, e.g., *Re Arthur*, No. CA1223/87, (Fam. Div. Jan. 13, 1988), at 10-11 (unpublished opinion) (discussing Australia’s Family Law Act of 1975, sec. 60A, and stating that when a mother and father are married, an order for custody gives care and control to one party, but both parties continue to have the rights of a guardian, like in a joint custody arrangement in England).

243. See *In re H.*, 1999 WL 1319095 (H.L. Dec. 14, 1999) (father with contact rights obtained by consent could successfully petition for child’s return because father’s application for guardianship was pending at the date of removal, thereby providing the district court in Ireland with rights of custody within Art. 3(a)); see generally Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 66-70 (1999).

244. See, e.g., *B v. B.*, [1993] Fam. 32 (Can.) (allowing father’s petition for the return of his child to Canada based on mother’s breach of the rights of custody of the court, even though father had no rights of custody).

residence, including a court's permission to depart for reasons of safety. A broad reading also insulates a batterer's chosen forum when neither party has yet invoked that country's courts (pre-decree abductions), or when the courts in the child's habitual residence have awarded the domestic violence victim sole physical and legal custody and yet some residual rights in the batterer allow him to veto a domestic violence victim's departure with the children (if not expressly, then by successfully invoking the Hague Convention).

### b. *Habitual Residence*

Before an application for the return of the child will be successful, the applicant must satisfy a threshold issue: that the child has been taken *from* his or her habitual residence.<sup>245</sup> If the child has been taken *to* his or her habitual residence, a *prima facie* case cannot be made out. The term "habitual residence" is not defined in the Convention. The Convention's commentary suggests that the term was intended to invoke a purely factual inquiry<sup>246</sup> to assess "the centre of the child's life."<sup>247</sup>

Domestic violence victims who have abducted their children have argued that a child's habitual residence cannot be a place where the child's primary caretaker is forced to live by virtue of domestic violence. This argument was made in *In re Ponath*<sup>248</sup> and *Nunez-Escudero v. Tice-Menley*,<sup>249</sup> with very different results. These cases indicate that courts have tended to take extreme positions in resolving the argument: either domestic violence is always relevant or domestic

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245. Ironically, a woman who obtains custody and permission to take her children abroad may not have a valid claim under the Convention if she decides to leave her children temporarily in their country of habitual residence and travel abroad for help, and then the father later refuses to return the children to her. At the 1989 Special Commission on the Operation of the Convention, the question was raised whether Article 3 could help obtain the "return" of a child to the custodial parent when the child is wrongfully retained in the country of his or her habitual residence. "There was no definitive conclusion" as to whether the State of the child's habitual residence should accept an application for return to the mother. Conclusions of 1989 Special Commission, *supra* note 15, ¶ 11, at 223. In this situation, a country would be enforcing its own custody decree to send the child away. This possibility turns on an understanding of "habitual residence," discussed *infra*.

246. Pérez-Vera Report, *supra* note 15, ¶ 59. There has been great resistance to making the term more technical. See, e.g., *Re Bates*, (Minor), No. CA 122/89 (Fam. Feb. 23, 1989) at 8 (unreported) ("The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.") (quoting Albert Veun Dicey et al., *The Conflicts of Laws* 166 (11th ed. 1989)); see also *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) ("To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.").

247. *Checklist of Issues to Be Considered*, *supra* note 192, ¶ 33, at 16.

248. 829 F. Supp 363 (D. Utah 1993).

249. 58 F.3d 374 (8th Cir. 1995).

violence is never relevant. The best approach may rest somewhere in between these two extremes.

*Ponath* involved an American woman and a German man who married each other in the United States.<sup>250</sup> They had a child in the United States and then traveled to Germany when the child was approximately four months old.<sup>251</sup> They initially went to Germany only to visit the man's family, and had purchased return-trip tickets.<sup>252</sup> While in Germany, the man found employment and began building a house.<sup>253</sup> After three months in Germany, the woman wanted to return to the United States with the child, "but Petitioner refused to permit her and the minor child to return. Petitioner prevented and continued to prevent respondent and the minor child's return to the United States by means of verbal, emotional and physical abuse."<sup>254</sup> "Some months later," the father permitted the petitioner and the child to leave Germany; the mother and child returned to Utah approximately ten months after they arrived in Germany.<sup>255</sup>

The father filed a petition with the federal district court in Utah for the return of the child, which the court denied.<sup>256</sup> The court made the factual determination that the child's habitual residence was the United States.<sup>257</sup> The court determined that "the desires and actions of the parents cannot be ignored,"<sup>258</sup> and it held that "habitual residence must...entail some element of voluntariness and purposeful design,"<sup>259</sup> as well as a "settled purpose."<sup>260</sup> The court concluded that, "Petitioner's coercion of [R]espondent by means of verbal, emotional and physical abuse removed any element of choice and settled purpose *which earlier may have been present* in the family's decision to visit Germany."<sup>261</sup> The district court explained:

The aim of the Hague Convention is to prevent one parent from obtaining an advantage over the other in any future custody dispute. For the court to grant petitioner's motion, and thereby sanction his behavior in forcing continued residence in Germany upon respondent, and through her, the minor child, would be to thwart a principle [sic] purpose of the Hague Convention.<sup>262</sup>

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250. *Ponath*, 829 F. Supp at 366.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 368.

257. *Id.*

258. *Id.* at 367.

259. *Id.*

260. *Id.*

261. *Id.* at 368 (emphasis added).

262. *Id.* (citation omitted).

The court's reasoning has intuitive appeal. After all, forum shopping using coercion should not be tolerated any more than forum shopping by abduction, which the Hague Convention deems unacceptable. To the extent that the mother and father never agreed to make Germany the child's habitual residence, *Ponath* is the correct result. *Ponath* demonstrates that the factual determination of a child's "habitual residence" provides courts an adequate mechanism to address the situation where a woman is coerced to go to a country or forced to remain there when she intended the trip only to be a visit.

Yet, to the extent that the parties in *Ponath* agreed to stay in Germany, and the domestic violence erupted subsequent to their agreement,<sup>263</sup> *Ponath* may go too far. If one reads the facts in this way, then the court's decision in *Ponath* implies that any amount of domestic violence that prevents departure can erase an otherwise valid habitual residence. While domestic violence is wrong, it perhaps goes too far to say that domestic violence can vitiate an otherwise valid habitual residence. Otherwise, any self-help used to stop an impending abduction might prohibit later recourse to the Hague Convention. This result seems at odds with the expansive application of the Convention generally.

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263. The Prevot court relied on the narrow reading of *Ponath*. Yet it is indeterminable whether the trip to Germany ceased to be temporary after Mr. Ponath found a job and started building a house, but before, or in spite of, when the violence commenced. Based upon the wide interpretation given to the notion of "settled purpose," however, it seems likely that the couple had changed the child's habitual residence. The phrase "settled purpose" was popularized through its adoption by the Family Division of the High Court of Justice in *Re Bates (Minor)*. *Re Bates (Minor)*, No. CA 122/89 (Fam. Feb. 23, 1989) (unreported). *Bates* cited an earlier English case, *R. v. Barnet London Borough Council*, where the House of Lords described "settled purpose" as follows: "All that is necessary is . . . purpose of living where one . . . has a sufficient degree of continuity to be properly described as settled." *R. v. Barnet London Borough Council*, 2 A.C. 309, 314 (1983) (Scarman, L.J.). A "purpose of living" can include one's "education, . . . employment, health, family, or . . . love of the place." *Id.* A settled purpose need not mean that the person "intends to stay where he is indefinitely." *Id.* In *Bates*, a stay of under three weeks indicated there was a settled purpose sufficient to change the child's habitual residence. *Re Bates (Minor)*, No. CA 122/89 (finding that an agreement between the parents for the mother and child to stay in New York for about three months while the father traveled was sufficient to form a settled purpose that made New York the child's habitual residence). *Bates* has been cited by numerous American courts. See, e.g., *Feder v. Evans-Feder*, 63 F.3d 217, 222-24 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993); *Mozes v. Mozes*, 19 F. Supp. 2d 1108, 1113-14 (C.D. Cal. 1998); *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 268 (N.D. Iowa 1993); *Levesque v. Levesque*, 816 F. Supp. 662, 666 (D. Kan. 1993); *Zuker v. Andrews*, 2 F. Supp. 2d 134, 137 (D. Mass. 1998); *Toren v. Toren*, 26 F. Supp. 2d 240, 243 (D. Mass. 1998), *vacated on other grounds* 191 F.3d 23 (1st Cir. 1999); *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994); *Walton v. Walton*, 925 F. Supp. 453, 457 (S.D. Miss. 1996); *Isaac v. Rice*, 1998 WL 527107, at \*2 (N.D. Miss. July 30, 1998); *In re Ponath*, 829 F. Supp. 363, 367-68 (D. Utah 1993); *Harsacky v. Harsacky*, 930 S.W.2d 410, 413-14 (Ky. Ct. App. 1996); *Harkness v. Harkness*, 577 N.W.2d 116, 121 (Mich. Ct. App. 1998); *David B. v. Helen O.*, 625 N.Y.S.2d 436, 440 (N.Y. Fam. Ct. 1995); *Flores v. Contreras*, 981 S.W.2d 246, 249 (Tex. App. 1998).



While some U.S. courts cite *Ponath*,<sup>264</sup> no court has followed the more expansive interpretation of the decision. In fact, other courts explicitly reject the approach. For example, the Eighth Circuit specifically rejected it in *Nunez-Escudero v. Tice-Menley*.<sup>265</sup> There Stephanie Rose Tice-Menley, a United States citizen, left Mexico and her Mexican husband, Enrique Nunez-Escudero, for her parents' home in Minnesota, taking with her the couple's then six-week-old child.<sup>266</sup> She alleged that her husband "physically, sexually and verbally abused her, and that she was 'treated as a prisoner' by her husband and father-in-law."<sup>267</sup> She claimed that she was not allowed to leave the house without her husband or father-in-law.<sup>268</sup> There were also allegations regarding the child's safety. Her husband and his family allegedly objected to her nursing the baby, and the husband refused to acquire a car seat for the child.<sup>269</sup> Tice-Menley had argued "she had no intention of remaining in Mexico and had no choice in living there because her husband and father-in-law made her a virtual prisoner."<sup>270</sup> As she "lost the fundamental right of freedom of movement," she argued that neither she nor her six-week old nursing infant "had a voluntary habitual residence in Mexico."<sup>271</sup>

The Eighth Circuit rejected Tice-Menley's argument as an independent basis on which to affirm the trial court's decision not to return the child.<sup>272</sup> The appellate court cited *Friedrich v. Friedrich* for the proposition that "[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."<sup>273</sup> The court rejected Tice-Menley's argument

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264. Courts tend to cite *Ponath* for the proposition that a child's habitual residence can be changed based upon the shared intentions of the parents. See, e.g., *In re Morris*, 55 F. Supp. 2d 1156, 1162-63 (D. Colo. 1999) (determining two-year-old child's habitual residence by looking at parents' shared intention to return to Colorado with child and parents' failure to form the necessary degree of settled purpose in Switzerland); *Harsacky v. Harsacky*, 930 S.W.2d 410, 414 (Ky. Ct. App. 1996) (determining habitual residence of four and five-year-old children by examining parents' shared intention); *Schroeder v. Vigil-Escalera Perez*, 664 N.E.2d 627, 632-33 (Ohio Ct. Common Pleas 1995) (determining five-month-old child's habitual residence by looking at parents' intentions, and father's acquiescence).

265. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995).

266. *Id.* at 375.

267. *Id.* at 376.

268. *Id.* Although Tice-Menley detailed the abuse through her own affidavit, an affidavit from her parents, and an affidavit from a psychologist, the allegations of the abuse—other than the alleged physical restraint—are not detailed in the Court of Appeals' opinion. *Id.* The Court of Appeals only reports that Tice-Menley detailed accounts of her father-in-law's verbal abuse, although it also notes that Tice-Menley "had seen her father-in-law hit his youngest son with a wooden plunger." *Id.*

269. *Id.*

270. *Id.* at 378.

271. *Id.*

272. *Id.* at 379.

273. *Id.* (quoting *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993)). The approach suggested by *Ponath* has received general disapproval because the approach

that the reasoning in *Ponath* should guide the court in her case.<sup>274</sup> The Eighth Circuit distinguished *Ponath*, explaining that the child in *Ponath* was born and lived in the United States before visiting Germany.<sup>275</sup> In *Nunez-Escudero*, however, "the baby was born and lived only in Mexico" until the abduction.<sup>276</sup>

The Eighth Circuit's attempt to distinguish *Ponath* is fairly unconvincing. The *Ponath* court held that the child's habitual residence was the United States, but the child in *Ponath* arguably had more of a connection to Germany than the United States. The child was born in the United States, but lived there for only four months.<sup>277</sup> The child also had lived in Germany for ten months before the abduction.<sup>278</sup> More importantly, the court in *Ponath* arguably suggested that a voluntary change of habitual residence was then vitiated by the domestic violence.<sup>279</sup> By analogy, the domestic violence in *Nunez* should have vitiated the mother's initial consent to live in Mexico and to have her child there. The Eighth Circuit, however, feared the consequences of *Ponath* and refused to apply it: "To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is wherever the mother happens to be."<sup>280</sup>

One can imagine a compromise between the extreme interpretations of both *Ponath* and *Nunez*, an interpretation where domestic violence is relevant to determining the child's habitual residence, but is not always determinative. Courts should continue to focus on the child when determining the child's habitual residence, but

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focuses on the parent's intent. For example, the 1993 Special Commission, noting "some problems" with the application of the term habitual residence, explained that some courts treated habitual residence more like the concept of domicile and looked at the parent's intent and attributed that to the child, i.e., if the parent had no intent of being in the country (because the parent was sent to the country because of military orders) then that country was not the child's habitual residence. Report of Second Special Commission, *supra* note 14, at 234. The 1993 Special Commission emphasized that only the child's habitual residence was relevant, not the parents' residence or intentions. *Id.*

274. *Nunez-Escudero*, 58 F.3d at 379.

275. *Id.* (citing *In re Ponath*, 829 F. Supp. 363, 366 (D. Utah 1993)).

276. *Id.*

277. *Ponath*, 829 F. Supp. at 364. The father was German and had lived in the United States shortly over a year, during which time he married and had the child. *Id.* at 364, 366.

278. *Id.* at 364.

279. *See id.* at 367-68.

280. *See Nunez-Escudero*, 58 F.3d at 379 (citing *Friedrich v. Friedrich*, 989 F.2d 1396, 1402 (6th Cir. 1993)). It is somewhat confusing that the Eighth Circuit said that while it could not affirm the district court's ruling on the alternate ground that the father had failed to establish Mexico as the child's habitual residence, the appellate court still required the district court to make the determination of habitual residence on remand. *Id.* ("If the parties wish to further litigate this issue on remand, they are free to do so.").

perhaps also acknowledge the factual reality that the habitual residence of a child of tender years derives from the habitual residence of the child's primary caretaker.<sup>281</sup> Courts could also follow the narrow interpretation of *Ponath*: where the primary caretaker never intended to travel to or live in the country from which she later fled, and went or stayed there only by force or coercion, then neither the primary caretaker's habitual residence nor the child's habitual residence was ever established in that country.<sup>282</sup> To hold otherwise would reward the abuser and allow him to forum shop through violence.<sup>283</sup>

On the other hand, one need not accept the more extreme reading of *Ponath*, i.e., that a habitual residence once voluntarily established by the primary caretaker and the child can be vitiated by a later onset of domestic violence. Individuals who voluntarily choose to live in a country should be held to have accepted that country's legal system for any contingencies that might arise there.<sup>284</sup> Requiring that a child custody dispute be resolved in the forum does not reward the partner for his abuse because the domestic violence victim could not establish a new habitual residence for the child without the other parent's consent, or litigate custody in another forum, even without his abuse. The key inquiry, therefore, is whether the habitual residence was voluntarily established.

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281. See *C v. S*, 2 A.C. 562 (H.L. 1990) (Brandon, L.) (finding three-year-old child's "habitual residence" to be derivative of mother's, who had sole legal custody); *Re F (A Minor) (Child Abduction)* 1 F.L.R. 548 (1992) (Butler-Sloss, L.J.) (stating *in obiter* that where the parents live apart, the young child's habitual residence follows the habitual residence of the primary caretaker, so long as there is acquiescence by the other parent); *Re O (A Minor) (Abduction: Habitual Residence)* 2 F.L.R. 594 (1993) (holding habitual residence of approximately five-year-old child was the same as the habitual residence of her mother, in whose sole and lawful custody she was when the mother left Nevada, because the child "was not of an age at which she could form her own intentions relevant to acquiring habitual residence in any given place"); *In re Artso*, Fam. Ct. Austrl. (20 Mar. 1991), at 81.634, 81.638 (habitual residence of twelve-year-old and eight-year-old rested on habitual residence of parents since "they are unable to establish their own habitual residence and it is their parents who decide that on their behalf"); cf. *In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (finding that a determination of a two-year-old child's habitual residence required considering "the overtly-stated intentions and conduct of his parents").

282. See *In re Artso*, Fam. Ct. Austrl. (20 Mar. 1991).

283. See *R. v. Barnet London Borough Council*, 2 A.C. 309, 344B (1983) (Scarman, L.J.) ("Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is."). But see *Cameron v. Cameron*, S.L.T. 306 (Scot. 1995) ("[W]e are not satisfied that in all cases the residence must be voluntarily adopted before there can be habitual residence. Even though Robinson Crusoe had no opportunity to escape, we are inclined to think that he had his habitual residence on the desert island.").

284. This would be consistent, for example, with *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995), where the Third Circuit found the child's habitual residence to be Australia because both parents shared a present intention to live there, despite the mother's intention to leave if the marriage did not improve.

Admittedly, such an approach would not have helped someone in the position of Ms. Prevot.<sup>285</sup> A year after the Prevots settled in France, Mr. Prevot isolated Ms. Prevot and began abusing her violently.<sup>286</sup> He took her identification, including her and the children's passports, so that she and the children could not leave the country.<sup>287</sup> Ms. Prevot responded to her husband's petition for the children's return by arguing that France was not the children's habitual residence because the children's residence was "coerced" by taking their passports.<sup>288</sup> She cited *Ponath* in support of her argument.<sup>289</sup> The trial court rejected her argument, emphasizing that the visit to Germany by the Ponath family was purportedly temporary; it was during the visit that the husband's abusive actions prevented the wife from returning to the child's habitual residence.<sup>290</sup> In contrast, the court found that the Prevot family went voluntarily to France to settle permanently, and after one year there difficulties arose.<sup>291</sup>

Assuming the distinction is accurate,<sup>292</sup> there is a way that courts could interpret "habitual residence" to aid someone like Ms. Prevot. A legitimately established habitual residence should cease to exist when there is violence, when insufficient assistance exists in that location to end the victim's abuse, and the victim leaves the jurisdiction for safety reasons. People expect countries that are parties to the Hague Convention to have effective remedies against domestic violence, although not all countries do.<sup>293</sup> To hold that a voluntarily established residence endures regardless of the subsequent violence against the victim and the systemic failure to address that violence, renders what was initially a voluntary choice a virtual death sentence. Recall that Ms. Prevot sought help, but found no protection in France from Mr. Prevot's violence. She would have litigated custody in France had she received protection, but she and her children departed for the United States to ensure her physical safety.

A court could obtain this result through established doctrine. Employing the language of Lord Scarman, a court could recognize that habitual residence must be voluntarily adopted *and maintained*: "enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity to escape, may be so overwhelming a factor as to negate the will to be where one is."<sup>294</sup> A victim of domestic violence who finds herself in a

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285. See *supra* Part I.C.

286. *Prevot v. Prevot*, 855 F. Supp. 915, 918 (W.D. Tenn. 1994).

287. *Id.* at 920.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 920-21.

292. See discussion *supra* note 263.

293. See *supra* notes 139, 141.

294. *R. v. Barnet London Borough Council*, 2 A.C. 309, 344B (1983) (Scarman,

foreign country without adequate assistance is like a person stranded on a desert island. She has no opportunity to escape the violence, and that negates her will to be where she is, even if she initially went there voluntarily. After all, Robinson Crusoe's voyage was voluntarily undertaken.<sup>295</sup>

"Settled purpose" may also prove useful to domestic violence victims who find themselves in a different type of factual scenario, such as those victims whose batterers eventually permit them to leave, but then petition for the children's return. For example, a contrite batterer might agree that his victim and the children should visit the victim's family in another country, and this consent may alter the child's habitual residence. Courts have held that this type of agreement is sufficient to change the child's habitual residence.<sup>296</sup> Consider *Levesque v. Levesque*.<sup>297</sup> There the child had been living alternately in the United States and Germany her entire life, spending almost the same amount of time in both locales. The girl was born in Germany and lived there for approximately two years.<sup>298</sup> She then lived in the United States for one year.<sup>299</sup> She then traveled to Germany with her mother for approximately five weeks, after which she returned to the United States for another five weeks.<sup>300</sup> She then returned to Germany with her mother, and about three weeks later, her father took her, without the mother's permission, to the United States.<sup>301</sup> Within four hours, the mother obtained a German court order awarding her the right to determine the child's residency.<sup>302</sup> Approximately seven months later, the mother filed a petition in Kansas for the return of the child to Germany.<sup>303</sup>

The Kansas court granted the petition for the return of the child, finding that the child's habitual residence was Germany.<sup>304</sup> It specifically mentioned that the husband knew that the mother's last trip to Germany with the child was because of their marital problems,

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L.J.)

295. Robinson Crusoe, "born to be [his] own destroyer," could not resist the offer to go to Guinea to acquire slaves. Daniel Defoe, *The Life & Adventures of Robinson Crusoe* 60 (Angus Ross ed., 1965). In fact, as Crusoe said, "In a word, I told them I would go with all my heart." *Id.*

296. See, e.g., *Mozes v. Mozes*, 19 F. Supp. 2d 1108, 1115-16 (C.D. Cal. 1998); *Levesque v. Levesque*, 816 F. Supp. 662, 666-67 (D. Kan. 1993); *Toren v. Toren*, 26 F. Supp. 2d 240, 243 (D. Mass. 1998), *vacated on other grounds* 191 F.3d 23 (1st Cir. 1999); *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994); *Harsacky v. Harsacky*, 930 S.W.2d 410, 414-15 (Ky. Ct. App. 1996). *But see* *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (holding the opposite of above referenced cases).

297. 816 F. Supp. 662 (D. Kan. 1993).

298. *Id.* at 663.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 664.

304. *Id.*

and that he did not know when the child would return.<sup>305</sup> The court found it unnecessary to decide whether the mother had said she was going only temporarily to Germany.<sup>306</sup> The court emphasized that even if the father had been misled and thought that the child would return to the U.S. after a short time, the child's habitual residence had shifted:

[B]oth parents agreed that [the child] would return to Germany for some period of time with Vallery. The amount of time was left open and [the father] agreed that [the child] should go with [the mother]. These arrangements had been agreed to and 'amounted to a purpose with a sufficient degree of continuity to enable it properly to be described as settled.'<sup>307</sup>

The court found that when the mother and child returned to Germany at the beginning of the five-week period, and then at the beginning of the final three-week period, they had "an intent to remain, at least for a period of time which was indefinite," and that their presence in Germany was by mutual agreement.<sup>308</sup>

*Levesque's* usefulness, however, should not be overstated. First, the father's consent, here relevant to the child's habitual residence, is more typically analyzed as relevant to the "consent" defense specifically set forth in the Convention.<sup>309</sup> While a Hague Convention petitioner bears the burden of proof on the issue of a child's habitual residence, abductors typically have the burden of proof on the "consent" defense. The *Levesque*-type argument may be more difficult to win when the abductor bears the burden of proof. Second, batterers like to maintain power and control, and they typically isolate their victims.<sup>310</sup> Few batterers may approve of their victims going abroad, even if the batterers are contrite. Third, few battered women are likely to broach the subject of a potential departure, for it may be life-threatening to inform their abusers that they want to depart with the children. For example, Maria Foldes, a respondent to a Hague petition, fled to the United States to escape domestic abuse and said that she "feared that [the petitioner] would physically abuse her if he knew that she was leaving Hungary."<sup>311</sup>

Either of these solutions could allow courts to avoid the rigid application of the Hague Convention to some domestic violence victims who abduct their children and who may, in fact, have

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305. *Id.* at 665.

306. *Id.*

307. *Id.* at 666.

308. *Id.* at 667.

309. See *infra* Part II.B.2.d.

310. See Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, Colo. Law., Oct. 1999, at 19, 22.

311. *Viragh v. Foldes*, 612 N.E.2d 241, 244 (Mass. 1993); see also *supra* notes 147, 231 (discussing how separation is the most dangerous time for battered women).

voluntarily agreed to change the child's habitual residence. However, the above interpretations of the term admittedly complicate what would otherwise be a simple factual determination, and there is great reluctance to make habitual residence a technical concept. As the Family Division of the High Court of Justice said in *Bates*, and as has been repeated in this country,<sup>312</sup>

It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.<sup>313</sup>

Therefore, the interpretations suggested above may meet with resistance.

On the other hand, the interpretations suggested above do not create new legal rules; they just make more facts relevant to the evaluation of what constitutes the child's habitual residence. Ignoring the information does not avoid presumptions or pre-suppositions, but rather fosters conflicts between courts and jurisdictions trying to grapple with the issue. Minimizing such conflicts would further one of the drafters' goals, for they purposefully chose not to define "habitual residence" in order to reduce the "rigidity and inconsistencies as between different legal systems," which can be caused by "technical rules."<sup>314</sup>

## 2. The Defenses

The Convention sets forth several defenses to Article 12's remedy of return. Article 12 itself contains the "well-settled exception" that a court need not return a child if one year has elapsed since the wrongful removal or retention and the child is now settled in his or her new environment.<sup>315</sup> In addition, a country is not required to return the child if the person seeking the child's return "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention."<sup>316</sup> Also, the court need not return the child if "[t]here is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an

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312. *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

313. *Re Bates (Minor)*, No. CA 122/89 (Fam. Feb. 23, 1989) (unreported) (quoting Dicey, *supra* note 246).

314. *Id.* (quoting Dicey, *supra* note 246); The Special Commission "stressed" that the term "should normally be interpreted in an international way and not by reference to a specific national law." Conclusions of the 1989 Special Commission, *supra* note 15, at 235.

315. Hague Convention on Child Abduction, *supra* note 12, Art. 12.

316. *Id.* Art. 13(a).

intolerable situation.”<sup>317</sup> A child need not be returned if the child objects to being returned and is of an age and maturity to understand the situation. Finally, the Convention permits a court to refuse to return a child if required by “the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”<sup>318</sup>

A defensive approach will not necessarily aid the domestic violence victim. While a mother’s flight from domestic violence might seem like an appropriate reason not to return the child, the Convention’s defenses generally are not interpreted to prevent the remedy of return in this situation. Moreover, the court retains the discretion to return the child even when one of the defenses enumerated above is made out.<sup>319</sup> Finally, these defenses are exclusive:<sup>320</sup> no *forum non conveniens* or domestic violence defense exists, nor is it relevant what is in the best interest of the child.

#### a. *Grave Risk of Harm*

One of the principal ways that a domestic violence victim could potentially defeat the remedy of return is by arguing the “grave risk” of harm defense found in Article 13(b).<sup>321</sup> Domestic violence is a “recurring fact pattern[]” for parties who invoke the defense.<sup>322</sup> A successful defense requires that the “return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>323</sup> In evaluating the defense, the court must consider “the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.”<sup>324</sup>

At first blush, the defense appears useful for domestic violence victims because domestic violence between a child’s parents can harm the child.<sup>325</sup> While such an argument occasionally works, and it seems

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317. *Id.* Art. 13(b).

318. *Id.* Art. 20.

319. *Id.* Art. 18. The defenses “do not limit the power of a judicial or administrative authority to order the return of the child at any time.” *Id.*

320. See Conclusions of 1989 Special Commission, *supra* note 15, at 228 (commenting that “[i]t appeared that no cases were known where the return had been refused on grounds other than those permitted by the Convention”).

321. One author has said this provision is “analogous to the ‘serious and immediate question’ exception to an automatic return of the child pursuant to a writ of habeas corpus.” Brian L. Webb & Diana S. Friedman, *Hague Convention on International Child Abduction*, in *How to Handle International Child Abduction Cases*, *supra* note 9, at 15.

322. *Checklist of Issues To Be Considered*, *supra* note 192, at 44. The Article 13(b) defense involves “the largest part of case law so far known.” Conclusions of 1989 Special Commission, *supra* note 15, at 228.

323. *Hague Convention on Child Abduction*, *supra* note 12, Art. 13(b).

324. *Id.* Art. 13.

325. See *supra* text accompanying notes 129-35.



to be working with increasing frequency, the defense typically succeeds only in cases where there is more direct abuse of the children by the left-behind parent.<sup>326</sup> For example, in *Blondin v. DuBois*,<sup>327</sup> the court applied the defense to stop the return of two children to France. While chronicling the domestic violence against the mother, the court recited facts that emphasized how the father's abuse of the mother was also directed at the children. For example, the father would hit the mother when the child was in her arms so that the child would also "get blows."<sup>328</sup> The father "screamed at and frequently hit [the daughter], sometimes . . . with a belt."<sup>329</sup> The father abused the mother when she was pregnant.<sup>330</sup> The father beat the mother "in front of the children and he often threatened to 'kill everyone.'"<sup>331</sup> He once threatened to throw his son out of the window.<sup>332</sup> The seven-year-old daughter testified "that she did not want to return to France because 'I don't want my daddy to hit me.'"<sup>333</sup> In permitting the Article 13(b) defense, the court conveyed its fear that the father would expose the children to physical or psychological harm if they were returned.<sup>334</sup>

Less typical is a case like *Pollastro v. Pollastro*,<sup>335</sup> where the Ontario Court of Appeals accepted the argument that domestic violence perpetuated against the parent harms the child.<sup>336</sup> The record in that case was replete with evidence of physical and emotional abuse "directed primarily at the parent who removed the child."<sup>337</sup> The court drew two connections between the abuse directed at the parent

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326. See *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 459-60 (D. Md. 1999) (finding Article 13(b) defense established where father abused one child and mother, and other child observed the physical abuse of brother and mother); *Re F (A Minor) (Child Abduction)* 1 F.L.R. 548 (1992) (Butler-Sloss, L.J.) (holding Article 13(b) defense made out where child was present at acts of violence directed at mother by father, and where "child was himself the recipient of the violence by the father").

327. 19 F. Supp. 2d 123 (S.D.N.Y. 1998).

328. *Id.* at 124.

329. *Id.*

330. *Id.* at 125.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 127. The court emphasized the girl's testimony about why she did not want to return to France. *Id.* at 129. The court mentioned that to return the children would mean that the mother and the children "would be dependent on [the batterer]." *Id.* at 128. The parties seemed unable to afford separate living quarters. *Id.* at 128; see also *infra* text accompanying notes 381-83, 390-91 (discussing the Second Circuit's decision in this case and the district court's decision on remand).

335. [1999] 171 D.L.R.4th 32; see also *Krishna v. Krishna*, No. C 97-D021 SC, 1997 WL 195439, at \*2-4 (N.D. Cal. Apr. 11, 1997) (finding the Article 13(b) defense established because while "there is little evidence that relocation of the child to Australia poses a grave threat of physical harm to the child," the history of domestic abuse between parents establishes "the potential for serious psychological harm").

336. *Pollastro*, 171 D.L.R. 4th at 45.

337. *Id.* at 35.

and the danger to the child. First, the court found that the mother's well-being was integral to the well-being of her infant child:

[T]he threatening phone calls reflect a continuing inability on the father's part to control his temper or hostility. This means that the mother, who would inevitably accompany the child if he is ordered to return to California, would be returning to a dangerous situation. Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, [the child's] interests are inextricably tied to her psychological and physical security. It is therefore relevant in considering whether the return to California places the child in an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.<sup>338</sup>

Second, the court recognized that an abuser might inadvertently, or even intentionally, also harm the child:

There is also evidence that returning [the child] to California represents a grave risk of exposure to serious harm to [the child] personally. The father's hostility, irresponsibility and irrational behaviour are ongoing. Although John Pollastro has not been overtly physically violent to his son, he has been violent and had temper outbursts when his wife has been with the child. On one occasion, for example, he threw hot coffee at her, narrowly missing their 7-day-old son whom she was holding.<sup>339</sup>

*Pollastro* is truly unique because the court did not mention, although neither may have the parties, the legal protection that Ms. Pollastro could have obtained upon her return to California.

*Walsh v. Walsh*<sup>340</sup> is an American case where the court adopts reasoning that straddles *Blondin* and *Pollastro*.<sup>341</sup> In *Walsh*, the First Circuit reversed the district court's decision that an Article 13(b) defense was not established. The appellate court found that the district court "inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse."<sup>342</sup> Specifically, the district court erred by ignoring the violence, claiming that it was not directed at the children.<sup>343</sup> The appellate court emphasized that the children had witnessed the assaults, and that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."<sup>344</sup> The First Circuit also mentioned the potential direct risk to the children from the batterer,

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338. *Id.* at 45.

339. *Id.*

340. Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. July 25, 2000).

341. *See id.* at \*13.

342. *Id.*

343. *Id.*

344. *Id.*

although the father had never abused them.<sup>345</sup> The court noted that the batterer ignored "the bonds between parent and child or husband and wife, which should restrain such behavior," that the batterer had assaulted much younger strangers, and that "credible social science literature establishes that serial spousal abusers are also likely to be child abusers."<sup>346</sup>

In contrast to *Blondin*, *Pollastro*, and *Walsh*, courts often view domestic violence against a parent as irrelevant to the Article 13(b) defense. An excellent example is *Tabacchi v. Harrison*.<sup>347</sup> In *Tabacchi*, there was extensive spousal abuse.<sup>348</sup> Among other things, Tabacchi, Harrison's husband, slapped her, choked her, punched her in the head and face, and pushed her.<sup>349</sup> Harrison eventually left Italy with the couple's child and traveled to the United States to live with her brother.<sup>350</sup> Tabacchi brought an action for the return of the child pursuant to the Hague Convention.<sup>351</sup> A social worker testified that Tabacchi's assaults caused Harrison to suffer post-traumatic stress disorder,<sup>352</sup> and that she might reexperience the disorder "if she had to return to Italy where she might be reminded of her history of problems with Tabacchi and his family, even if Harrison had custody of [the child], her own car, and her own home."<sup>353</sup>

Harrison argued that an Article 13(b) defense existed because the child would also suffer physical and psychological harm if returned.<sup>354</sup> She cited Tabacchi's history of domestic abuse in support of her argument.<sup>355</sup> The court rejected Harrison's argument, citing *Nunez-Escudero*,<sup>356</sup> and held that it was irrelevant "who is the better parent in

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345. *Id.*

346. *Id.*

347. No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000).

348. *Id.* at \*1-3.

349. *Id.* at \*2-3.

350. *Id.* at \*4.

351. *Id.* at \*5.

352. According to the expert, symptoms included "reliving the event or trauma or traumas . . . and a person goes into a generalized feeling of numbing, and impairment in jobs, social and marital relations." *Id.* at \*7.

353. *Id.*

354. *Id.* at \*12.

355. *Id.*

356. *See id.* In *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), the facts of which were set forth above, *see supra* text accompanying notes 265-76, the appellate court also found the allegations of domestic abuse irrelevant to the proceedings. The trial court had refused to return the child upon the father's application because of the Article 13(b) defense. *Id.* at 376. It found that there was a risk that the six-month-old child would be institutionalized upon its return, and that was intolerable. As the appellate court stated, "[t]he district court based its order on the baby's age, the impact of separating the baby from his mother, and the possibility that the baby could be institutionalized during the pendency of the Mexican custody proceedings." *Id.* at 377. No evidence was offered about the possibility of institutionalization; it was just raised as a possibility in argument. The appellate court reversed and remanded the case, and indicated, among other things, that the trial

the long run, or whether [Harrison] had good reason to leave her home . . . and terminate her marriage, or whether [Harrison] will suffer if the child she abducted is returned to [Italy].”<sup>357</sup>

As to the risk of physical harm to the child, the court said, “the primary risk of physical harm is to Harrison, not to [the child].”<sup>358</sup> The court acknowledged that the child was present when some of the physical abuse occurred, but minimized this fact by saying that the child was present on “only two of these occasions,”<sup>359</sup> and that the child “was not harmed during any of these altercations.”<sup>360</sup> The court was blinded to the real risk of injury that existed for the child. On one of the two occasions, Tabacchi hit Harrison in the face while Harrison held the child.<sup>361</sup> On the other occasion, Tabacchi tried to choke Harrison while she drove and the child was in the car.<sup>362</sup> Yet, the court concluded, “[a]lthough Tabacchi’s behavior toward his wife is

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court had erred when it considered evidence of domestic violence. *Id.* at 377-78. Evidence of domestic violence was “irrelevant to the Article 13b inquiry.” *Id.* at 377. The appellate court indicated the following about the Article 13(b) defense:

[Article 13] does not include an adjudication of the underlying custody dispute . . . and only requires an assessment of whether the child will face immediate and substantial risk of an intolerable situation if he is returned to Mexico pending final determination of his parents’ custody dispute. It is not relevant to this Convention exception who is the better parent in the long run, or whether Tice-Menley had good reason to leave her home in Mexico and terminate her marriage to Nunez-Escudero, or whether Tice-Menley will suffer if the child she abducted is returned to Mexico.

*Id.* Consequently, Tice-Menley’s evidence suffered a “shortcoming” because it was “general and concern[ed] the problems between Tice-Menley, her husband and father-in-law.” *Id.* The appellate court stated that the district court also incorrectly considered the effect of the possible separation of the child from his mother when separation would not rise to the level of grave risk of harm. *Id.* The appellate court’s categorical dismissal of the evidence of domestic violence was somewhat inconsistent with its direction that the trial court examine the relevant “social background” information on remand. *Id.* at 377-78. The Eighth Circuit interpreted the relevant social background to include the social background *upon return*, including “the surroundings to which the child is to be sent and the basic personal qualities of those located there.” *Id.* at 377 (citing *Currier v. Currier*, 845 F. Supp. 916, 923 (D.N.H. 1994)). As the court stated, “[t]o ensure that the child is adequately protected, the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence.” *Id.* at 378. The court believed that this could be done without getting into the best interest inquiry itself. *Id.*; see also *Tahan v. Duquette*, 613 A.2d 486, 489 (N.J. Super. Ct. App. Div. 1992) (although an Article 13(b) inquiry should not get into issues or facts relevant to a plenary custody proceeding, the court is empowered to evaluate “the surroundings to which the child is to be sent and the basic personal qualities of those located there”). In fact, the appellate court instructed the district court “not to consider evidence relevant to custody or the best interests of the child.” *Nunez-Escudero*, 58 F.3d at 378.

357. *Tabacchi*, 2000 WL 190576, at \*12 (alteration in original) (quoting *Nunez-Escudero*, 58 F.3d at 377).

358. *Id.* at \*13.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at \*2, \*13.

unacceptable, to qualify as a grave risk of harm under the convention, the risk must be to the child."<sup>363</sup>

The court also dismissed the potential psychological harm to the child that might result if Harrison returned to Italy and her child were exposed to Tabacchi's abuse of Harrison.<sup>364</sup> The court rejected this argument, emphasizing Tabacchi's most recent behavior:

Since Harrison has been in Chicago with [the child], Tabacchi and Harrison have arranged visits without any difficulties. There is no evidence that Tabacchi has harassed Harrison or abused her. There is nothing in the record to suggest that Tabacchi would not obey protective orders issued in Italy. The court finds no reason to believe that Harrison and Tabacchi could not co-exist in Italy pending the resolution of the custody proceedings as long as they were not living together.<sup>365</sup>

The court also mentioned that Harrison did not prove that the Italian authorities would be unresponsive to her complaints, or unable to adequately protect her and the child.<sup>366</sup>

*Tabacchi* is typical.<sup>367</sup> The defense is seldom successful.<sup>368</sup> Courts especially tend to reject the defense in the subset of cases where the respondent raises allegations of domestic violence:

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363. *Id.* at \*13.

364. *Id.*

365. *Id.* at \*14.

366. *Id.* at \*15.

367. *See, e.g.,* Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995); *see also* Wojcik v. Wojcik, 959 F. Supp. 413, 416 n.4 (E.D. Mich. 1997) (reporting that trial court excluded as irrelevant the mother's request to call experts to testify as to the children's psychological health when mother testified to the father's emotional and physical abuse of her and her children); Croll v. Croll, 66 F. Supp. 2d 554, 561-62 (S.D.N.Y. 1999) (dismissing as irrelevant an assault that did not occur in the child's presence, as well as one that did occur in the child's presence because the mother never filed a report of child abuse); Wipranik v. Super. Court, 73 Cal. Rptr. 2d 734, 736-37 (Cal. Ct. App. 1998) (affirming superior court's finding that Article 13(b) defense was not made out despite her allegation that her husband "physically and verbally abused her and the child" and quoting superior court saying "the courts in Israel are empowered to protect the interests of the minor child. That's the proper place for those issues to be addressed"); Dalmasso v. Dalmasso, No. 83,895, 2000 WL 966746 (Sup. Ct. Kan. July 14, 2000); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (rejecting Article 13(b) defense despite allegations of violent behavior toward abductor, and "insufficiency of the Greek judicial system and its unwillingness to protect the interests of non-Greek citizens"); Ciotola v. Fiocca, 684 N.E.2d 763, 769 (Ohio Ct. Com. Pl. 1997) (finding that mother had not proven by a preponderance of the evidence that Article 13(b) defense was made out despite mother's testimony "that defendant has an explosive temper and . . . that she had been a victim of domestic violence during the marriage"); *Re D* (Abduction: Custody Rights) 2 Fam. 626 (1999) (Eng.) (holding that Article 13 was not applicable where wife complained of assault by father and had 'non-molestation' order from child's habitual residence).

As the 1989 Special Commission on the Operation of the Hague Convention stated, "[i]n the great majority of cases from all countries, however, the courts have interpreted Article 13b strictly and have adhered closely to the spirit of the

In most cases these are allegations of violence directed against the parent/abductor and only very rarely have there been allegations of violence directed to the child.

Courts in these situations tend to have confidence in the willingness and ability of the courts in the place of the child's habitual residence to sort out these claims and take the necessary protective measures, especially since the evidence relating to any alleged violence, aside from the direct testimony of the abducting parent, is normally to be obtained in the country of the child's habitual residence before the removal.<sup>369</sup>

Litigants face numerous obstacles when attempting to successfully invoke the Article 13(b) defense. First, the child must face a "grave risk" of harm. "[C]ourts in general had given a strict interpretation to the words 'grave risk' and it was suggested that the word 'intolerable' also indicated that a high degree of risk was required."<sup>370</sup> A respondent may have a difficult time convincing a court that returning a child to the former place of domestic abuse qualifies as a "grave risk" of harm, especially when the parents no longer live together, or the country's statutory measures seem able to protect domestic violence victims.<sup>371</sup> In addition, even assuming that the court can

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Convention." Conclusions of 1989 Special Commission, *supra* note 15, at 228 n.4. This follows the recommendation of the Pérez-Vera Report that accompanied the Convention. Pérez-Vera Report, *supra* note 15, ¶ 34 (claiming that the defenses "are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter"). Some experts view the Article 13(b) defense with utter disdain. For example, Bill Hilton writes that Article 13(b) is the "last refuge of the . . . scoundrel." Hilton, *supra* note 113, at 13. This same sentiment made its way into the U.S. implementing legislation. ICARA requires that a respondent who opposes the return of the child has the burden of establishing by "clear and convincing evidence" that one of the exceptions set forth in Articles 13(b) or 20 applies, although only need prove by a "preponderance of the evidence" that any other exception in Article 12 or 13 applies. The heightened evidentiary burden was adopted because there was some feeling that the two defenses to which it applied were "nebulous." 134 Cong. Rec. H5334 (1988) (statement of Rep. Cardin).

368. Report of the Second Special Commission, *supra* note 14, at 241.

369. *Checklist of Issues to Be Considered*, *supra* note 192, at 44.

370. Conclusions of 1989 Special Commission, *supra* note 15, at 228; see, e.g., *In re A*, 1 Fam. L. R. 365, 372 (Eng. C.A. 1988). A "grave risk" "might" exist "where a nuclear disaster occurred in the country and the children would be exposed to large doses of radiation upon their return home." Webb & Friedman, *supra* note 321, at 16.

371. See *In re Walsh*, 31 F. Supp. 2d 200 (D. Mass. 1998), *rev'd*, *Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. July 25, 2000). The court suggested that there was no "grave risk" of harm: "Whatever damage long term exposure to such a poisonous atmosphere may cause, the evidence does not reveal an immediate, serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities." *Id.* at 206. The court was not persuaded that the past non-responsiveness of the Irish authorities to her claims of abuse increased the viability of her defense, for that fact said nothing as to the ability of Irish authorities to protect the children's best interests. *Id.* at 206-07. Few courts seem to recognize that the risk to the wife and children increases as a result of the separation, *but see* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 462 (D. Md. 1999) (recognizing that the Hague

envision future violence between the parents, the respondent has to convince the court that the abuse of the parent qualifies as a grave risk of harm to the child.<sup>372</sup> Courts tend to interpret the defense very narrowly to avoid turning the defense into a "best interest" inquiry.<sup>373</sup>

Second, victims of domestic violence may have a difficult time presenting credible evidence of abuse because witnesses and physical evidence of abuse are usually in the other country. While the Convention expressly permits courts to order social welfare reports from the child's habitual residence,<sup>374</sup> "a number of experts" have suggested that social welfare reports should not be sought and considered by a court to resolve an Article 13(b) defense because the reports can take months to prepare and can delay the otherwise speedy Convention procedure.<sup>375</sup> Even when ordered, social welfare reports are not necessarily helpful to the domestic violence victims. The reports are compiled abroad, most likely without the input of the

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proceeding increased "exponentially" the risk to wife and children), or that the law on the books might differ from the law in action, *but see id.* at 460-61 (detailing the inaction of Venezuelan police when asked to intervene in a domestic dispute).

Even if the parties are not in geographical proximity and the domestic violence is no longer occurring, a child who is living with (or even near) a batterer may still suffer emotional harm. This harm can arise from fear of the batterer himself, or from absorption of the social message that the batterer is more deserving of the child than the mother (even if for a brief time). If the mother elects not to return to the country because of fears for her own safety, the child also may be traumatized by separation from the mother.

372. In *Prevot*, the court did not make findings on the conflicting evidence of the domestic violence, which suggests that the court did not consider this information relevant to the Article 13(b) defense. *Prevot v. Prevot*, 59 F.3d 556, 559 (6th Cir. 1995) (referring to trial court's opinion). A clinical psychologist testified "that the older child was terrified of his father and . . . would be subject to grave risk of psychological harm by being sent to France, and the younger child would be subject to grave risk of psychological harm if separated from her brother for an extended period." *Id.* at 561. The trial court found the doctor's testimony to fall short of the clear and convincing evidence standard imposed by ICARA. *In re Prevot*, 855 F. Supp. 915, 921 (W.D. Tenn. 1994). The doctor was "unable to state with certainty the cause or source of the trauma and/or stress" experienced by the 4-year old son. *Id.* The court specifically mentioned that a risk of physical harm was not present, and that children of these ages (4 and 3 at the time of the examination) are "highly suggestible." *Id.* In addition, the court stated that anticipating the grave risk of psychological harm "involves line drawing and predicting the future." *Id.* The doctor testified, and the court reiterated, "that it is important to view the children with their father," but the doctor could not because the father was not in the country. *Id.*

373. As the 1989 Special Commission stated, "in most cases the courts had found that this defence was in fact a matter of the welfare of the child to be decided by the courts of the habitual residence." Conclusions of 1989 Special Commission, *supra* note 15, at 228. Before the United States Senate ratified the Convention, Arthur W. Rovine, Chairman, Section of International Law and Practice, American Bar Association, explained to the Senate that the defenses in Article 13 were for "exceptional circumstances." 132 Cong. Rec. S29881, 82 (1986).

374. Hague Convention on Child Abduction, *supra* note 12, Art. 13 (the court "shall take into account the information relating to the social background of the child").

375. Report of the Second Special Commission, *supra* note 14, at 241.

domestic violence victims. For example, in *Ciotola v. Fiocca*,<sup>376</sup> the abductor argued that she was the victim of domestic violence and that the Article 13(b) defense applied.<sup>377</sup> The court rejected the defense and specifically mentioned that the mother had not reported the abuse to local authorities or sought medical attention for it.<sup>378</sup> The court relied, in part, on a social welfare report that "concluded that neither [father] nor anyone in the [father's] family presented any significant problems that might prove detrimental or even harmful to the normal physical and psychological development of the minor child."<sup>379</sup>

Third, and most importantly, some courts hold that the "intolerable situation" must arise from the child's "habitual residence," not from the child's relationship to a particular parent.<sup>380</sup> Of course, sometimes the risk of harm is not attributable solely to the habitual residence or to the child's relationship with a particular parent, but rather to some combination of the two. This combination of factors exists when a child is returned to a jurisdiction that does not adequately protect domestic violence victims and the child's mother is such a victim. In this situation, it is important for courts to assess *both* the lethality of the batterer and the level of protection offered to the mother by the child's habitual residence.

The Second Circuit in *Blondin v. DuBois* took such an approach, in large part.<sup>381</sup> Despite a trial court record replete with examples of domestic abuse and child abuse, the Second Circuit directed the district court to consider whether France was capable and willing to give the child adequate protection upon the child's return.<sup>382</sup> The circuit court emphasized that the structure of the Convention required deference to the courts in the child's habitual residence, and that

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376. 684 N.E.2d 763 (Ohio Ct. Com. Pl. 1997).

377. *Id.* at 768-69.

378. *Id.* at 769.

379. *Id.*

380. See *Gsponer v. Johnstone* (1998) 12 Fam. L. R. 755 (Austl.) This interpretation has led to a general consensus, for example, that a child's need for continuity of care cannot give rise to a viable defense under Article 13(b). See Report of the Second Special Commission, *supra* note 14, at 241 (commenting that one expert suggested that the provision could be used when the child spent a large part of the child's life with the abducting parent and did not remember the other parent, but that others found this suggestion to be "unacceptable").

381. See *Blondin v. DuBois*, 189 F.3d 240, 242 (2d Cir. 1999); see also *Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863, at \*12-14 (1st Cir. July 25, 2000); *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

382. *Blondin*, 189 F.3d at 242, 250; see also *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (suggesting that abuse or neglect does not constitute a "grave risk of harm" absent an additional finding that the abducted-from country cannot protect the child upon the child's return). Some courts presume that the laws in Hague signatories are adequate and reject a detailed examination. See, e.g., *Re S*, (2000) F.L.R. (forthcoming) (Fam. Div. 1999) (rejecting invitation to examine Beth Din's procedures in Israel in connection with Article 13(b) defense).



before finding an Article 13(b) defense, the district court must consider whether "any ameliorative measures" could be taken by the parents or by the authorities of the habitual residence in order to reduce the risk attending the child's return.<sup>383</sup>

The Second Circuit's approach in *Blondin* tracks the advice of Professor Linda Silberman who, in two 1994 articles, warned: "Beware the Child Savers."<sup>384</sup> Professor Silberman cautioned that "well-intentioned child savers could . . . frustrate the objectives of the Convention," by using Article 13(b) to "frustrate return."<sup>385</sup> These efforts could "undermine the Convention and transform its procedural framework into one of substance," and could "lengthen the proceedings and undercut the expeditious procedure envisioned by the Convention."<sup>386</sup> Instead of over utilizing Article 13(b), or adopting a new mechanism to address situations where "allegations of serious harm are made," Professor Silberman recommended that courts "fashion interim arrangements . . . to ensure the safety of the child," including undertakings.<sup>387</sup> She continued, "[o]nly if such alternatives are unavailable should the court proceed to a full-scale hearing to determine whether the defense has been substantively established by clear and convincing evidence, as is required under the federal statute."<sup>388</sup>

The *Blondin*-Silberman approach is a high hurdle for domestic violence victims who claim an Article 13(b) defense. First, it is very difficult to prove a negative—the future noncompliance of a batterer with undertakings or inaction by governmental authorities with their

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383. *Blondin*, 189 F.3d at 248; cf. *Friedrich*, 78 F.3d at 1069 ("[A] grave risk of harm . . . can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect . . . when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.") (emphasis removed). For example, not all countries agree with the United States that sexual abuse of a child is an "intolerable situation" that poses a "grave risk." Legal Analysis of the Hague Convention, *supra* note 228, at 10510. Other countries believe a valid defense under Article 13(b) would not be made out since they assume that the court of the child's habitual residence can protect him or her. See Report of the Second Special Commission, *supra* note 14, at 241 (commenting that participants stated that the requesting State should be trusted to make a proper custody determination upon the return of the child and that the child could be protected during the pendency of the custody proceeding by allowing the child to return in the custody of the abducting parent or by placing the child in the custody of a third party).

384. Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 Law & Contemp. Probs. 209, 267 (1994); Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 Fam. L. Q. 9, 32 (1994) [hereinafter Silberman, *A Brief Overview*].

385. Silberman, *A Brief Overview*, *supra* note 384, at 32-33.

386. *Id.* at 33.

387. *Id.*

388. *Id.*

laws-on-the-books. Second, this difficulty is compounded in the context of a Hague proceeding because the laws of the Contracting States, and their implementation, are presumed adequate. This presumption explains why countries readily defer to each other in the determination of custody decisions. Moreover, a country may be reluctant to admit its own short-comings.<sup>389</sup>

There are several arguments victims can make if a court follows the *Blondin-Silberman* approach. For example, the district court in *Blondin v. DuBois*<sup>390</sup> found the Second Circuit's analysis broad enough to encompass a situation where a child will experience emotional trauma because the child is being returned to a place where serious abuse occurred, with the attendant uncertainties of a custody proceeding, despite the availability of protection from further physical abuse for the child and the parent.<sup>391</sup> Another court emphasized the batterer's disregard of court orders to conclude that the remedy of return was not a viable option, even though the batterer was willing to give undertakings regarding the safety of the petitioner.<sup>392</sup> A domestic

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389. See *Turner v. Frowein*, 752 A.2d 955, 976 (Conn. 2000) (suggesting that on remand, the trial court make "appropriate or necessary inquiries of the government of Holland by, inter alia, requesting the aid of the United States Department of State").

390. No. 98 Civ. 4274, 2000 WL 23214 (S.D.N.Y. Jan. 12, 2000).

391. *Id.* at \*16.

392. *Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. July 25, 2000). Despite the fact that the respondent was subject to "random beatings" for five years, the district court concluded that "the evidence does not reveal an immediate, serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities." *In re Walsh*, 31 F. Supp. 2d 200, 202, 206 (D. Mass. 1998); see also *Walsh*, 2000 WL 1015861, at \*2, \*10. As a condition of ordering the children's return, the court obtained a number of undertakings from the petitioner, John, including "if [Jackie] does return to Ireland . . . John must have no contact with her nor come within 10 miles of her residence, wherever she chooses to take up residence. Moreover, if Jackie returns to Ireland, John will have no contact with the children unless ordered by the authorities in Ireland." *Walsh*, 31 F. Supp. 2d at 207.

The First Circuit noted that when determining whether Article 13(b) applies, a court must consider where and how a child is to be returned, and a consideration of potential undertakings is an important part of that evaluation. *Walsh*, 2000 WL 1015863, at \*12. The court found, however, that the undertakings, as well as any order issued by the Irish courts (which the First Circuit had no doubt would be issued) would be insufficient to protect the children since the petitioner had a history of violating orders. *Id.* at \*14. Specifically, the petitioner left the United States and absconded to Ireland after an arraignment on criminal charges related to his threats to kill a neighbor. *Id.* at \*2. In Ireland, he was suspected of twice ransacking the respondent's house after she received a protection order and after he had told the court that he would stay away from her residence. *Id.* at \*3. The respondent also came to the house and threatened her. *Id.* Three years after her arrival in Ireland, she sought and obtained a protection order, "similar to an American temporary restraining order." *Id.* It "required that John 'not use or threaten to use violence against, molest or put in fear' Jacqueline and that he 'not watch or beset the place where [she] resides.'" *Id.* John assaulted Jacqueline despite the order. An application for a barring order was adjourned after Mr. Walsh agreed to an undertaking that he stay away from the home. *Id.* For a more extended discussion of undertakings' limitations, in particular, see Part III.A.

violence victim could also argue that the child's habitual residence will not protect her if future violence erupts, either because of inadequate laws or because adequate laws are not enforced.<sup>393</sup> Her own experience on this point would be very relevant. She should remind the court that when the United States became party to the Hague Convention, domestic violence was not an issue in the forefront of many people's minds, and it is doubtful whether the adequacy of Contracting States' laws in this regard was even considered.<sup>394</sup>

Finally, a victim must emphasize her batterer's lethality because that comprises the other half of the risk equation. On this topic, her personal perspective and experience with the batterer are the best evidence for assessing whether undertakings or the habitual residence can adequately protect her. A victim often has intimate knowledge about the batterer's potential dangerousness and his regard for legal processes. While an in-depth look at the batterer's behavior may not be exactly what the *Blondin-Silberman* approach calls for, and while it may lengthen the proceedings, it best promotes the purpose of an Article 13(b) defense.

Despite the difficulty prevailing on an Article 13(b) defense, Article 13(b) is still the best avenue presently available for domestic violence victims who seek to defeat a petition and who have not been forced to go to or remain in the child's habitual residence. Although the broader interpretation of Article 13(b), similar to the interpretation adopted in *Blondin*, *Pollastro*, or *Walsh*, is gaining currency, victims often still face doctrinal hurdles to the defense's successful invocation. At best, Article 13(b) offers a piecemeal case-by-case solution, available only to women whose judges understand the link between adult-on-adult violence and harm to children, and whose judges do not blindly trust either the ability of Contracting States to protect domestic violence victims, or batterers' promises to adhere to undertakings.

#### b. *Children's Aversion to Return*

A court can elect not to return a child when a child of sufficient age

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393. See *supra* notes 139, 141.

394. As one High Court Judge of the Family Division in England stated, "The most troubling aspect of my perception is that some women are being pursued and oppressed by controlling or vengeful men with the full support of the system. . . . [I]t is difficult to see how it could be addressed in child abduction cases, unless a criterion for accession to the Convention were that the same level of legal aid, refugee provision and protection against violence were available in all contracting states." Brenda Hale, *The View From Court 45*, 11 *Child & Fam. L.Q.* 377, 385 (1999).

The argument may have less force for those countries who have recently acceded to the Convention. "As part of the accession process, acceding countries furnish their family law legislation." Silberman, *A Brief Overview*, *supra* note 384, at 32. "It is notable that existing States are more often now taking advantage of the procedure provided for by Article 38 of the Convention and, before making a declaration of acceptance, making enquiries through diplomatic channels concerning the capacity of the acceding State to fulfil [sic] its responsibilities." Duncan, *supra* note 29, at 16.

and maturity expresses his or her desire not to being returned.<sup>395</sup> The court has wide discretion as to whether the child's age and maturity qualify,<sup>396</sup> and what weight to afford the child's opinion once these criteria are met. Generally, the defense "has been narrowly construed,"<sup>397</sup> with some courts imposing a fairly high age threshold before considering a child's opinion,<sup>398</sup> and other courts refusing to consider the preference "if the objection is simply that the child wishes to remain with the abductor."<sup>399</sup> Some courts discount the child's opinion or fail to consider it at all if the abductor appears to have influenced the child's opinion.<sup>400</sup> These limitations hamper the usefulness of the defense for domestic violence victims.

Courts should be especially open to honoring the child's preference when a child expresses a desire to stay with a parent who has been a victim of domestic violence. Even young children can witness domestic violence, be traumatized by it,<sup>401</sup> and express a desire not to have that situation repeated. In addition, a child rightly may perceive that an order of return may mean a temporary or permanent loss of contact with his or her present custodian, either because the custodian's life is endangered, or, perhaps, because the parent will not return with the child to the child's habitual residence for safety reasons. Moreover, children may not want to be returned because they may fear for their own safety, especially if their abductors are not

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395. Hague Convention on Child Abduction, *supra* note 12, Art. 13.

396. *Compare* Sheikh v. Cahill, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. 1989) (nine-year-old who preferred not to return to England had "not attained an age and degree of maturity to warrant [the] court to take account of his views"), and *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992) (nine-year-old was too young to be considered of an appropriate age and maturity), with *B. v. K.*, 1993 Fam. 17 (seven- and nine-year-old children had "attained an age and degree of maturity at which it is appropriate . . . to take account of their views").

397. See *Nicholson v. Nicholson*, No. 97-1273-JTM, 1997 WL 446432, at \*3 (D. Kan. July 7, 1997).

398. *Tahan*, 613 A.2d at 490 (finding that a nine-year-old child could not meet the Convention's standard for appropriate age and maturity).

399. *Nicholson*, 1997 WL 446432, at \*3 (citation omitted). Many courts require that the child object to the place where he or she would be returned, and not simply to the custodian or potential custodian. See *Beaumont & McEleavy*, *supra* note 243, at 188-91.

400. See *In re Robinson*, 983 F. Supp. 1339, 1343-44 (D. Colo. 1997) (refusing to consider the child's objection after determining that the child was unduly influenced by the abductor); *Nicholson*, 1997 WL 446432, at \*3 ("[T]he defense has no application if the child's views have been influenced by an abductor."). Courts fear that the child might be brainwashed by the abductor. See S. Exec. Rep. No. 99-25, *supra* note 208, at 42 (giving State Department's legal analysis of the Convention). Courts should also recognize, however, that "[i]t is unrealistic, indeed inhuman, to expect a caring parent not to influence the child's preference." *Robinson*, 983 F. Supp. at 1343.

401. *Doyne*, *supra* note 126, at 4 ("Preschool children who are exposed to domestic violence may suffer from nightmares or other sleep disturbances. Often, this trauma may lead to great insecurity and confusion causing regressive behavior, such as excessive clinging to adults and/or fear of being abandoned.").

there to protect them or to deflect the left-behind parents' wrath.<sup>402</sup> While a court typically may discount the importance of a relationship cultivated by a "wrongdoer," the situation differs where a parent flees with a child for safety reasons, and the left-behind parent rather than the abductor is blameworthy.

Courts must be sensitive to the likelihood that a child may be unable or unwilling to share the details of abuse, or his or her fears,<sup>403</sup> and that a preference to remain with the abductor may exist without further explanation. When such a preference is coupled with credible allegations that the left-behind parent abused the abductor, courts should take the child's preference very seriously.

*c. Protection of Human Rights and Fundamental Freedoms*

Article 20 provides a defense if the child's return would "not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."<sup>404</sup> As the Pérez-Vera Report explained:

This particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, . . . it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.<sup>405</sup>

In addition, the principles "must not be invoked any more

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402. A high percentage of batterers also abuse their children. See Lenore E. Walker, *The Battered Woman Syndrome* 59 (1984) (stating that 53% of the men studied who battered their partners have also abused their children). If the woman is out of the home, there may be an even greater risk of child abuse, as the batterer's abusive behavior is displaced onto the child. See generally Pauline Quirion, *Commentary, Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. Pub. Int. L.J. 501, 508-15 (1997) (discussing the harm to children, both physical and mental, from domestic violence).

403. Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 Fam. & Conciliation Cts. Rev. 273, 285 (1999) (stating that children may be unwilling to share information about abuse due to loyalty to their parents, family secrecy, shame, or fear).

404. Hague Convention on Child Abduction, *supra* note 12, Art. 20. Article 20 was adopted as a compromise between those countries that wanted a public policy exception in the Convention, and those who did not. See S. Exec. Rep. No. 99-25, *supra* note 208, at 43. The broad clause that had been adopted initially stated, "[c]ontracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed." *Id.* at 44 (internal quotation omitted).

405. Pérez-Vera Report, *supra* note 15, ¶ 118, at 462.

frequently... than they would be in their application to purely internal matters."<sup>406</sup>

It is improbable that Article 20 will prove useful to domestic violence victims. Both attitudinal and substantive problems exist to the defense. Courts show more resistance to allowing this defense than any other. In fact, few courts, if any, have ever accepted the defense.<sup>407</sup> This judicial reticence is consistent with the State Department's admonition that Article 20 is "to be restrictively interpreted,"<sup>408</sup> and Pérez-Vera's comment that invocation of Article 20 would be "clearly exceptional."<sup>409</sup>

There are also several substantive difficulties to using the defense successfully. The problems with Article 13(b) discussed above may be imported into any Article 20 analysis. First, some believe that Article 20 is duplicative of Article 13.<sup>410</sup> Second, legal scholars are only beginning to address the issue of domestic violence as a violation of international law,<sup>411</sup> and there are few international instruments, let

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406. *Id.*

407. See, e.g., *Nicholson v. Nicholson*, No. 97-1273-JTM, 1997 WL 446432, at \*3 (D. Kan. July 7, 1997) (finding that the father "failed to demonstrate the applicability of any of the defenses," including fundamental rights); *Freier v. Freier*, 969 F. Supp. 436, 443-44 (E.D. Mich. 1996) (finding that returning the child to the father's country would not violate the mother's or the child's fundamental right to freedom of travel); *Harliwich v. Harliwich*, No. FA 9868306S, 1998 WL 867328, at \*2 (Conn. Super. Ct. Dec. 3, 1998) (commenting that an Article 20 defense was neither claimed nor applicable); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (rejecting the fundamental rights defense because there was no proof that Greece is suspect in its treatment of the parties' rights); *Caro v. Sher*, 687 A.2d 354, 361 (N.J. Super. Ct. Ch. Div. 1996) (holding that the respondent had failed to show a procedural due process violation by clear and convincing evidence under Article 20); see also Conclusions of 1989 Special Commission, *supra* note 15, at 230 ("There are no cases in which this article has been successfully relied upon: each time that a party has tried to invoke a defense drawn from Article 20, it was an attempt to use it in favour of the kidnapper and not of the child, this has never been allowed by the courts.").

408. S. Exec. Rep. No. 99-25, *supra* note 208, at 44.

409. Pérez-Vera Report, *supra* note 15, at 462. As the 1989 Special Commission explained, Article 20 "was intended to enact a very strictly qualified form of *ordre public*." Conclusions of 1989 Special Commission, *supra* note 15, at 230.

410. Report of the Second Special Commission, *supra* note 14, at 243 ("Article 20 is already covered by the earlier grounds for refusing to return a child, listed under Article 13."). Finland and the U.K. have not included Article 20 in their internal legislation because they believe Article 13 covers any situation falling under Article 20. Conclusions of 1989 Special Commission, *supra* note 15, at 230.

411. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 295 (1994) (arguing that violence against women by their partners should be understood as torture and thus receive the requisite international attention); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 Harv. Int'l L.J. 507, 513-26 (1993) (examining domestic violence as a violation of international human rights); Anthony P. Ewing, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, 26 Colum. Hum. Rts. L. Rev. 751, 767-83 (1995) (arguing that the American Convention on Human Rights obligates states to address

alone international instruments that countries have incorporated into their own law, that would obligate a court to accept the defense for a domestic violence victim ordered to return her children.<sup>412</sup> Third, internal constitutional law may not prove useful. Any success on this front will be limited in scope to countries with the wisdom to include freedom from domestic violence as a fundamental principle of human rights.

A victim in the United States would have difficulty making a successful argument that Article 20 is violated by returning a child to a country where domestic violence is not treated seriously. The United States Constitution contains no right to be free from private violence or its effects.<sup>413</sup> The domestic violence victim might make, at best, an equal protection argument to defeat application of the remedy of return. A domestic violence victim who abducts her child transnationally is treated differently from a domestic violence victim who abducts her child but remains in the United States.<sup>414</sup> The interstate abductor knows that domestic violence will be relevant to her proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), and its emergency jurisdiction

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violence against women); Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issues*, 58 Alb. L. Rev. 1119, 1121 (1995) (concluding "that the human rights approach can be a powerful tool to combat domestic violence, but that there are currently both practical and methodological limitations—in part related to the use of the equal protection framework to assign state responsibility for domestic violence—that are problematic and require further analysis to make the approach more effective").

412. There are certainly some international instruments that can bolster the argument. See, e.g., U.N. G.A. Res. 48/104 Containing the Declaration on the Elimination of Violence Against Women (Feb. 23, 1994); The Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, at Arts. 2, 5 (entered into force Sept. 3, 1981); see also *supra* note 411. It is beyond the scope of this Article to explore the argument that freedom from domestic violence constitutes a human right. For now it is sufficient to note the argument's infancy and that the Pérez-Vera Report suggests caution in assessing the argument's promise. Pérez-Vera Report, *supra* note 15, at 462 ("A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.").

413. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989) (concluding that "a State's failure to protect an individual against private violence [is not] a violation of the [Fourteenth Amendment] Due Process Clause"). Some Contracting States might, in fact, be much better about seeing domestic violence as a human rights abuse than is the United States. Compare, e.g., *In re R-A*, interim decision 3403, (BIA 1999) (en banc) (stating that spousal abuse does not qualify one for asylum because victim is not persecuted on account of her membership in a particular social group), with *Islam (A.P.) v. Secretary of State for the Home Dep't*, reprinted in 38 I.L.M. 827 (H.L. 1999) (finding the opposite).

414. Similarly, the child who is abducted internationally is treated differently than the child who is abducted domestically, given the courts' ability to listen to their abductors' arguments about the need to escape domestic violence.

provision.<sup>415</sup> In contrast, the Hague Convention and ICARA contain no emergency jurisdiction provision, nor is domestic violence particularly relevant. The weaknesses of this argument, however, are manifest. Even if the domestic and international abductors are similarly situated,<sup>416</sup> it is disingenuous to say that domestic violence is irrelevant to the Hague proceeding. Article 13(b), for example, would permit the court to consider evidence of domestic violence, even though the argument might not succeed. More importantly, valid reasons may exist for the distinction, including the need to cooperate with other nations to redress international abductions.

#### d. *Consent or Acquiescence to the Removal*

Consent or acquiescence to the removal of the child by the left-behind parent is a defense under Article 13(a) to a return petition.<sup>417</sup> Domestic violence victims may find this defense attractive because batterers frequently promise to end their violence,<sup>418</sup> often in connection with a woman's attempt to escape the violence. When the batterer then breaks his promise, the woman may raise a defense of consent or acquiescence.<sup>419</sup> For example, if an abuser promises his victim that he will stop his violence if she and the child remain in the country, and he then reneges on his promise, the batterer has constructively consented to the child's removal.<sup>420</sup> Similarly, an

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415. See *infra* text accompanying notes 549-53.

416. Indeed, it is also debatable whether the domestic and international abductors are similarly situated. A parent who flees with a child transnationally enhances an abduction's potential success because the left-behind parent will often be a foreigner in the abducted-to country. There may be language and cultural barriers to reclaiming a child, not to mention increased financial expenses. Yet it is hard to imagine why these differences matter to the availability of the defenses.

417. Hague Convention on Child Abduction, *supra* note 12, Art. 13(a).

418. Sarah Buel lists "[h]ope for the [v]iolence to [c]ease" as one of her fifty obstacles for battered women leaving. Buel, *supra* note 310, at 22. She states that this hope is fueled in part by "the batterer's promises of change." *Id.*

419. This Article does not address all the situations where acquiescence or consent might exist, e.g., when the left-behind parent fails to take action in a timely fashion. See, e.g., *In re Ponath*, 829 F. Supp. 363, 368 (D. Utah 1993) (finding as an alternative basis for the court's ruling that the petitioner's failure to take action for return of the child for almost six months constituted consent).

420. Cf. *Re Edji Zenel*, 1993 Sess. Cas., *aff'd*, *Zenel v. Haddow*, 1993 S.L.T. 975 (1993) (Allanbridge, L.J. and Mayfield, L.J.) (holding that consent could be given for a removal to take place at a future and indefinite date); *Re C*, 1 F.L.R. 414 (Fam. 1996) (suggesting that consent could be inferred from conduct where father had helped to sell surplus belongings and sold a second vehicle to pay international shipping expenses for belongings, and relationship had suggestions of violence). Alternatively, a respondent may be able to argue that the onset of domestic violence negated any agreement the parties had to make the new country the child's habitual residence. *In re Artso*, Fam. Ct. Austl. (20 Mar. 1991) 81.633, at 81.638 (when "husband advised the wife that the marriage was over, the agreement between the parties pursuant to which they were exploring the possibility of settling in Australia was at an end by mutual consent"); see generally *supra* text accompanying Part



abuser's offer to drop his Hague petition for the child's return if the mother will reconcile with him constitutes acquiescence to the child's new residence, regardless of the mother's decision to reconcile.<sup>421</sup>

The power of this sort of argument is seen in a Scottish case, *In re Zenel*.<sup>422</sup> A mother and her two-month-old infant traveled from the mother's home in Scotland to Australia to be with the child's father.<sup>423</sup> After fifteen months in Australia, the mother surreptitiously took the child back to Scotland.<sup>424</sup> When the father petitioned for the child's return to Australia, the mother argued that the father had constructively consented to the child's removal.<sup>425</sup> The constructive consent was predicated on an understanding reached between the parties before the mother went to Australia.<sup>426</sup> The trip to Australia was apparently part of an attempted reconciliation between the parties, and they had agreed some fifteen months before returning to Scotland that "if things did not work out, both she and the child would come back to Scotland."<sup>427</sup>

The relationship did not work. It was an "unhappy one," with "heated arguments" from time to time.<sup>428</sup> The court found that given their "deteriorating, rather than . . . improving, relationship," the father could not be surprised when the mother eventually left consistent with their understanding.<sup>429</sup> Consequently, the court found that the father had consented to the departure "in form and in

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II.B.1.b. (discussing term "habitual residence").

421. Carol Bruch describes an analogous French case:

[A] French trial court, later reversed on appeal, held that an American father who offered to drop a request for his children's return in exchange for their mother's waiver of her ownership rights in the family home acquiesced to the children's residence abroad. In the trial court's view, the father actually had no objection to the children's residence in France. He sought financial advantage, not an opportunity to litigate custody in the United States. The court reasoned that a return request intended solely to serve strategic purposes unrelated to the children's custody does violence to the Convention's legitimate purposes.

Bruch, *supra* note 233, at 8 & n.32 (citing Trib. gr. inst. de Paris, R.G. 90/37163 (10 Oct. 1990), *reversed* Cour d'appel de Paris (1ere Ch. Civ.) (July 16, 1992), *Gazette du Palais* 8 (18-19 Nov. 1992)); *see also* *Re A.*, (1992) Fam. 106 (finding that left-behind parent's statement to abductor that he was not going to fight for custody but wanted continued contact with children constituted acquiescence even though left-behind parent claimed he changed his mind the next day and told abductor he would bring a Hague petition); *Re C*, 1 F.L.R. 414 (explaining that consent existed when father implicitly allowed mother to go to England with the belief that she would change her mind and return to Alaska seeking a reconciliation).

422. 1993 Sess. Cas.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

substance . . . within the meaning of Article 13(a)."<sup>430</sup> The court reached this conclusion despite evidence that the relationship was not uniformly deteriorating. For example, the parties lived together, purchased a new kitchen for the house, and the mother obtained full-time employment in Australia.<sup>431</sup>

Despite the potential attractiveness of the defense, most domestic violence victims who abduct their children will find the defense difficult to use. First, "[m]ost courts, because of their wish to discourage loopholes in the Convention, have been very reluctant to find acquiescence, even when there has been ambiguous behavior by the parent who was left behind."<sup>432</sup> For example, the Sixth Circuit in *Friedrich v. Friedrich*<sup>433</sup> articulated a high evidentiary standard for establishing acquiescence. It requires either "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time."<sup>434</sup> Courts sometimes articulate a similar standard for consent.<sup>435</sup> Some jurists believe that an Article 13(a) defense requires consent to a specific removal.<sup>436</sup> Courts also find that an expeditious filing for the child's return resolves any ambiguity regarding consent or acquiescence in the left-behind parent's favor.<sup>437</sup>

Second, consent or acquiescence typically has to be for the child's permanent absence.<sup>438</sup> A batterer can always argue that his consent was for a departure of limited duration, e.g., only for so long as it

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430. *Id.*

431. *Id.*

432. See Bruch, *supra* note 233, at 8.

433. 78 F.3d 1060 (6th Cir. 1996). There the Sixth Circuit rejected the argument that the father acquiesced to the removal by his statement to a military officer that "he was not seeking custody of the child, because he didn't have the means to take care of the child." *Id.* at 1069-70.

434. *Id.* at 1070 (footnotes omitted).

435. See *In re W* (Abduction: Procedure), [1995] 1 F.L.R 878, 888 (Wall, J.) (stating that "The evidence for establishing consent needs to be clear and compelling. In normal circumstances, such consent will need to be in writing or at the very least evidenced by documentary material."). But see *In re Ponath*, 829 F. Supp. 363, 366, 368 (D. Utah 1993) (holding that petitioner's statement that "if she desired to live without him as her husband and as the minor child's father, she and the child could leave Germany" constituted consent); *Krishna v. Krishna*, No. C97-0021 SC, 1997 WL 195439, at \*4 (N.D. Cal. Apr. 11, 1997) (finding consent when husband provided the mother with the child's passport after discovering the mother's intention to take child to the United States).

436. *Zenel v. Haddow*, 1993 S.L.T. 975, at 986C-E (Morton of Shuna, L.J.).

437. *Croll v. Croll*, 66 F. Supp. 2d 554, 561 (S.D.N.Y. 1999) (crediting father's filing Hague petition "within a few weeks of his daughter's departure").

438. One commentator summarized the law: "A parent's consent that a child remain outside their country of habitual residence for a limited and objectively determinable period of time will not ordinarily support a conclusion that the parent has consented or acquiesced in the permanent removal of the child." Hon. James D. Garbolino, *International Child Abduction: Guide to Handling Hague Convention Cases in U.S. Courts* 147 (1993).

would take him to "clean up his act" (most charitably) or only for so long as it would take the mother to overcome her delusional hysteria (less charitably). The scope of the consent will be a factual determination, and domestic violence victims will often be at a disadvantage. Frequently, a victim's inadequate financial resources may require purchasing a round-trip ticket (often the cheapest type of airfare),<sup>439</sup> which may suggest that the removal was only meant to be temporary.<sup>440</sup> Additionally, victims' claims of their batterers' consent or acquiescence may appear inconsistent with batterers' reputations for controlling and dominating their victims.

Third, some courts require that consent or acquiescence not be done for the purpose of securing a reconciliation.<sup>441</sup> Such a limitation seems unwarranted in the context of domestic violence, and nullifies the defense in those cases where it is undoubtedly appropriate. Even without this limitation, however, a court may impose a time limit on an agreement's validity. For example, the Lord Ordinary in *Zenel* recognized that "there must surely come a stage when for all practical purposes the parties can be seen as having become wholly reconciled and to have embraced a new life together."<sup>442</sup> This point was not reached in *Zenel* because the parties' relationship was of a "deteriorating, rather than an improving" nature.<sup>443</sup> A relationship experiencing continued violence is similarly not improving, although a court might find that a period of calm terminates the implicit consent to removal. A woman who departs with her child after the violence reemerges might have difficulty relying on the defense.

Finally, a court has discretion under Article 13(a) to return a child even if the petitioner consented to or subsequently acquiesced in the child's removal or retention.<sup>444</sup> It was an exercise of this discretion that perhaps best explains the trial court's decision in *Turner v. Frowein*.<sup>445</sup> The parties' child was born in 1990, and lived in the United States until the parties moved to Holland in 1994.<sup>446</sup> "Prior to the time of their move to Holland in 1994, they entered into a form of

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439. See, e.g., *Re Arthur*, No. CA1223/87, (Fam. Div. Jan. 13, 1988), at 4 (unpublished opinion) (citing mother's testimony that she purchased a round trip ticket because it was cheaper, not because she thought she would return); *In re C*, 1996 Fam. 266 (same).

440. *Checklist of Issues to Be Considered*, *supra* note 192, at 42; see, e.g., *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1285 (S.D. Fla. 1999).

441. *Beaumont & McEleavy*, *supra* note 243, at 123-24; see, e.g., *Pesin*, 77 F. Supp. 2d at 1289-91.

442. 1993 Sess. Cas.

443. *Id.*

444. See, e.g., Hague Convention on Child Abduction, *supra* note 12, Art. 13(a); *In re C*, 1996 Fam. 266.

445. *Turner v. Frowein*, No. FA 9700084450, 1998 Conn. Super. LEXIS 3781 (Conn. Super. Ct. June 25, 1998), *rev'd and remanded*, *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

446. *Id.* at \*4-5.

agreement . . . in which, amongst other things, the father agreed that he would not use any force or coercion nor would he claim any proprietary rights over the child."<sup>447</sup> The parties agreed that the mother would remain in Holland for three weeks to aid her husband's job search, and that she would stay in Holland if her husband obtained employment.<sup>448</sup> The court concluded that "the mother entered into whatever this agreement may constitute on the implied condition that he would not . . . continue to mistreat and/or abuse her physically or emotionally."<sup>449</sup> Despite the fact that abuse resumed and motivated the mother to return to the United States,<sup>450</sup> the court analyzed the agreement as relevant only to the child's habitual residence, which it held was Holland.<sup>451</sup> The court focused solely on the fact that the child lived in Holland and had made contacts there.<sup>452</sup> The court either failed to see the Article 13(a) defense or used its discretion to return the child despite the existence of a valid Article 13(a) defense. In either case, the defense offered this domestic violence victim no protection even though she had a factual predicate for the defense.<sup>453</sup>

*e. The Elapse of One Year From the Date of Wrongful Removal*

Article 12 gives a court discretion not to order the return of a child if the proceedings for the child's return have been commenced later than one year from the date of the wrongful removal and the child is now settled into his or her new environment.<sup>454</sup> Article 12 is sometimes called the "well-settled" exception to the remedy of return. Courts have been rather sympathetic to domestic violence victims' attempts to invoke the defense in their favor, or to defeat the defense when their batterers raise it.

For example, in *Wojcik v. Wojcik*,<sup>455</sup> the federal district court was sympathetic to a domestic violence victim who invoked the defense to defeat the application of the remedy of return.<sup>456</sup> The American mother testified that "from the beginning of their marriage," the father had "emotionally and occasionally physically abused her" and

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447. *Id.* at \*7.

448. *Id.*

449. *Id.*

450. *Id.* at \*8-9.

451. *Id.* at \*15-16.

452. *Id.* at \*16-17.

453. The trial court ultimately denied the child's return based on Article 13(b). The Supreme Court of Connecticut remanded on the Article 13(b) determination, and no issue was made of the "habitual residence" point on appeal. *Turner v. Frowein*, 752 A.2d 955, 960-61 (Conn. 2000).

454. Hague Convention on Child Abduction, *supra* note 12, Art. 12.

455. 959 F. Supp. 413 (E.D. Mich. 1997); *see also In re Robinson*, 983 F. Supp. 1339 (D. Colo. 1997).

456. *Wojcik*, 959 F. Supp. at 420-21.

their daughters.<sup>457</sup> In accepting the "well-settled" exception, the *Wojcik* court concluded that only a commencement of proceedings before a judicial authority mattered, and not the filing of a Hague application with the United States Central Authority.<sup>458</sup> The court also rejected the equitable reasons why Article 12 might not apply in the case.<sup>459</sup> Additionally, the court found that the children were, in fact, settled in their new environment. This finding is most remarkable considering that the children were both French-born and had been living in the United States for only eighteen months out of their five- and eight-year-old lives.<sup>460</sup> The court minimized the fact that during the last eighteen months the mother of the children had lived in two residences,<sup>461</sup> and the older daughter was "not involved in community or church activities."<sup>462</sup> The court also believed the somewhat incredible testimony that "both have forgotten French."<sup>463</sup>

One sees a similarly sympathetic application of the defense to the benefit of a domestic violence victim in *Lops v. Lops*.<sup>464</sup> In *Lops*, the mother alleged that her husband physically abused her.<sup>465</sup> The husband abducted the children to the United States and remained in hiding with them for two years. When they were finally located, the mother petitioned for the children's return to Germany. The trial court rejected the father's defense based on the "well-settled" exception and the appellate court affirmed.<sup>466</sup>

The conclusion that the children were not "well settled" was somewhat surprising. The Eleventh Circuit rested its conclusion, in part, on the fact that the children's grandmother was more involved in certain aspects of child-rearing than was the father.<sup>467</sup> Yet a grandmother's participation in her grandchildren's life should contribute to a finding that they were settled. The court also mentioned that the father actively tried to keep the children's whereabouts concealed.<sup>468</sup> Yet the mere fact of being "underground" does not say much about whether a child is well settled in a new environment without a more exacting factual inquiry. The appellate court did not address the fact that the children had been living in the same home, attending the same private school, and in the company of their father, grandmother, and other U.S. relatives for approximately

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457. *Id.* at 415-16.

458. *Id.* at 418-20.

459. The court found that none existed because the mother had always told the father where the children were. *Id.* at 421.

460. *Id.* at 415, 421.

461. *Id.* at 416.

462. *Id.*

463. *Id.*

464. 140 F.3d 927 (11th Cir. 1998).

465. *Id.* at 929.

466. *Id.* at 945.

467. *Id.* at 946 n.27.

468. *Id.* at 931.

three years.<sup>469</sup> Finally, the appellate court mentioned that the father could be prosecuted for violations of state and federal law based on his efforts to conceal his whereabouts.<sup>470</sup> This factor should be irrelevant to the "well-settled" analysis since a parent will always face potential criminal liability for the abduction. Consideration of this factor could eliminate the "well-settled" defense, regardless of how settled the children actually were. Had such a limit on the defense been desired, the drafters certainly could have made the limit explicit.

Neither the district court in *Wojcik* nor the Eleventh Circuit in *Lops* were necessarily wrong in their conclusions. It is noteworthy, however, that both courts made a point of mentioning the mother's allegations of domestic violence, although in neither case were these allegations relevant to the court's actual decision. Reading between the lines, courts may be using the "well-settled" defense to obtain the results they seek when they are troubled by the facts in the case. The "well-settled" exception to the remedy of return is more flexible than the other defenses because of its highly fact-intensive nature, and the subjectivity inherent in the notion of "well settled."

Notwithstanding the defense's flexibility, there are several inherent limitations for domestic violence victims who seek to use it. First, few Hague Convention respondents meet the one-year time requirement to invoke the defense.<sup>471</sup> Domestic violence victims who may have hidden with the children in the children's habitual residence before going abroad can not count this time towards the one-year threshold requirement. The removal of the child from his or her habitual residence and not from the batterer starts the clock under Article 12. This interpretation seems unfortunate because the removal of the child from the abusive household may have more to do with whether the child is well settled than does international travel.<sup>472</sup>

Second, and of more concern, domestic violence victims who remain in hiding abroad can be disadvantaged by the requirement that the child be "settled," even if the one-year threshold requirement is met.<sup>473</sup> Some courts require that "the child . . . be integrated as a part of the surrounding community, not only the immediate household of

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469. *Id.* at 931-33 & n.4

470. *Id.* at 946.

471. Beaumont & McElevay, *supra* note 243, at 204 (calling the "classic Convention case" the "summary return in the immediate aftermath of an abduction").

472. On the other hand, if a woman enters a domestic violence shelter within the country of the child's habitual residence, or can successfully hide from her abuser, she may be able to avoid the violence within the child's habitual residence. Helping women "escape" violence may, therefore, prove an insufficient justification for interpreting this provision broadly and allowing her an advantage not afforded to other abductors.

473. Women who choose to remain in hiding after fleeing may be equitably estopped from invoking the defense if they need to include the time they were in hiding to establish the one-year requirement.

the abducting parent."<sup>474</sup> Only courts that relax this requirement will be able to find that a child is settled when the mother and child have been hiding from the father by living in secrecy.<sup>475</sup>

Third, if other courts follow the Eleventh Circuit's reasoning in *Lops*, few domestic violence victims will be able to make out a successful defense because they will often be in hiding, will often be subject to criminal liability for abduction, and will frequently rely on child care assistance in order to work.<sup>476</sup>

In conclusion, domestic violence victims who abduct their children to escape domestic violence face difficulty in defeating a Hague Convention petition for their children's return. While the Convention does not make the domestic violence perpetrated against them totally irrelevant to the petition's adjudication, neither does the Convention make the violence obviously relevant. Consequently, domestic violence victims are left to argue on a case-by-case basis the legal relevance of the information. The success of their arguments will turn on the sympathy of the particular judge. This uncertainty is unacceptable; it undermines substantive justice for victims and their children.

### III. POTENTIAL REFORMS

As discussed above, depending upon the interpretation of the Convention a court adopts, domestic violence perpetrated against the abductor may or may not be relevant to the Hague proceeding. This part canvasses wider-reaching solutions for making domestic violence pertinent to Hague Convention adjudications. Specifically, this section explores the possibility that the Hague Convention could be reformed through the adoption of new provisions or complementary conventions.

Four potential solutions are evaluated. This part initially discusses some countries' current practice of relying upon undertakings to ensure the safety of the abductor upon her return to the child's habitual residence, and considers whether the availability of undertakings should be codified and extended. This part then explores the new *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental*

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474. Report of the Second Special Commission, *supra* note 14, at 240 (response to Question 19). As one expert stated, "The term 'environment' is not defined in the Convention, and it may be taken that it refers both to the physical and the human environment of the child." *Checklist of Issues to Be Considered*, *supra* note 192, at 38.

475. See *Checklist of Issues to Be Considered*, *supra* note 192, at 38.

476. See, e.g., *Zucker v. Andrews*, 2 F. Supp. 2d 134, 141 (D. Mass. 1998) (discussing importance of formulating contacts and difficulty of doing so when a child is concealed): *In re Coffield*, 644 N.E.2d 662, 666 (Ohio Ct. App. 1994) (suggesting that the child was not settled because father's concealment of child led to limited contacts).

*Responsibility and Measures for the Protection of Children* ("Protection Convention"),<sup>477</sup> which, if adopted, would confer emergency jurisdiction on a court in the abducted-to country to issue orders of protection. Next, this part considers the possible adoption of an explicit defense for domestic violence victims, similar to the defense found in the United States' International Parental Kidnapping Crime Act ("IPKCA"). Finally, this section explores the possibility and ramifications of modifying the Hague Convention on Child Abduction to permit a court to suspend the remedy of return until custody has been adjudicated by a court in the child's habitual residence, and to provide a mechanism by which the respondent can litigate custody from a country where she feels safe.

Preliminarily, it is important to acknowledge that perhaps the best solution, and one that will not be discussed, would be to remove the need for domestic violence victims to flee their children's habitual residence for safety. Countries should adequately address the problem of domestic violence. Because other writers have focused on pre-abduction solutions,<sup>478</sup> this Article focuses on post-abduction legal accommodations that can be made for battered women who flee with their children to escape domestic violence.

It is also important to note at the outset that revising the Hague Convention is not procedurally easy. While the statute of the Hague Conference has an explicit and straightforward mechanism for amending the statute,<sup>479</sup> no such procedure exists within the Hague Convention on Child Abduction. Authors have criticized the lack of a reasonable procedure for the amendment of Hague Conventions.<sup>480</sup>

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477. Protection Convention, *supra* note 26. The Protection Convention replaces the 1961 Hague Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Children. Protection Convention, *supra* note 26, Art. 51.

478. See, e.g., Greif & Hegar, *supra* note 8, at 197 (discussing pre-abduction intervention by professionals, including finding techniques for reversing the violent nature of the relationship). Greif and Hegar's suggestions include having a legal and social welfare system that aims to eliminate domestic violence. *Id.* at 221 ("Because the major goal of primary prevention is to keep people at potential risk from experiencing a problem, primary prevention of parental abduction requires that society deal with the root causes of family disruption, including . . . gender inequality, domestic violence, and limited access to a variety of resources."). They also seek a system that adequately responds to victims of domestic violence. Among other things, courts should be "accessible and prompt in response to parents seeking temporary custody orders," and court orders should include a no-contact provision, as well as a vacate provision that allows the parent and child to stay temporarily in the family home. *Id.* at 227. Greif and Hegar also argue that law enforcement personnel, investigators, prosecutors, and judges hearing juvenile, civil, and criminal matters should receive "special expertise and training." *Id.* at 263.

479. See Statute of the Hague Conference on Private International Law, Art. 12 (entered into force 15 July 1955) ("Amendments to the present Statute may be made if they are approved by two-thirds of the Members.").

480. See, e.g., Susan Burke, *The Increasing Focus of Public International Law on Private Law Issues*, 86 Am. Soc'y Int'l L. Proc. 456, 468-69 (1992) (highlighting comments of Professor Andreas Bucher noting need for amendment procedures in



An entirely new convention would need to be authored and ratified, accepted, approved or acceded to in order to amend the Hague Convention on Child Abduction.<sup>481</sup> The logistics of this process are more cumbersome than a simple amendment procedure. In addition, advancing a new Convention on Child Abduction that incorporates specific protection for domestic violence victims creates the opportunity for divisiveness among members on numerous issues that member states treat differently.<sup>482</sup> Nonetheless, direct reform of the Convention may prove the most expedient way to achieve the desired result.

### A. Undertakings: Formalizing and Extending an Existing Practice

Undertakings have become a fairly common way for some courts to try to secure the child's safety, and at times the abductor's safety, when ordering the child's return.<sup>483</sup> In the context of a Hague proceeding, undertakings are verbal assurances given to the court by a litigant, typically through counsel, as a condition of the child's return. For instance, a petitioner might undertake to have no contact with the abductor upon the abductor's return to the child's habitual residence, or might agree to a series of conditions akin to what a court might award a victorious plaintiff in a civil protection order proceeding. For example, in *In re Walsh*,<sup>484</sup> the trial court received an undertaking from the batterer when it ordered the return of the children to Ireland, despite the mother's argument that she was a domestic violence victim and that an Article 13(b) defense existed. The court stated the following:

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international conventions).

481. See T.O. Elias, *The Modern Law of Treaties* 88-94 (1974) (discussing the procedures for amending multi-lateral treaties pursuant to the Vienna Convention on the Law of Treaties (1969) and customary international law); I.M. Sinclair, *The Vienna Convention on the Law of Treaties* 79-83 (1973) (describing amendment and modification procedures).

482. Elias, *supra* note 481, at 92 (explaining that each party "must be duly notified of the proposed amendment" and each has a right to participate in the negotiations and the conclusion of the amending agreement). See generally Beaumont & McEleavy, *supra* note 243, at 146-48 (discussing varying interpretations of Art. 13(1)(b)). See also *id.* at 80-82 (comparing differing applications of "rights of custody").

483. See generally Beaumont & McEleavy, *supra* note 243, at 156-57. See, e.g., *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) ("If on remand the court decides that Evan's return is in order, but determines that Mrs. Feder has shown that an unqualified return order would be detrimental to Evan, the court should investigate the adequacy of the undertakings from Mr. Feder to ensure that Evan does not suffer shortterm [sic] harm."); *Pantazatou v. Pantazatos*, No. FA 960713571S, 1997 WL 614572, at \*3 (Conn. Super. Ct. Sept. 24, 1997) (entering undertakings); *C. v. C. (Minor: Abduction: Rights of Custody Abroad)*, 2 All E.R. 465 (C.A. 1989) (accepting father's undertakings).

484. 31 F. Supp. 2d 200 (D. Mass. 1998), *rev'd and remanded*, *Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. July 25, 2000).

If [the mother] does return to Ireland . . . John must have no contact with her nor come within 10 miles of her residence, wherever she chooses to take up residence. Moreover, if [the mother] returns to Ireland, John will have no contact with the children unless ordered by the authorities in Ireland. Each of these undertakings are conditions of this Court's order, and if any is violated, the order will be of no force and effect.<sup>485</sup>

Similarly, a Hungarian court that ordered a mother to return to France with her children addressed the problem of domestic violence by accepting the husband's undertaking to provide support and separate housing for her and the children pending resolution of a divorce action.<sup>486</sup>

While the text of the Hague Convention does not mention undertakings, undertakings can be justified as protection for the child.<sup>487</sup> Without them, the abductor may choose not to return with the child, and the child would be forced to be without his or her primary caretaker. This would be "an intolerable situation."<sup>488</sup> In addition, without undertakings, violence may resume upon the abductor's return, and harm the children.<sup>489</sup> Because protection of children is the *raison d'être* of the Convention,<sup>490</sup> and since courts appear to have the legal authority to impose undertakings,<sup>491</sup> the increased use of undertakings is a viable option for dealing with allegations of domestic abuse.

With the qualifications discussed below, the increased use of undertakings is a reasonable approach to deal with the problem identified in this Article. The advantage of undertakings is that they present a procedural shortcut to address numerous allegations of domestic violence made in these cases. A court can assess the possibility of undertakings as the first step in adjudicating an Article 13(b) defense. If the undertakings seem futile, the court can then

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485. *Id.* at 207; see also *Damiano v. Damiano*, [1993] N.Z.F.L.R. 548 (allowing petitioner only supervised access to children until custody hearing).

486. See Bruch, *supra* note 233, at 10 & n.37 (citing No. 2.P.I.31.588/1988/2 (Central Dist. Ct., Budapest) (official translation of 5 Aug. 1988 from Hungarian into French)).

487. *Pantazatou*, 1997 WL 614519, at \*3 (justifying communication between courts of different countries regarding undertakings as "consistent with the purpose of the Hague Convention to set an appropriate forum and still protect the child"); see also *Feder*, 63 F.3d at 226 ("[I]n order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon 'undertakings' from the petitioning parent.") (citation omitted).

488. Dyer, *Summary of Remarks*, *supra* note 237, at 2 ("[S]ome courts have required so-called 'undertakings' on the part of the parents seeking return in order to make the return of the primary caretaker also possible.").

489. See *supra* text accompanying notes 129-35.

490. Hague Convention on Child Abduction, *supra* note 12, Preamble.

491. Beaumont & McEleavy, *supra* note 243, at 159-63 (discussing, *inter alia*, principle of non-exclusivity).

accept the defense and deny the petition to return the child.<sup>492</sup> As discussed above, such a solution would comport with the recommendations of some scholars that courts should look first to fashioning remedies for the alleged violence, without adjudicating the underlying dispute, as a way to keep the Hague procedures expeditious.<sup>493</sup>

For undertakings to be a widespread solution, however, the Convention itself would need to authorize them, and make them enforceable in all member states. Currently, some jurisdictions are skeptical of undertakings. Apparently, they are "only being recognised at present in anglophone jurisdictions."<sup>494</sup> Moreover, there is currently no remedy for the violation of an undertaking.<sup>495</sup> Contrary statements by some courts are simply wrong.<sup>496</sup> When an undertaking is violated, the violator is typically outside the jurisdiction of the court that imposed the condition, and the child has already been returned. While a court could require forfeiture of a bond if the undertaking is violated, or hold a petitioner in contempt if and when the petitioner ever reappears in the jurisdiction, or even dismiss any future Hague petitions that the petitioner files in that jurisdiction,<sup>497</sup> these options offer the domestic violence victim and the court little comfort that an abuser will obey an undertaking.<sup>498</sup>

If the Convention explicitly recognized undertakings and made them enforceable transnationally, a parallel "safe harbor" order from a court in the child's habitual residence would not be necessary. Some courts make return contingent on such an order,<sup>499</sup> and the left-behind

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492. *Walsh v. Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863 (1st Cir. July 25, 2000).

493. Silberman, *A Brief Overview*, *supra* note 384, at 33; *see also supra* notes 384-389 and accompanying text.

494. Beaumont & McEleavy, *supra* note 243, at 170.

495. One expert wrote, "A deficiency of the system of taking undertakings, as it is presently known, is that the courts in the other country are not bound to enforce such promises." *Checklist of Issues to Be Considered*, *supra* note 192, ¶ 100.

496. The statement, for example, by the court in *In re Walsh*, 31 F. Supp. 2d 200, 207 (D. Mass. 1998), rings hollow. The court held that its order would be of no force and effect if the undertaking were violated. *Id.* Yet if the undertaking were violated, the return of the child would have been effectuated already.

497. *Cf. Sortomme v. Sortomme*, No. 92-4218-SAC, 1993 WL 105144, at \*5 (D. Kan. Mar. 10, 1993) (dismissing petition for failure to follow the parties' stipulation, which was embodied in an agreed order and signed by the court, that required the petitioner to return to Germany with their children on a certain date).

498. *See also Re O*, (1994) 2 F.L.R. 349 (stating that the English court must bear in mind the "limited extent, if at all, to which the Greek court is likely to come to the mother's aid" in support of the father's undertakings); *In re Marriage of McOwan*, (1994) 17 Fam. L. R. 377 (stating that there is no "existing mechanism by which the court that extracts the undertaking can be assured that it is complied with").

499. *See Pantazatou v. Pantazatos*, No. FA 960713571S, 1997 WL 614519, at \*4 (Conn. Super. Ct. Sept. 24, 1997) (refusing to order child's return unless court in Greece entered undertaking as its order).

parent typically has to obtain the parallel order.<sup>500</sup> A safe harbor order is an inefficient mechanism for ensuring the enforceability of a court's order because the process requires two court proceedings to obtain an enforceable order. Additionally, safe harbor orders have not gained "currency outside of the US."<sup>501</sup> It is questionable whether civil law countries will enter them.<sup>502</sup>

Notwithstanding the potential benefit of undertakings, this solution also has limitations, especially if judges are not educated about domestic violence. First, courts may not order the full range of relief necessary to protect a victim. Some courts elicit undertakings with financial relief provisions more readily than undertakings with conditions related to abductors' safety.<sup>503</sup> In *Tabacchi v. Harrison*,<sup>504</sup> for example, the court required Tabacchi to provide separate housing and living expenses for his wife and child pending resolution of the custody dispute,<sup>505</sup> and to drop all abduction charges against Harrison in the child's habitual residence.<sup>506</sup> Yet the court imposed no conditions at all regarding Tabacchi's behavior around Harrison. In another case, the Family Court of Australia limited the undertakings imposed by a lower court, leaving "only the bare minimum necessary for avoiding serious risk of harm to the child."<sup>507</sup> Undergirding these and similar decisions is a fear that these undertakings "could get out of hand."<sup>508</sup> Unless judges who apply the Hague Convention receive domestic violence training and become accustomed to ordering broader relief, codifying the undertaking process would be an insufficient solution.

Second, in some cases, a victim may not be adequately protected even with the imposition of a wide range of conditions related to her safety. Some batterers are so determined to harm their victims that

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500. See *Checklist of Issues To Be Considered*, *supra* note 192, ¶ 101. The practice works best when the courts in the two jurisdictions communicate directly about the safe-harbor provision. See, e.g., *id.* ¶¶ 101-102 (statement by Permanent Bureau calling communication between courts in California and Quebec "exemplary"); see also *Pantazatou*, 1997 WL 614519, at \*3 (reporting that Connecticut court was trying to call Greek court to ensure undertakings would be honored in Greece).

501. Beaumont & McEleavy, *supra* note 243, at 170.

502. *Id.*

503. See, e.g., *Croll v. Croll*, 66 F. Supp. 2d 554, 562 (S.D.N.Y. 1999).

504. No. 99 C 4130, 2000 WL 190576 (N.D. Ill. Feb. 10, 2000).

505. *Id.* at \*16.

506. *Id.*

507. Dyer, *Summary of Remarks*, *supra* note 237, at 3. In this country, courts have expressly found undertakings imposed by a foreign court to be in excess of the foreign court's jurisdiction and unenforceable. See, e.g., *Roberts v. Roberts*, No. 95-12029, 1998 WL 151773, at \*13 (D. Mass. Mar. 17, 1998) (citing order of Probate and Family Court Department that foreign court exceeded its jurisdiction when it extracted an undertaking from a petitioner that the petitioner would not enforce "an otherwise valid custody order of a Massachusetts court"). The federal district court, while not reviewing the decision, called the decision "correct." *Id.*

508. *Id.*

laws and court orders mean little, if anything. That is why advocates for domestic violence victims believe that safety planning is often *more* essential for victims than obtaining a protection order against abuse. Some victims may only be safe a continent away from their abusers, regardless of the conditions that courts could impose for their safety. Consequently, undertakings should be considered *per se* inappropriate in various situations, including where any of the following facts exist: the petitioner has a history of disobeying court orders; past violence has been so life-threatening that only vast geographic distances can protect the respondent; there are indications that future violence may be severe; or, the harm to the child will not be mitigated because the child will still fear renewed violence between the parents. Courts and reformers must acknowledge that undertakings may not sufficiently protect some battered women or children, and allow an Article 13(b) defense in those situations.

Third, undertakings are a remedy connected with the return of a child. Sometimes, however, the return of the child is the wrong remedy. For example, if the child's habitual residence was established by coercion of the mother, then it may be better for the court to make a factual determination that the abducted-from state never became the child's "habitual residence" and thereby avoid the return of the child. Alternatively, another remedy—such as a domestic violence defense—might better address the equities of the situation.

Fourth, the power dynamic between the domestic violence victim and the batterer may undermine some courts' ability to assess the adequacy of undertakings.<sup>509</sup> Unless there are proper procedural safeguards in place, a battered woman may tell the court that she feels safe with the proposed undertakings, but her response may be subtly coerced by the batterer. "Intimidation can occur quite subtly—for example, with a certain look that a [judge] may not see or interpret as threatening."<sup>510</sup> Players in the family law field generally appreciate that the parties' power disparities can make mediation a "dangerous process" for those subjected to domestic violence.<sup>511</sup> Studies show that

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509. Similar concerns have been raised about the appropriateness of mediation, a solution currently being contemplated by the Permanent Bureau, for cases involving domestic violence. "[T]he organization Reunite intends in the near future to conduct a pilot mediation project, in the context of Hague proceedings." Duncan, *supra* note 29, at 13.

510. Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's Principles of the Law of Family Dissolution into Oregon Law*, 35 Willamette L. Rev. 643, 680-81 (1999) (citing Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. Rev. 2117, 2117 (1993) ("The relationship between a battered woman and her abuser frequently involves communication through subtle phrases and modes of interaction that have meanings and symbols idiosyncratically shared by the two parties.")); see also Fischer, *supra*, at 2118 (giving the example of how a nose scratch was a signal to the victim that the batterer might abuse her if she did not follow his lead).

511. Oregon Protocol Handbook, *supra* note 127, at 17-20.

outcomes for women who are afraid of their husbands tend to be worse than for women who are not so afraid.<sup>512</sup> While Hague proceedings are not "mediation," a similar power imbalance may arise when a court asks the parties to agree upon undertakings, especially if only the batterer is represented.<sup>513</sup> Again, the need to train the courts on the issue of domestic violence will be critical.

Fifth, undertakings are a reasonable solution only when the jurisdiction to which the child is to be returned adequately protects domestic violence victims. If the police do not respond to domestic violence calls, for example, then undertakings should be considered an inadequate solution. Undertakings technically do not depend upon the habitual residence's response to domestic violence, but rather depend upon the petitioner's agreement and good faith. Yet batterers often violate agreements or court orders designed to stop the batterers' violence, as experience in the United States demonstrates.<sup>514</sup> Courts must recognize this fact, and determine whether the other country can adequately protect the victim upon her return to the country. Otherwise, a court that extracts undertakings to address serious domestic violence may actually be threatening the lives of the respondent and her children.

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512. Demi Kurz, For Richer, For Poorer: Mothers Confront Divorce 138 *tbl.* 5-4 (1995) (noting that women who are afraid of their husbands receive less in negotiations over child support than women who are not afraid).

513. See *supra* note 216.

514. See Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, NIJ Research Report (January 1996), available at <http://www.ncjrs.org/txtfiles/crimdon.txt> (finding that 60% of women interviewed had suffered at least one episode of violence during the year after they had received a protective order, with over 20% reporting threats to kill and 29% reporting severe violence) (citing Adele Harrell et al., *Court Processing and the Effects of Restraining Orders for Domestic Violence Victims* 47-48 (The Urban Institute, 1993)); see also Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims, in Do Arrests and Restraining Orders Work?* 233 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (reporting that after receiving a protective order, women with children were 70% more likely to experience violent acts and 50% more likely to experience threats or property damage than women without children); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. Rev. 329, 344 n.83 (1994) ("Domestic abusers may pose a significantly more serious danger than other violent criminals since batterers do not reform their behavior as often as other violent offenders. A study on recidivism for violent crimes has shown that violence between intimates is two and one-half times more likely to recur than violence between strangers.") (citing Sarah Curtis, *Criminal Enforcement of Restraining Orders: A Study of Four District Courts* 31 (May 1991) (unpublished manuscript, on file with Boston University Law Review) (citing Bureau of Justice Statistics, U.S. Department of Justice, *Preventing Domestic Violence Against Women*, Special Report 3 (1986)); cf. Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, at 11 (1998) ("69 percent of the women [who obtained a restraining order] said their stalker violated the order"). Certainly, it would be useful to have empirical work done on batterers' compliance with undertakings. Until additional research can be completed, existing research suggests a cautious approach to undertakings.

*B. The Protection Convention: Emergency Jurisdiction to Issue Orders of Protection*

Another possible solution to the problem faced by domestic violence victims is to allow courts adjudicating Hague petitions to enter emergency orders related to the victims' and children's safety that would be enforceable in other countries, including the children's habitual residence. Such orders would be available if member states adopt the new "Protection Convention"<sup>515</sup> proposed by the Hague Conference in 1996. Unlike undertakings, emergency orders would not be contingent on the petitioner's consent. In addition, all Contracting States would be obligated to enforce the measures entered.<sup>516</sup> Member states may be more likely to accept this solution than codifying the practice of undertakings because the Hague Conference already has crafted the Protection Convention. Proponents of the Protection Convention have suggested that this new convention rectifies the inadequacies of the Hague Convention on Child Abduction.<sup>517</sup>

The Protection Convention gives jurisdiction to the judicial or administrative authorities of the child's habitual residence to take measures to protect a child's person or property.<sup>518</sup> Authorities in the state where the child is found also have emergency jurisdiction to take protective action.<sup>519</sup> Article 11 provides:

1. In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.
2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.
3. The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and

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515. Protection Convention, *supra* note 26. For an excellent guide to the Protection Convention's history and provisions, see Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, \_\_\_ Fam. L. Q. \_\_\_ (\_\_\_) (forthcoming) (on file with author) [hereinafter Silberman, *Should the United States Join*].

516. Protection Convention, *supra* note 26, Art. 23(1). The orders are also enforceable. *See id.* Art. 26.

517. Statement of Gloria DeHart, Second World Congress on Family Law and the Rights of Children and Youth (June 1997).

518. Protection Convention, *supra* note 26, Arts. 5, 7(3).

519. *Id.*

taken by the authorities of another State are recognized in the Contracting State in question.<sup>520</sup>

The range of possible protective measures is not defined and is, theoretically, quite broad.<sup>521</sup>

Despite the breadth of the Protection Convention, there are several reasons why the Protection Convention may be an inadequate solution for domestic violence victims. First, only two countries have ratified the Convention, and few countries have signed it. The Protection Convention addresses a wide range of issues,<sup>522</sup> and whether the signatories to the Hague Convention on Child Abduction will join the Protection Convention is presently unclear. Even countries who favor the Protection Convention as a remedy for the problem identified in this Article may have difficulties with the application of the Protection Convention to domestic violence victims in other contexts. In some scenarios, the Protection Convention seems misguided.<sup>523</sup>

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520. *Id.* Art. 11.

521. Paul Lagarde, Explanatory Report on the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Art. 11, ¶ 1, § 70 (Jan. 15, 1997) ("The Conference deliberately abstained from setting out what measures might be taken on the basis of urgency in application of Article 11. This is indeed a functional concept, the urgency dictating in each situation the necessary measures.").

This Article does not consider Article 10 of the Protection Convention. When a person files for divorce in the abducted-to country, Article 10 would give a court jurisdiction to protect the child's person or property. Article 10 requires, *inter alia*, that the divorce court's jurisdiction be "accepted by the parents." Protection Convention, *supra* note 26, Art. 10(1)(b). It is unlikely that a batterer would consent to the court's jurisdiction.

522. *See, e.g.*, Protection Convention, *supra* note 26, Art. 3 (designating situations in which the Protection Convention would apply, including termination of parental responsibility, guardianship, placement of a child in foster care, and the conservation or disposal of the child's property).

523. For example, the Protection Convention presents problems for victims of domestic violence who successfully defeat an application for the child's return pursuant to the Hague Convention on Child Abduction. Imagine, for example, a victim who successfully argues that returning her child to its habitual residence would subject the child to grave psychological harm. After the court denies the petition for the child's return, the mother then seeks an award of legal and physical custody in the abducted-to state in order to facilitate her role as the child's custodian, or she may even seek to terminate the left-behind parent's rights. Unless there was acquiescence in the removal or retention by each person or institution having rights of custody, *see id.* Art. 7(1)(a), the Protection Convention precludes the court in the abducted-to nation from exercising jurisdiction for at least one year (unless it could call the situation "urgent" and exercise its emergency jurisdiction under Article 11), *id.* Art. 7(3). Despite the abductor's successful Article 13(b) defense, the abduction would still be "wrongful" under the Protection Convention. *See id.* Art. 7(2). This one-year waiting period is inconsistent with Article 16 in the Abduction Convention, which suggests that a court can exercise jurisdiction to determine rights of custody as soon as it determines a child is not to be returned.

The one-year waiting period may, in fact, turn out to be longer. Jurisdiction is



triggered "at least one year after the [left-behind parent] . . . has or should have had knowledge of the whereabouts of the child." *Id.* Art. 7. Imagine a child who has been well-hidden in another country for three years, and the left-behind parent had no way of knowing, despite his or her diligent search, where the child was located. At the beginning of year four, when the left-behind parent discovers the whereabouts of the child, he or she commences a Hague Abduction Convention proceeding. Imagine further that the court denies the remedy of return under Article 12. Article 12 only requires that more than one year has elapsed from the date of wrongful removal or retention to the commencement of the proceedings, and that the child be settled in the new environment. The court in the abducted-to country may, however, want to exercise jurisdiction to have a social worker conduct home visits because the child shows early symptoms of child neglect. Under the Protection Convention, the court would lack such jurisdiction until one year expired from the date when the left-behind parent had knowledge of the child's whereabouts, unless the state of the child's habitual residence relinquishes its jurisdiction, *id.* Art. 7(3), or the situation is "urgent," *id.* Art. 11. The formulation was apparently part of a "compromise formula" reached between the U.S. delegates, who thought that a wrongful removal should never lead to a new habitual residence, and the other delegations, who thought that a determination of habitual residence must maintain a factual focus. Beaumont & McLeavy, *supra* note 243, at 218-19.

Even after one year, Article 7 of the Protection Convention requires that the child be settled in his or her new environment before a court in the abducted-to country can exercise jurisdiction as the court of the child's new habitual residence. Protection Convention, *supra* note 26, Art. 7. Moreover, Article 7 also requires that "no request for return lodged within that period is still pending." *Id.* That language may mean that no request for return of the child be pending in the original habitual residence either. See Silberman, *Should the United States Join?*, *supra* note 515, at 21 n.42. These requirements seem odd when there has been a successful defense under the Abduction Convention.

Even more peculiarly, prior to the new state becoming the child's habitual residence, see Protection Convention, *supra* note 26, Art. 5(2), the abducted-to state would have to honor any custody award entered by the court of the child's habitual residence, including an award of sole legal and physical custody to the batterer. *Id.* Art. 23(1). The order would have to be honored even if the court in the abducted-to state refused to order the child's return under the Abduction Convention because, for example, the child is of sufficient age and maturity and did want to be returned.

The notion that a wrongful removal should not lead to jurisdiction in the abducted-to state makes sense in many situations, and for these situations, the barriers to the establishment of jurisdiction in the abducted-to state are justified. Lagarde, *supra* note 521, Art. 7, § 46 ("The underlying idea is that the person who makes a wrongful removal should not be able to take advantage of this act in order to modify for his or her benefit the jurisdiction of the authorities called upon to take measures of protection for the person, or even the property, of the child."). Yet, whatever merit exists to maintaining jurisdiction in the courts of the child's habitual residence when a child is abducted ceases to apply when a defense to the remedy of return exists, especially when the defense is other than Article 12's "well-settled" exception. A legal instrument could accommodate successfully both of the competing policy interests. For example, the UCCJEA recognizes that a parent should not be able to establish jurisdiction by unjustifiable conduct, but defines unjustifiable conduct in a way so as *not* to include a woman who is fleeing to escape domestic abuse. See *infra* text accompanying notes 555-56.

Even when the abducted-to state becomes the child's new habitual residence, and its courts can theoretically modify any order of a court from the abducted-from state, the Convention's provisions suggest that the prior order will be presumptively valid. Article 23 requires that measures taken by one Contracting State "shall be recognised by operation of law in all other Contracting States." Protection Convention, *supra* note 26, Art. 23. In addition, Article 13 requires the court in the new habitual

Second, the Protection Convention is meant to operate harmoniously with the Hague Convention on Child Abduction. The Protection Convention, therefore, does not abrogate the Abduction Convention's remedy of return.<sup>524</sup> Consequently, the Protection Convention will be an inadequate solution for those who favor a domestic violence defense to the remedy of return, especially for situations where the batterer has forum shopped through force.

Third, the Protection Convention, like undertakings, may be an insufficient solution in those worst case scenarios, i.e., where the child's habitual residence insufficiently protects domestic violence victims and the victim feels compelled to return with her child to the child's habitual residence. A foreign order designed to protect the victim may prove ineffective because, for example, the police may not enforce "stay-away" orders between spouses. It may be especially foolish to think that the jurisdiction will enforce the stay away order

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residence to "abstain" from exercising its jurisdiction if "corresponding measures" are still "under consideration" in the former habitual residence. *Id.* Art. 13. Although a court in the new habitual residence can modify an order from the former habitual residence, "it was widely accepted that the new State would not act to modify an order absent a change in circumstances." Silberman, *Should the United States Join?*, *supra* note 515, at 19 n.40. A finding of a "grave risk" of harm "might" qualify as a change of circumstance, *see id.* at 23, but this conclusion is not guaranteed.

To be fair, the Protection Convention has several provisions that may help minimize some of these bizarre outcomes. Article 8 provides that the courts of the child's habitual residence can allow another state to assume jurisdiction "to take such measures of protection as it considers to be necessary," so long as the court in the child's habitual residence believes the other state "would be better placed in the particular case to assess the best interests of the child." Protection Convention, *supra* note 26, Art. 8. Article 9 allows courts in the abducted-to-state to request this transfer of jurisdiction. *Id.* Art. 9. While these provisions are useful, they will not apply in all situations. For example, only certain states may ask (or may be asked) to assume jurisdiction. While the list includes, for example, a "State whose authorities are seised [sic] of an application for divorce or legal separation of the child's parents, or for annulment of their marriage," *id.* Arts. 8(2), 9(1), the list does *not* include a "State whose authorities are seized of an application for a civil protection order for allegations of domestic violence," or a "State whose authorities are seized of an application for a child's return pursuant to the Hague Convention on Child Abduction." While a "State with which the child has a substantial connection," *id.* Art. 8(2)(d), is included and may be broad enough to assist domestic violence victims and their children, Lagarde, *supra* note 521, Art. 8, ¶2, § 55 (mentioning "substantial connection" would cover "the State in which members of the child's family live who are willing to look after him or her"), one can only speculate whether that result will find favor. In addition, unlike the UCCJEA, nowhere is it explicit that the safety of the mother is a factor to consider in assessing whether to transfer jurisdiction. *See infra* text accompanying notes 549-61.

524. Protection Convention, *supra* note 26, Art. 50 ("This [Protection] Convention shall not affect the application of the [Hague Convention on Child Abduction], as between Parties to both Conventions."). The Protection Convention may, in fact, undermine the defenses available to a domestic violence victim under the Abduction Convention. An application under Article 23 of the Protection Convention requires recognition and enforcement, *id.* Art. 23, without offering the defenses of the Abduction Convention.

since the victim initially fled from there because of her batterer's violence and her inability to obtain protection from the State.

Fourth, the Protection Convention contains an explicit preference for resolving disputes by alternative dispute resolution, such as mediation, which historically has been problematic for domestic violence victims.<sup>525</sup> Article 31 states that "[t]he Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to . . . (b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies."<sup>526</sup> A court adjudicating a petition under the Abduction Convention might ask the parties to reach a mediated agreement regarding what provisions should be ordered for the child's and abductor's safety. Without assuring that mediators receive adequate training about the dynamics of domestic violence, and without an explicit provision allowing victims to opt out of mediation, the Protection Convention is not an optimal solution.

Fifth, the Protection Convention only works to the extent that a court perceives the situation as "urgent," and assumes jurisdiction under Article 11. The Convention contains no definition of urgency, although the Explanatory Report to the Protection Convention explains that urgency means "irreparable harm for the child," and requires an inability of the child's habitual residence to protect the child.<sup>527</sup> A court might not draw a link between threats to the parent and the well-being of the child, or find that the child's habitual residence is incapable of adequately addressing the situation.

Experience with the United States' Uniform Child Custody and Jurisdiction Act ("UCCJA") provides strong evidence that courts may not sufficiently invoke the Protection Convention's emergency jurisdiction to aid domestic violence victims.<sup>528</sup> The UCCJA, originally drafted in 1968 by the National Conference of Commissioners on Uniform State Laws, was eventually enacted by every state and the District of Columbia.<sup>529</sup> The Act clarified which state's courts had jurisdiction to adjudicate custody matters, and helped minimize the modification and re-litigation of custody matters resolved by sister states.

Under the UCCJA a court could assume emergency jurisdiction if the child was in need of protection because of actual or threatened

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525. See *supra* notes 509-11 and accompanying text.

526. Protection Convention, *supra* note 26, Art. 31.

527. Lagarde, *supra* note 521, Art. 11, ¶ 1, § 68.

528. Uniform Child Custody Jurisdiction Act, 9 U.L.A. 261 (1968) [hereinafter UCCJA].

529. National Conference of Commissioners on Uniform State Laws, 1995-96 Reference Book, at 84 (1996).

abuse, mistreatment, or neglect.<sup>530</sup> Courts often refused to assume emergency jurisdiction when women fled from domestic violence,<sup>531</sup> finding that the woman, not the child, was in need of protection. *In re Marriage of Ieronimakis*<sup>532</sup> demonstrates how the UCCJA's emergency jurisdiction provision proved inadequate for some domestic violence victims. The case involved an American mother who left Greece with her two children to return to her parents' home in the United States. She claimed, among other things, that her husband kept her and the children socially isolated, that he drank excessively, and that he physically abused her and the children.<sup>533</sup> Seven days after the mother came to the United States, she petitioned the Washington state court for custody of her children.<sup>534</sup> The father commenced a simultaneous proceeding in Greece.<sup>535</sup> He also appeared in the Washington proceeding to contest that court's jurisdiction.<sup>536</sup> The Washington Superior Court ordered that custody be retained in Washington and the father appealed.<sup>537</sup>

Applying Washington's version of the UCCJA, the appellate court reversed the trial court and held that jurisdiction was inappropriate.<sup>538</sup> The court held that Greece was the children's home state and neither the mother nor the children had a "significant connection" with Washington when the petition was filed.<sup>539</sup> Emergency jurisdiction

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530. See UCCJA, *supra* note 528, at 307, § 3(a)(3)(ii) (the child is "physically present in this State and . . . it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]") (alteration in original).

531. See, e.g., *Benda v. Benda*, 565 A.2d 1121, 1124 (N.J. Super. Ct. App. Div. 1989); see also Richard E. Crouch, *International Child-Snatching*, Fam. Advoc., Spr. 1987, at 17, 46 (explaining that the emergency jurisdiction is "looked upon with great suspicion by appellate courts," that the "classic" emergency was one that occurred in the forum, not in the home state, and that some courts read the UCCJA rule as permitting only a temporary order pending action by the appropriate forum).

532. 831 P.2d 172 (Wash. Ct. App. 1992).

533. *Id.* at 173.

534. *Id.*

535. *Id.* at 174.

536. *Id.*

537. *Id.* at 175-76.

538. *Id.* at 177. As the *Ieronimakis* case demonstrates, Article 23 of the UCCJA has been used to secure the return of children in the United States to foreign countries. See generally 132 Cong. Rec. 29,881 (1986) (statement of Arthur W. Rovine, Chairman, Section of International Law and Practice, American Bar Association commenting that from 1983 to 1986, forty-three cases were reported to the State Department of children who were ordered returned from the United States to their country of origin). Many courts, although not all, have held that the UCCJA applies to these international disputes. See, e.g., *Ieronimakis*, 831 P.2d at 176-77. See generally *Ivaldi v. Ivaldi*, 685 A.2d 1319, 1325 (N.J. 1996) (noting that the "majority of state courts that have considered the issue have held, either explicitly or implicitly, that the term 'state' may include a foreign nation . . . notwithstanding that relevant statutes uniformly define 'state' as 'any state, territory, possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia'").

539. *Ieronimakis*, 831 P.2d at 176-77.

was deemed inappropriate for several reasons.<sup>540</sup> Skeptical of the mother's allegations,<sup>541</sup> the *Ieronimakis* court refused to accept flight from domestic abuse as a justification for a child abduction, especially because it saw no connection between the abduction and the need "to avoid threatened mistreatment and abuse of the children."<sup>542</sup> In particular, the mother had not shown that the Greek courts were incapable of protecting the children's interests.<sup>543</sup> Even if the emergency jurisdiction exception had applied, the court would have declined jurisdiction because the mother's conduct, i.e., the abduction, was wrongful.<sup>544</sup> The majority stated: "[T]his court cannot condone [the mother's] conduct, no matter how well intentioned, when it presents a deliberate frustration of [the father's] rights and an attempt to select the forum for the custody dispute contrary to the statutory policies."<sup>545</sup> The dissent, in contrast, thought "it is neither 'wrongful' nor an 'abduction' to remove one's children from an abusive situation and to re-establish them in a place of safety, unilaterally or otherwise,"<sup>546</sup> especially when no court decree restricted the mother from taking the children from Greece.<sup>547</sup>

Cases like *Ieronimakis* prompted commentators to recommend that states "[e]xtend[] the emergency jurisdiction provision of the UCCJA to include abuse of a parent or sibling of an abducted child."<sup>548</sup> When the National Conference adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") in 1997,<sup>549</sup> the Conference incorporated a new emergency jurisdiction provision in an effort to improve upon the UCCJA. Section 204 of the UCCJEA now affords a court emergency jurisdiction "if the child is present in this State and the child has been abandoned or it is necessary in an

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540. *Id.* at 178 (referring to Wash. Rev. Code § 26.27.030(1)(c)(ii)); *supra* note 530 (setting forth text of emergency jurisdiction provision). While the Hague Convention did not apply because Greece was not a party, *Ieronimakis*, 831 P.2d at 179 n.18, the court thought that its decision was "in harmony with the provisions and purposes of the Hague Convention." *Id.* at 180. The dissent, however, felt that the majority's decision "is most definitely *not* in harmony with the purposes of the Hague Convention." *Id.* (Kennedy, J. dissenting).

541. While the dissent thought there was substantial evidence of abuse, *id.* at 182 (Kennedy, J. dissenting), the majority said "none of [the allegations of mistreatment] seemed overwhelming." *Id.* at 178.

542. *Id.*

543. *Id.*

544. *Id.* at 179. The Revised Code of Washington provides that "[i]f the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances." Wash. Rev. Code Ann. § 26.27.080(1) (1997).

545. *Ieronimakis*, 831 P.2d at 179.

546. *Id.* at 182.

547. *Id.*

548. Girdner & Hoff, *supra* note 201, at 10.

549. Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1999) [hereinafter UCCJEA].

emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."<sup>550</sup> Despite the language that emergency jurisdiction be necessary "to protect the child," the commentary clarifies that children need protection from domestic violence perpetrated against their parents. A domestic violence protective order that awards custody, which typically is based solely on the abuse or threatened abuse of the adult petitioner,<sup>551</sup> "will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent . . . has been subjected to or threatened with . . . abuse."<sup>552</sup>

The UCCJEA is an improvement over the UCCJA and the Protection Convention. First, *Ieronimakis* might be decided the same way under the Protection Convention, although differently under the UCCJEA. Domestic violence perpetrated against a parent is sufficient under the UCCJEA to invoke emergency jurisdiction.<sup>553</sup> In addition, the UCCJEA, unlike the Protection Convention or the UCCJA, explicitly states that a court should not decline jurisdiction because of "unjustifiable conduct" when a domestic violence victim flees with her children to avoid domestic violence.<sup>554</sup> Second, the UCCJEA makes explicit that a court should decline jurisdiction based on "unjustifiable conduct" when batterers flee with their children.<sup>555</sup>

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550. *Id.* § 204(a), at 676.

551. See generally Klein & Orloff, *supra* note 2, at 848-76 (citing domestic violence statutes and relevant case law from around the country); Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 Fam. L.Q. 43 (1989) (reviewing civil protection order schemes across the nation).

The effect of an order made pursuant to section 204 depends upon whether a child-custody determination has already been made at the time the court assumes emergency jurisdiction. If no previous custody determination exists, then the emergency jurisdiction remains in effect until an order is obtained from a court having a regularly-established basis for jurisdiction. If no custody proceeding is commenced, the emergency court's order can become final "if it so provides and if [the] State becomes the home state of the child." UCCJEA, *supra* note 549, § 204(b), at 676-77. On the other hand, if there has been a previous custody determination, or a proceeding has been initiated in a State with primary jurisdiction, then the emergency order will remain valid only for as long as the court with emergency jurisdiction specifies is "adequate to allow the person seeking an order to obtain an order from the State" with primary jurisdiction. *Id.* § 204(c), at 677. In this situation, the two courts are to immediately communicate with each other in order "to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." *Id.* § 204(d) at 677.

552. UCCJEA, *supra* note 549, § 204, cmt. at 678.

553. *Id.* § 204, cmt. at 685.

554. *Id.* § 208(a), cmt. at 685.

555. The comment to section 208 of the UCCJEA states:

Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal . . . . An inquiry must be made into whether the flight was justified under the circumstances of the case.

The Protection Convention implies that an abduction should not preclude a court from exercising emergency jurisdiction, but draws no distinction between abductions perpetrated by batterers or victims. Third, the UCCJEA, unlike the Protection Convention, provides that a court must consider evidence of domestic violence when assessing whether it should decline jurisdiction on *forum non conveniens* grounds: "If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse."<sup>556</sup> The Protection Convention contains no explicit statement authorizing a court to assess which state can best protect a parent from further abuse.<sup>557</sup> In fact, the child's habitual residence may be precluded from declining jurisdiction in favor of the state where the domestic abuse victim and her child are now found if the latter state falls outside of a specified category.<sup>558</sup>

Lastly, and most importantly, the Protection Convention is insufficient for domestic violence victims because it states that any measures taken to protect the child and the parent cease to operate once the court in the child's habitual residence takes "measures required by the situation."<sup>559</sup> It appears that the court in the child's habitual residence assesses the adequacy of its own measure.<sup>560</sup> This

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However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

*Id.* § 208, cmt. at 685.

556. *Id.* § 207(b)(1), at 685 (directing court to consider "whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child"); *id.* § 207(b)(1), cmt. at 683.

557. *But cf.* Protection Convention, *supra* note 26, Art. 8(1) (allowing a court to decline jurisdiction if "it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interest of the child").

558. *See id.* Arts. 8(2) & 9.

559. Protection Convention, *supra* note 26, Art. 11(2).

560. Article 11(3) makes clear that the court in a Contracting State, probably the court with emergency jurisdiction, assesses the adequacy of a non-Contracting state's measures. "Contracting State in question" could either be the state that took the emergency action or the state where recognition of either the earlier or the later measure is sought. *See* United States Delegation Report on the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 10 (1996) (stating that the United States delegation favors the former interpretation). But the absence of a comparable provision in Article 11(2) suggests that the emergency court's jurisdiction lapses as soon as the court with jurisdiction under Articles 5-10 (e.g., the child's habitual residence) takes what it believes to be sufficient measures. This interpretation is consistent with the general notion that members of the Hague Conference can trust each other to act competently. *Accord* Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) ("[W]e acknowledge that courts in the abducted-from country are as ready and able as we are to protect children."). This interpretation also comports with the Conference's reluctance to split or share jurisdiction between two contracting states. For example, the Conference rejected a proposal by the United States' delegation to allow the court in the child's habitual residence to retain exclusive jurisdiction for a period of two years, if it decided a custody or access issue before the child left, and one of the parents

self-policing is potentially problematic. A court in the child's habitual residence may impose measures less protective than those imposed by the court in the abducted-to state because, for example, the batterer parent is a national to whom the court in the child's habitual residence may be sympathetic, the victim is not present to argue for broader protection, the court has an inadequate understanding of domestic violence, or its laws do not afford the same type of protection.<sup>561</sup> These less restrictive measures may be insufficient to protect the victim. After all, the victim fled because she reasonably believed the courts in the child's habitual residence could not adequately protect her. Unless the measures imposed by the court with emergency jurisdiction continue until that court determines that the new

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continued to reside in that state and maintained a relationship with the child, even if the child established a new habitual residence. Lagarde, *supra* note 521, Art. 5, ¶ 2, § 41. This proposal was rejected because it would have created a division of jurisdiction "between the authorities of the first residence, for custody and access, and the authorities of the new residence for the other aspects of parental responsibility." *Id.* Similarly, allowing the court with emergency jurisdiction to assess whether the court in the child's habitual residence has taken sufficient protective measures would also divide jurisdiction between two courts. The court with emergency jurisdiction would be deciding issues related to the child's safety while the court in the child's habitual residence would be deciding issues related to custody, the child's property, etc. The Convention's goal of "eliminat[ing] . . . all competition between the authorities of different States in taking measure of protection for the person on the property of the child," *id.*, Introduction, ¶ 6, will be better achieved if the emergency court's jurisdiction lapses as soon as the child's habitual residence takes what it believes are sufficient measures. Others have suggested that this is the correct interpretation. See Silberman, *Should the United States Join?*, *supra* note 515, at 34 ("[M]easures taken lapse automatically once other measures are taken by Contracting States exercising the basic jurisdiction.").

One fact suggests a contrary interpretation, however. Article 12, which addresses emergency measures that have a territorial effect limited to the issuing State, indicates that such provisional jurisdiction ceases "as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation." Protection Convention, *supra* note 26, Art. 12(2). This language differs from the language in Article 11, which states that emergency court's jurisdiction lapses when the court with jurisdiction under Articles 5 to 10 has "taken the measures required by the situation." *Id.* Art. 11(2). The difference in phraseology may suggest some residual authority in the court with emergency jurisdiction to assess the adequacy of measures taken. In addition, Article 23 permits a court not to recognize an order of another state if it is "manifestly contrary to public policy of the requested State, taking into account the best interests of the child." *Id.* Art. 23(2)(d). While this interpretation of Article 12 might permit a court with emergency jurisdiction to say that its order continues, a woman who tried to enforce the emergency order in the child's habitual residence, instead of the country that issued the order, would undoubtedly have difficulty.

561. See *id.* Art. 15(1) ("In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law."). There is an exception, however, in Article 15(2). *Id.* Art. 15(2) ("However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.").



measures are sufficient, domestic violence victims gain little over the status quo.

For all of these reasons, the Protection Convention inadequately resolves the issues the Hague Convention on Child Abduction poses for domestic violence victims and their children.

### *C. A New Defense for Victims of Domestic Violence*

The broadest reform possible would be to excuse an abduction when the abductor acts to escape from domestic violence, i.e., domestic violence would be a defense to the remedy of return. Such a defense currently exists in U.S. federal criminal law governing child abduction. In 1993, the United States enacted the International Parental Kidnapping Crime Act ("IPKCA") and made it a felony to "remove[] a child from the United States or retain[] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights."<sup>562</sup> Parental rights are defined to mean "the right to physical custody," whether "joint or sole (and includ[ing] visiting rights)," and "whether arising by operation of law, court order, or legally binding agreement of the parties."<sup>563</sup> IPKCA does not specify how long a child must have been in the United States or retained outside of the United States before IPKCA is triggered. The Act vindicates the rights of all parents left behind in the United States, both U.S. citizens and non-U.S. citizens alike.<sup>564</sup>

Congress did not make international child abduction a federal felony to facilitate federal prosecution of international child abductors.<sup>565</sup> In fact, a search of Westlaw shows that only a few cases have been decided under the Act.<sup>566</sup> Rather, the Act was passed to

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562. International Parental Kidnapping Crime Act of 1993, Pub. L. No. 103-173, § 2(a), 107 Stat. 1998 (1993) (codified at 18 U.S.C. § 1204 (1994)). The felony is punishable by imprisonment of not more than three years or a fine or both. *Id.*

563. 18 U.S.C. § 1204(b)(2) (1994). Parental rights are to be determined by reference to state law. H.R. Rep. No. 103-390, *supra* note 94, at 4, *reprinted in* 1993 U.S.C.C.A.N. at 2422 (commenting that this is "in accordance with the Hague Convention").

564. *See, e.g., United States v. Amer*, 110 F.3d 873 (2d Cir. 1997) (concerning prosecution of U.S./Egyptian citizen when non-abducting parent was permanent resident alien in U.S. and two of three abducted children were U.S. citizens).

565. In fact, in a report by the Congressional Budget Office to the Judiciary Committee on the potential fiscal impact of the Proposed Act, the Director of the Congressional Budget Office revealed that his office assumed that the Department of Justice "would handle no more than three additional cases annually." Letter from Robert D. Reischauer, Director, Congressional Budget Office, to Jack Brooks, Chairman, Committee on the Judiciary (Nov. 19, 1993), *in* H.R. Rep. No. 103-390, *supra* note 94, at 6, *reprinted in* 1993 U.S.C.C.A.N. at 2424. The Department of Justice anticipated that the legislation would cause it to handle only those few international child abduction cases where states could not afford to reimburse the federal government for its assistance. *Id.*

566. *See Amer*, 110 F.3d 873; *United States v. Alahmad*, 28 F. Supp. 2d 1273 (D. Colo. 1998).

facilitate extradition of the abductor from those countries with whom the United States has extradition treaties,<sup>567</sup> to allow the issuance of federal warrants which help diplomats obtain foreign governments' cooperation in returning children,<sup>568</sup> and to deter abduction.<sup>569</sup> The Act itself recognizes that the preferred remedy for parental kidnapping is the Hague Convention.<sup>570</sup>

IPKCA recognizes as one affirmative defense, among others, that "the defendant was fleeing an incidence or pattern of domestic violence."<sup>571</sup> This defense appeared in various versions of the bill,<sup>572</sup> and appears not to have been the subject of controversy during the bill's drafting or passage.<sup>573</sup> The lack of controversy is perhaps attributable to the fact that prosecution and conviction were not the purpose of the Act, and the perception that only a small number of cases would qualify for this defense.<sup>574</sup> Controversy also may have been slight because a number of states already had enacted a similar defense in their criminal statutes addressing parental abduction.<sup>575</sup>

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567. H.R. Rep. No. 103-390, *supra* note 94, at 3, *reprinted in* 1993 U.S.C.C.A.N. at 2421; *see, e.g., In re Extradition of Schweidenback*, 3 F. Supp. 2d 118 (D. Mass. 1998) (regarding extradition for Canadian arrest warrant). Extradition had been a possibility before, although the remedy was difficult to achieve. A state could pursue a parent by obtaining a federal warrant for unlawful flight to avoid prosecution. *See* 18 U.S.C. § 1073 (1994) (making it a federal crime to "travel[] in interstate or foreign commerce with [the] intent . . . to avoid prosecution . . . [for] a felony under the laws of the place from which the fugitive flees"). However, these warrants were "neither practicable nor effective in international kidnapping cases." H.R. Rep. No. 103-390, *supra* note 94, at 2, *reprinted in* 1993 U.S.C.C.A.N. at 2420. State prosecutors were reluctant to spend their limited funds on costly international extraditions. *Id.* (citing testimony of Ernest E. Allen, President, National Center for Missing and Exploited Children, in *International Parental Child Abduction Act of 1989: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 101st Cong. 2d Sess. (Sept. 27, 1990)). Some of the problems with extradition prior to the adoption of the IPKCA still exist. For example, the warrant is of limited use if the country to which the child has been taken does not have an extradition treaty with the United States, or if the abducting parent is a national of that country. *See id.* (citing testimony of David Margolis, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice, in *International Parental Child Abduction Act of 1989: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, supra*). In fact, "[M]ost parents who snatch their kids have dual nationalities." *See* Rebecca Poole, *Crimes of the Heart*, *Parenting Mag.*, Apr. 1990.

568. H.R. Rep. No. 103-390, *supra* note 94, at 3, *reprinted in* 1993 U.S.C.C.A.N. at 2421.

569. *Id.*

570. Pub. L. No. 103-173, § 2(b), 107 Stat. 1998 (1993) (reporting "sense of the Congress" that the Hague Convention should be "the option of first choice" for a parent seeking return of a child). IPKCA can be used to obtain the return of a child if the court orders the child's return as a condition of supervised release. *See Amer*, 110 F.3d at 882-84 (upholding such a condition).

571. 18 U.S.C. § 1204(c)(2) (1994).

572. 137 Cong. Rec. 17078 (1991) (statement of Presiding Officer).

573. *See supra* note 93.

574. *Id.*

575. Before passage of IPKCA, parental kidnapping was already a criminal offense in all fifty states, and was a felony in the majority of the states. H.R. Rep. No. 103-390,

Despite the availability of the domestic violence defense at the federal and state level, there is little practical experience with it. Few federal or state cases are reported where a parent invokes the defense. The dearth of reported decisions may reflect the nonuse of IPKCA and the comparable state statutes generally,<sup>576</sup> or it may reflect defendants' successful use of the defense and governments' failure to prosecute or to appeal. Regardless, one is left largely to speculate as to how such a defense would play out if adopted as an amendment to the Hague Convention on Child Abduction.

Adding a domestic violence defense to the Hague Convention would undoubtedly be an asset to any victim who could invoke it based on her factual circumstances. It would be the most straightforward method to address the problem set forth in this Article. Adoption of the defense would send a strong symbolic message about the harm to children from domestic violence, and the importance of victims' safety. Furthermore, it would ensure that a domestic violence perpetrator never gets the benefit of a litigation forum that has been imposed on his victim by coercion or force, or that compromises his victim's safety.

The disadvantages attending a new defense, however, mar the attractiveness of the option. One potential problem is that a domestic violence defense might change the character of Hague Convention proceedings by lengthening them and requiring courts to delve into facts that normally are explored in a custody proceeding.

*People v. Griffith*<sup>577</sup> serves as an example of how a domestic violence defense might lengthen and complicate a Hague proceeding. *Griffith* involved the prosecution and conviction of a mother for child abduction. The mother defended her actions on the basis that she was fleeing from domestic violence.<sup>578</sup> During the trial, the mother and others testified at length about the couple's stormy relationship. The mother called over a dozen witnesses, including neighbors, friends and

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*supra* note 94, at 2, reprinted in 1993 U.S.C.C.A.N. at 2420 (citing testimony of Sen. Alan J. Dixon and Peter Pfund, Assistant Legal Adviser for Private International Law, United States Department of State, in *International Parental Child Abduction Act of 1989: Hearings on H.R. 3759*), *supra* note 52; see also *supra* notes 94-95.

576. A national study of law enforcement policies and practices reported the following:

Police in most jurisdictions visited believed the local district attorney was reluctant to prosecute in cases of parental or family abductions. They therefore believed they were being used as an adjunct of the civil court simply to locate and return these children, and were not serving in a law enforcement capacity.

Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Law Enforcement Policies and Practices Regarding Missing Children and Homeless Youth: Research Summary 18 (Dec. 1993). In fact, "police intervene in only a small percentage of reported family abductions." *Id.* at 21.

577. 620 N.E.2d 1130 (Ill. App. Ct. 1993).

578. *Id.* at 1136.

relatives, to inform the jury about her relationship with the father.<sup>579</sup> Several of the State's five witnesses in its case-in-chief also addressed the father's alleged violence;<sup>580</sup> the State then called three witnesses in rebuttal.<sup>581</sup> One witness was called in surrebuttal.<sup>582</sup> Apart from these twenty-one witnesses, "[t]he State and defendant stipulated that three other people from [the] neighborhood would testify that [the father] had a reputation for violence."<sup>583</sup> The trial took six weeks.<sup>584</sup> The summary of the testimony comprised six full pages in the law reporter, even though the appellate court only reported the highlights of the testimony and much of the witness testimony was excluded altogether.<sup>585</sup> Even with the quantity of evidence admitted, the defendant argued on appeal that "she was denied a fair trial because the trial court limited the evidence in support of her defense."<sup>586</sup>

Certainly courts have tools whereby they could reduce the quantity of evidence heard on the domestic violence defense, if the defense were adopted. The *Griffith* case itself suggested three ways to accomplish this result, although only one of the suggestions is truly attractive. First, a court could require that the domestic violence occur close in time to the actual abduction and limit the admissibility of evidence that is more remote in time.<sup>587</sup> Yet, a fact finder needs to hear about all instances of domestic violence in order to understand why a person might reasonably flee with a child to escape the violence. The pattern of violence is critical to understanding the psyche of the victim, and the potential danger posed by the batterer. This need for detail is similar, for example, to cases where a domestic violence victim kills her batterer and defends on the basis of self-defense.<sup>588</sup>

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579. *Id.* at 1132.

580. *Id.* at 1131-32.

581. *Id.* at 1136.

582. *Id.*

583. *Id.*

584. Telephone Interview with James Paese, Asst. Public Defender, Public Defender of Cook County (May 28, 1997) (on file with author) [hereinafter Paese Telephone Interview].

585. *Griffith*, 620 N.E.2d at 1131-37.

586. *Id.* at 1136.

587. It seems that the court of appeals found significant that the harassment and abuse ended more than a month before the abduction when it ruled that additional evidence would have been cumulative. *Id.* at 1137. However, the trial court had excluded evidence of harassment that also occurred during the month preceding the abduction, including the father's interference with the other children's visitation and demeaning the mother in front of the children. Paese Telephone Interview, *supra* note 584.

588. See, e.g., *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *State v. Rodriguez*, 734 So.2d 608 (La. 1999); see also Cynthia K. Gillespie, Justifiable Homicide: Battered Women, Self-Defense, and the Law (1989) (exploring the reasons women are rarely able to claim self-defense); Kym C. Miller, *Abused Women Abused By the Law: The Plight of Battered Women in California and a Proposal for Revising the California Self-Defense Law*, 3 S. Cal. Rev. L. & Women's Stud. 303 (1994).

Second, domestic violence could be defined narrowly to exclude specific instances of conduct that might be termed "harassment."<sup>589</sup> A new domestic violence defense would need an accompanying definition of domestic violence in order to promote uniformity.<sup>590</sup> A narrow definition of domestic violence would achieve shorter and more focused evidentiary contests. However, a narrow definition might preclude admission of evidence related to the batterer's non-violent means of control, or even to behavior that might be characterized as stalking. This sort of information is very relevant to understanding the victim's need to leave a country for safety reasons, and should not be excluded.

Third, a court could limit the admission of evidence if it is cumulative.<sup>591</sup> Cumulative evidence should be excluded, provided that a court understands the importance of admitting evidence about a batterer's non-violent (but controlling or threatening) behavior, a batterer's acts that are remote in time, and corroborative testimony that boosts a victim's credibility. Whether limiting cumulative evidence would sufficiently address the concern about longer and more complicated proceedings is an empirical question without a present answer.

Another possible disadvantage of adding a new domestic violence defense is the potential expansion of defenses generally under the Hague Convention. A new domestic violence defense might encourage others to propose new defenses to the Conference or the courts. After all, the "justifiable" reasons for child abduction are limitless. For example, parents might claim they abducted their children to free them from poverty or immorality.<sup>592</sup> If their justifications are not considered, these parents may feel that the

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(detailing the limitations of California's self-defense law and proposing a solution); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L. Rep. 195 (1986).

589. The court did not resolve the disagreement between the parties as to whether "domestic violence" included harassment. *Griffith*, 620 N.E.2d at 1136-37.

590. The Assistant Public Defender who represented the abductor in the *Griffith* case indicated that, after the abductor's conviction, the jury foreperson stated that the jury did not understand what a "pattern of domestic violence" meant. The trial court had refused to respond to the jury's request for a definition, and instead told the jury to use its "common sense." *Id.* at 1136. The foreperson indicated that had the Assistant Public Defender's defense been given, the defense would have been successful. Paese Telephone Interview, *supra* note 584.

591. The appellate court in *Griffith* ruled that no error had been committed by the trial court because further elaboration on the domestic violence would have been cumulative. *Griffith*, 620 N.E.2d at 1137.

592. For example, one congressional witness has argued that a non-custodial parent has "a right and a responsibility to remove his or her child from the domicile of the primary custodian" when the child suffers "psychological injury" because the custodial parent is living with a member of the opposite sex and the child calls the non-custodial parent for help. *Parental Kidnapping*, *supra* note 35, at 173 (testimony of Jody Brant Smith, M.A.).

Hague Convention treats them unfairly, by considering only some justifications and not others.

Yet, the potential for expanding the number of defenses is not a serious concern. A new domestic violence defense would be well justified given the Convention's failure to provide any effective mechanism to address the unique safety and fairness issues involved for the numerous domestic violence victims who abduct their children. Attempts to promote other new defenses most certainly would subside after courts and the Conference rejected the initial efforts. Litigants would come to understand the policy reasons that support the new domestic violence defense, but do not support other new defenses.

A more serious problem with the domestic violence defense is that the defense requires a theoretical orientation somewhat inconsistent with the present Convention: it assumes that some abductions are justifiable, and that any custody contest between parties with a history of domestic violence should occur in the abducted-to forum. While this theoretical orientation finds some recognition in the existing Convention defenses,<sup>593</sup> a new defense that linked the child's interest to the abductor's interest, or that recognized that children are not the only individuals with interests at stake in international custody disputes, would go much further in altering the Convention's philosophy. The practical problem with an ideological shift is that the solution might meet with resistance, and not be adopted. Professor Duncan, First Secretary of the Hague Conference, has called a similar proposal a "radical reaction" that would "send a strong signal of encouragement to other custodial parents contemplating unilateral action."<sup>594</sup> In addition, even if the defense were adopted, invocation of the defense might meet with judicial resistance as courts without domestic relations experience were asked to delve into the details of the parties' private lives.

Another serious potential problem is that the domestic violence defense might be raised as a matter of course by all respondents faced with petitions for their children's return. The enormous benefit that a litigant receives from a successful defense may encourage many litigants to raise it, considering that the child is not returned *and* custody is litigated, if at all, in the abducted-to state. Given the ubiquity of domestic violence, many abductors will have a factual basis for invoking the defense. The courts may have to spend considerable time evaluating the reasonableness of the victims' flight—including the extent of the violence, and whether courts in the children's habitual residences could have protected the victims. The value of the defense may even provide an incentive for some

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593. Hague Convention on Child Abduction, *supra* note 12, Art. 13(b).

594. Duncan, *supra* note 29, at 12-13.

respondents to fabricate allegations of domestic violence, although the risk is probably no greater than with any other defense and various legal mechanisms may help minimize the likelihood of false testimony (e.g., cross-examination and prosecution for perjury). But, overall, the value of a successful "defense" may increase the number of cases with allegations of domestic violence far above the number of cases in which the defense would succeed.

Overall, neither of the first two concerns appear sufficiently substantial to preclude adoption of a domestic violence defense. While speed, efficiency, and simplicity are admirable goals, making domestic violence relevant in any manner to Hague proceedings is always going to lengthen the proceedings, and invite argument about the relevance of other motivations for abduction. Lengthening Hague proceedings may ultimately be a small price to pay for allowing the vast numbers of abused parents to litigate custody from a safe and fair place. More seriously, however, a new domestic violence defense represents a shift in the Convention's ideology, and provides litigants a huge incentive for raising the issue. The next proposed solution avoids these last two problems, and therefore appears to be a potentially more attractive solution.

*D. Staying the Remedy of Return, Permitting the Abductor to Litigate Custody From a Safe Location, and Adjudicating Custody in the Child's Habitual Residence*

One possible reform would be to suspend the remedy of return if there are credible allegations of domestic abuse, but to have custody adjudicated in the child's habitual residence with the domestic violence victim participating from abroad. The mechanism would work as follows. When the left-behind parent petitions for the return of the child, the abductor would produce credible evidence that she fled from domestic violence and ask the court for a temporary stay. Once granted, the abductor, with the assistance of the Central Authorities, would ask the court in the child's habitual residence to permit the child to remain in the abducted-to state. Specifically, she would ask the court in the child's habitual residence either to award her sole legal and physical custody, or to transfer its custody jurisdiction to the court in the abducted-to state. Custody would either be adjudicated in the child's habitual residence, with the domestic violence victim participating from the abducted-to state with the aid of the Central Authorities, or the court in the child's habitual residence would decline jurisdiction and custody would be adjudicated in the state where the woman was located. The remedy of return would be suspended until the court in the child's habitual residence rendered its decision, hopefully on an expedited basis, and then the remedy would be applied, or not, as that decision necessitated.

This procedure allows the court in the child's habitual residence to render the custody decision, if it chooses, but also protects the victim's safety during the process. If the court in the child's habitual residence awards custody to the victim (perhaps, in part, because of the domestic violence),<sup>595</sup> or allows custody to be adjudicated in the abducted-to state (because of the domestic violence), then the child's return is unnecessary. Either way, the court in the child's habitual residence has had the opportunity to retroactively approve the victim's departure *before* the court in the abducted-to state makes its order to return the child effective. Because a battered woman typically would seek sole rights of custody from the court in the child's habitual residence in the event her child were returned, allowing her to do so from a safe location minimizes the chance that she will be abused during the proceedings and best assures that she will not view the Convention as an obstacle to her escape from an abusive relationship.

To be clear, the proposed reform differs from the provisions of Article 15 currently in the Hague Convention. Article 15 permits a court, prior to ordering the return of the child, to request that the petitioner obtain a determination from authorities of the child's habitual residence that the removal or retention was wrongful within the meaning of Article 3.<sup>596</sup> Such an inquiry focuses on the petitioner's rights of custody at the time of the removal, the actual exercise of those rights, and the child's "habitual residence." The Article 15 request is to facilitate a decision on the Convention's application by the court in the abducted-to state. The proposed reform, in contrast, allows the court of the child's habitual residence to permit the departure retroactively by granting either a permanent or temporary exodus, even if the departure was initially "wrongful."

At a minimum, this change would alter the result in those cases most in need of reform. For example, imagine a woman who obtains a custody order in the children's habitual residence subsequent to the abduction, but prior to an application for the children's return. Assume that she tells the court in the child's habitual residence that she left with the children because of the domestic violence. Despite her custody order, that woman's children might still be returned under the Hague Convention on Child Abduction. Article 17 states:

The sole fact that a decision relating to custody has been given in or

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595. All states in the United States now make domestic violence relevant to the substantive custody decision. See *Principles of the Law of Family Dissolution*, *supra* note 4, at § 2.13, reporter's note, cmt. c ("About two-thirds of states require consideration of evidence of domestic violence in determinations affecting allocation of responsibility for children at divorce.") (citing cases therein); Zorza, *supra* note 4, at 3 (reporting that "every state now has case law allowing courts to consider domestic violence in their custody decisions"); see also *supra* note 4.

596. Hague Convention on Child Abduction, *supra* note 12, Art. 15.



is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.<sup>597</sup>

Returning the children would be a ridiculous outcome because the woman could immediately take them abroad again, and the taking would not be wrongful. The illogic of the Convention in this context, especially when the mother's safety is at risk, suggests the wisdom of having a court in the child's habitual residence approve of a past departure *prior* to the child's return, and having that approval bind the courts in the abducted-to country.

The courts or the Central Authority in the abducted-to state could provide the court of the child's habitual residence with all of the information it needs to render a decision. For example, the courts of the abducted-to state could take testimony for the court in the child's habitual residence, order a home study, or gather any other evidence needed by the court of the child's habitual residence. These mechanisms are currently contained in the UCCJEA, and similar provisions would benefit courts adjudicating international custody disputes. Specifically, one UCCJEA provision permits the taking of testimony in another state.<sup>598</sup> The provision allows parties to testify by deposition, telephone, or audiovisual means.<sup>599</sup> Another section affords a mechanism for cooperation between courts of different states.<sup>600</sup> For example, a court of one state can request that the court

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597. *Id.* Art. 17.

598. Section 111 of the UCCJEA, regarding "Taking Testimony in Another State," provides:

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another State, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another State. The court on its own motion may order that the testimony of a person be taken in another State and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this State may permit an individual residing in another State to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that State. A court of this State shall cooperate with courts of other States in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another State to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

UCCJEA, *supra* note 549, at 668.

599. *Id.* § 111(b).

600. Section 112 of the UCCJEA, regarding "Cooperation Between Courts" and "Preservation of Records" states:

(a) A court of this State may request the appropriate court of another State to:

of another state hold an evidentiary hearing or order a custody evaluation.<sup>601</sup>

The Hague Convention on Child Abduction already contains a mechanism to facilitate implementation of such a reform: the Central Authorities. The Central Authorities of each Contracting State could greatly aid this transnational litigation process by expanding slightly their current functions under the Convention. The Central Authorities, which can act directly or through intermediaries,<sup>602</sup> are currently authorized to take a number of measures, including "to prevent further harm . . . to interested parties by taking or causing to be taken provisional measures."<sup>603</sup> Article 7 requires that Central Authorities "co-operate with each other and promote co-operation amongst the competent authorities in their respective States."<sup>604</sup> In addition, Central Authorities already "must assist applicants seeking

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(1) hold an evidentiary hearing;

(2) order a person to produce or give evidence pursuant to procedures of that State;

(3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(4) forward to the court of this State a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and

(5) order a party to a child-custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a court of another State, a court of this State may hold a hearing or enter an order described in subsection (a).

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) may be assessed against the parties according to the law of this State.

(d) A court of this State shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another State, the court shall forward a certified copy of those records.

*Id.* at 669.

601. To facilitate a court's consideration of domestic violence in the proceedings, litigants could be required to provide information about domestic violence to the adjudicating tribunal. This requirement could be added to Article 8, which sets forth the information to be provided when applying to a Central Authority for the return of the child. Alternatively, the information could be solicited on a model form. In 1980, a model form for Hague Convention petitioners was recommended. See Pérez-Vera Report, *supra* note 15, ¶¶ 48-51. "[M]ost Central Authorities have adopted it in substance, and many have issued printed forms for this purpose." *Checklist of Issues to Be Considered*, *supra* note 192, at 30. The form could ask an applicant whether there have been any orders of protection entered on behalf of the child or parent, or whether either parent has been arrested or found guilty of any crime involving domestic violence. An affirmative answer on the form would flag an important issue for the court to consider in adjudicating the return petition.

602. Hague Convention on Child Abduction, *supra* note 12, Art. 7.

603. *Id.* Art. 7(b).

604. *Id.* Art. 7.

an Article 15 declaration."<sup>605</sup> The procedure recommended, therefore, would not impose very different responsibilities on the Central Authorities than their current responsibilities under the Abduction Convention. The additional responsibilities would also conform with the Central Authorities' role under the new Protection Convention.<sup>606</sup>

This potential reform is attractive. It furthers the Convention's goal of promoting the child's best interest by affording safety to the child's custodian, and by avoiding an unnecessary shift in physical geography when the ultimate result would permit the child to be taken abroad. This proposal also builds upon the cooperation that the Central Authorities already provide to each other, and thereby operates within the framework of the Convention. In addition, this reform avoids the two more serious disadvantages of the domestic violence defense. First, this reform is consistent with the Convention's philosophy. The Convention "seeks . . . to prevent a later decision . . . being influenced by a change of circumstances brought about through unilateral action by one of the parties."<sup>607</sup> Under this proposal, the court in the child's habitual residence still makes the substantive custody decision or the decision to relinquish such jurisdiction. Second, because the proposal allows the court in the child's habitual residence to adjudicate custody if it so chooses, only respondents who are truly concerned about their safety in that forum will invoke the new procedural protection and litigate from abroad. After all, there are certain litigation disadvantages to expounding one's case from a distance.

Notwithstanding this proposal's promise, the proposed reform is not a panacea. Most significantly, it does not aid those women who should not be subjected to the jurisdiction of the courts in the child's habitual residence because they were forced to go there in the first place. This subset of domestic violence victims should be able to defeat outright the application for their children's return. Further research should be undertaken to assess whether courts are interpreting the existing concept of habitual residence adequately to accommodate these victims, or whether a domestic violence defense specifically tailored to these women should also be adopted.

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605. Beaumont & McEleavy, *supra* note 243, at 245.

606. See, e.g., *id.* Art. 30(2) ("They shall . . . take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children."); Art. 31(a) (directing central authorities to take all appropriate steps to "facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter"); Art. 32 ("On a request made . . . the Central Authority . . . may . . . (a) provide a report on the situation of the child; (b) request the competent authority of its State to consider the need to take measures for the protection of the person . . . of the child.").

607. Pérez-Vera Report, *supra* note 15, ¶ 71, at 447-48.

The other major disadvantage to the proposal is that it lengthens the time it takes to effectuate a child's return. Not only will evidence of domestic violence need to be heard, but it must be heard by two courts. Furthermore, two additional proceedings are required prior to the child's return, assuming the remedy of return is ultimately imposed. Arguably, however, an application that the court temporarily stay the remedy of return would not need voluminous evidence. In fact, a "probable cause" standard might be most appropriate at this stage. In addition, courts could cooperate in fact findings, thereby expediting the proceedings and diminishing delay.

In any event, any lapse of time is a problem only if the court in the child's habitual residence finds the domestic violence victim's allegations without merit, or irrelevant to the custody or *forum non conveniens* decision. The former is relatively unlikely. As mentioned previously, women rarely fabricate allegations of domestic violence, the regular litigation process helps ensure truthful testimony, and only victims with safety concerns about litigating in the child's habitual residence will have an incentive to raise the issue. As to the legal point, courts in member states hopefully would be caring and sensitive enough to permit these mothers to escape from domestic violence, either by declining custody jurisdiction in favor of the abducted-to state or by understanding that it is rarely in children's best interest to be awarded to their mothers' batterers.

While another approach would be to permit the domestic violence victim to litigate from afar, but not stay the remedy of return, this option should be rejected. As previously discussed,<sup>603</sup> most women, regardless of the risk to their own safety, will return with their children to the children's habitual residence. They return not for the purpose of litigating, but rather to remain with their children during that process. If member states want to afford victims of domestic violence the protection they deserve, the remedy of return must also be suspended. Moreover, if member states want to avoid sending the message that flight from domestic violence is more objectionable than the domestic violence itself, then courts must not expeditiously return children in the face of serious allegations of domestic violence.

### CONCLUSION

The reconceptualization of a social problem is a difficult process. It is uncomfortable to say that the reformers only got it partially right the first time. Also, it is hard to formulate a solution to address the new aspects of a problem without undermining those parts of an existing solution that work well. Inevitably, there will be some friction between the old framework and the new provisions, and between the first-generation reformers and the second-generation reformers. The

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608. See *supra* notes 190-92 and accompanying text.

international community must come together, however, to work out a solution to the problem identified in this Article. The reforms recommended are a starting point for this effort.

The Convention's framework works well for those abductions it was designed to address: abductions by parents seeking to gain litigation advantages, or abductions by non-custodial parents attempting to circumvent custody orders. In these situations, the abductors act for selfish reasons, and most children probably will be harmed by abduction. The Convention, however, operates to the detriment of children when its remedy of return can be invoked by a father who has abused the child's mother and caused her to flee for safety. In this common scenario, the remedy of return jeopardizes the mother's safety and the child's well-being.

Presently, the Convention offers too little hope for the domestic violence victim who flees with her children to escape domestic violence and then faces her batterer's petition for the children's return. Her batterer can easily make out the *prima facie* case for the children's return. Her batterer will almost always be able to establish that the removal was "wrongful" because "rights of custody" is defined so broadly. Her children's "habitual residence" can be determined, and most likely will be determined, without reference to the background violence that caused her to travel to the children's habitual residence in the first place, or to remain there even though her trip was to be a temporary visit. Moreover, it probably will not matter that she departed the children's habitual residence after her batterer broke an agreement to refrain from violence in the new country.

The various defenses that exist under the Convention afford insufficient aid to domestic violence victims and their children in their efforts to avoid the remedy of return. Too few courts have recognized that witnessing domestic violence is a type of "grave risk" with which Article 13(b) is concerned. Children's preferences may be ignored when they remain silent about the reasons for their preferences, even though the children are of sufficient age and maturity, and even though children often find it is difficult, if not impossible, to discuss their mothers' abuse. Article 20 affords little protection because of judicial hostility to the defense, and because the legal principles essential to the defense are, at best, in their infancy. The defense of consent or acquiescence is of limited use since the consent or acquiescence may need to be formalized in writing, for the child's permanent absence, and for a purpose other than securing a reconciliation. Few women qualify for the "well-settled" defense. Even when one year has elapsed from the date of the wrongful removal, the children may not be "settled" if they and their mothers have been hiding from their mothers' abusers.

This Article has suggested ways that courts could interpret the Convention's provisions to provide more protection for domestic violence victims and their children, including the continued expansion of Article 13(b). This Article also has explored some broader solutions to the problem. Codifying the process of undertakings could potentially increase their use and efficacy, although courts may not appreciate the full range of remedies often necessary to protect victims. Additionally, undertakings may prove insufficient when a victim's safety is best assured by being on a different continent from her batterer, either because of the batterer's lethality, or because the child's habitual residence would inadequately protect the mother when the batterer violates, or threatens to violate, the undertaking. While an improvement over undertakings would be to afford courts in the abducted-to country emergency jurisdiction to issue orders that would be enforceable in the child's habitual residence, the current Protection Convention is not the best mechanism for such a solution. Experience with the UCCJA demonstrates that courts applying the Protection Convention may not equate the abuse of a parent with a case of urgency for the child. Also, the Protection Convention inadequately protects victims because it allows an emergency order to expire as soon as the court in the child's habitual residence takes any measures, even if objectively insufficient.

Even the more novel solutions come with limitations. Adding a specific domestic violence defense to the Hague Convention on Child Abduction risks lengthening the proceedings and inviting arguments that other abductions are justifiable. More problematically, a domestic violence defense requires a shift from the Convention's philosophy. It also encourages litigants to raise the issue of domestic violence even if the facts in support of the defense are weak or nonexistent. A remedy that avoids the more serious objections to a domestic violence defense and fits well into the Convention's current structure was described in the final part of this Article: stay the remedy of return while the court of the child's habitual residence adjudicates custody (or transfers jurisdiction) and allow the victim to litigate from the abducted-to state. Undeniably, this solution will lengthen proceedings in those cases where the child ultimately is ordered to be returned. In addition, it fails to provide an adequate remedy for women who were forced by their batterers to travel to or remain in the abducted-from country; these women should not have to adjudicate custody there at all.

At a minimum, reform is needed to address the issues of one large segment of victims—the Ms. Prevots of this world. Assuming that courts will not expand Article 13(b) further to accommodate these women, the fourth proposed solution is perhaps the most attractive. This is the only option, other than a defense, that elevates victims' safety to the forefront and gives the type of protection that domestic

violence victims need. Transnational undertakings and protective orders do not provide the same level of protection for the reasons discussed. A victim simply should not have to put her life in danger as a co-requisite of litigating custody. Since the fourth proposed solution is not a defense, it may appeal to those who resent the continued expansion of Article 13(b) to accommodate these women.

Another solution, however, is needed for the Ms. Tice-Menleys of this world—those women whose batterers force them to live in a particular country. These women should never have to return their children to the venues from which they fled, or have those jurisdictions decide their custody disputes. For these women, courts should find that a child's "habitual residence" is established only if both parents voluntarily went to that venue and decided to settle there. However, if courts are not adequately responsive to this argument, then a narrowly tailored domestic violence defense should be adopted by the Conference to make explicit that these victims' children are not subject to the Convention's remedy of return.

Reforming the Hague Convention on Child Abduction is an important task. While every country should adequately protect domestic violence victims, and while women and their children should not need to flee transnationally to find safety, sometimes such flight is necessary. Sending those victims' children back to the places from which they fled is the wrong approach. Until every signatory to the Hague Convention on Child Abduction protects domestic violence victims effectively, women who take self-help measures to escape abusive relationships deserve our empathy. In no case should we privilege forum shopping accomplished through force by a batterer over a forum incidentally selected by his victim in her effort to escape from that violence. Nor should we ever require domestic violence victims to return to an unsafe jurisdiction in order to litigate custody. International cooperation can benefit both children *and* their abused parents.